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# REVIEW OF THE EIGHT EU CONSUMER *ACQUIS* MINIMUM HARMONIATION DIRECTIVES AND THEIR IMPLEMENTATION IN THE UK AND ANALYSIS OF THE SCOPE FOR SIMPLIFICATION


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# Introduction

1. In July 2001 the European Commission published a consultative "Communication on European Contract Law (COM 2001 398 final), intended to "broaden the debate" on European Contract law amongst interested bodies, including "businesses, legal practitioners, academics and consumer groups." The Communication sought to identify areas in which divergences between the (contract) laws of Member States created obstacles for the proper functioning of the Internal Market, and how such obstacles could be overcome. The Communication identified four possible routes for the further development of European Contract Law and invited reactions from various stakeholder groups. The identified options were:-

   a. to do nothing and leave the solution of any problems to the market;
   b. to promote the development of non-binding statements of common contract law principles which could be used by contracting parties, national courts and arbitrators and national and EU legislators when preparing legislation;
   c. to review and improve existing EU law in order to remove inconsistencies and ambiguities and to make it more coherent;
   d. to adopt a new EU law, possibly a set of mandatory rules contained in a Regulation: in effect a contract law for Europe.

2. A wide range of responses to this document was received and in 2003, in light of the responses, the Commission published a further document entitled *Action Plan on a Coherent European Contract Law* (COM 2003 68 final). The *Action Plan* proposed the development of a "Common Frame of Reference" which would set out a statement of underlying principles of contract law common to the legal systems of the Member States and which would serve as a basis for the preparation of future EU legal instruments and, at the same time, for the improvement of the coherence of the existing body of law - the existing *acquis*.

   The *Action Plan* has been followed, most recently, by a further communication entitled *European Contract Law and the revision of the acquis: the way forward* (COM 2004 651 final) which outlines how the *Common Frame of Reference* will be developed to improve the existing *acquis* and develop it in the future.

3. Early EC consumer protection directives, including those examined in this report[1], included a "minimum harmonisation" clause, meaning that member states are permitted to introduce or maintain in force provisions offering consumers a *higher* level of protection than provided by the directive.

4. On 11th May 2005 the European Parliament and Council adopted directive 2005/29/EC concerning unfair business – consumer practices in the internal market (the Unfair Commercial Practices Directive, "UCPD").The UCPD has as its objective the prohibition of unfair commercial practices in business – consumer contracts. A practice is unfair for this purpose if it is contrary to the requirements of professional diligence and it materially distorts or is likely materially to distort the economic behaviour of the average consumer whom it reaches or to whom it is addressed. In particular the directive regards as unfair practices which are misleading, including by omission, or aggressive, including as a result of the use of harassment, coercion or undue influence.

5. Unlike earlier *acquis* directives the UCPD is a maximum harmonisation directive, which incorporates a broad general clause prohibiting unfair commercial practices. As a maximum harmonisation measure it prohibits member states maintaining measures more protective of consumers in the area it occupies, subject to a temporary saving allowing member states to maintain more stringent measures in the field occupied by the directive for a period of six years from 12 June 2007, provided such measures implement directives containing a minimum harmonisation clause, are essential to ensure the proper protection of consumers and are proportionate to the attainment of that objective[2]. National provisions retained on the basis of this derogation must be notified to the commission[3].

6. The UCPD is also expressed to be "without prejudice to contract law, and in particular to the rules on the validity, formation or effect of a contract"[4].

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[1] Council Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises; Council Directive 90/314/EEC on package travel, package holidays and package tours; Council Directive 93/13/EEC on unfair terms in consumer contracts; Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis; Directive 97/7/EC on the protection of consumers in respect of distance contracts; Directive 98/67EC on consumer protection in the indication of the prices of products offered to consumers; Directive 98/27/EC on injunctions for the protection of consumers' interests; Directive 99/44/EC on the sale of consumer goods and associated guarantees.

[2] Art 3.5

[3] Art 3.6.

[4] Art 3.2.

7. The introduction of the UCPD therefore provides the opportunity for review and simplification of the existing consumer *acquis*. It also requires the review of existing domestic law in the area occupied by the UCPD in order to identify those measures which provide a higher level of consumer protection in order to determine whether they can be justified so as to benefit from the temporary derogation in art 3.2.

8. The UCPD has already been the subject of two detailed reports for the Department, analysing its likely impact on English law[5]. This present report has three objectives. In the first part it seeks to analyse eight existing consumer *acquis* minimum harmonisation directives and the domestic measures which implement them in order to identify areas in which they provide a higher level of protection, or protection broader in scope than required by the relevant directive, to consider the impact on such measures of the UCPD, and the scope, if any, for simplification of the law offered by the UCPD. This report comprises eight chapters, one devoted to each of the existing *acquis* directives and its implementation. The structure of each is similar. First the background to the relevant legislation is analysed. Next the provisions of the relevant directive are outlined. That is followed by a more detailed analysis of the provisions implementing the directive in the UK, identifying in each case where the implementation provides a higher level of protection, or more broadly based protection, than required by the directive. In some cases there are, or may be, deficiencies in the implementation. In those cases we identify those deficiencies. Finally each chapter contains a section outlining the effect on the measures considered of the UCPD.

9. The second part of the report comprises a comparative review of the eight consumer *acquis* directives in order to identify recurrent themes, similarities and differences, and to analyse the scope for simplification and rationalisation of the existing *acquis.* The third part contains recommendations for simplification and improvement of the *acquis* based on the analysis undertaken in the first two parts.

10. This report has been compiled for the Department of Trade and Industry by Professor Robert Bradgate and Annette Nordhausen of the Institute for Commercial

[5] . *The Impact of Adopting a Duty to Trade Fairly* (2003), Bradgate, Brownsword and Twigg-Flesner; *An Analysis of the Application and Scope of the Unfair Commercial Practices Directive* (2005), Twigg-Flesner, Howells, Nordhausen and Parry.

Law Studies at the University of Sheffield and Dr Christian Twigg-Flesner of the Law School, the University of Hull. Although it has been produced for the Department, this is an independent study which does not necessarily reflect the views of the Department for Trade and Industry, and its findings should not be taken as indicative of government policy.

**Part I**

# Analysis of the eight directives and their implementation

# Chapter 1

# Doorstep Selling

## Background

1. Council Directive 1985/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ L372 of 31/12/1985, p. 31-33 ("the doorstep sales directive") was the first of the modern consumer *acquis* directives. As the recitals to the directive acknowledge, it is a common commercial practice in the Member States for contracts between trader and consumer to be made away from business premises but, prior to the introduction of the directive, the legislative framework applicable to such contracts differed significantly from Member State to Member State. Since this was seen as directly affecting the functioning of the common market (Internal Market), harmonisation measures were seen to be necessary. Such measures were also consistent with the policy approach in different programmes for consumer protection[6].

2. The recitals to the Directive state the reasons for regulation for doorstep contracts. The decisive factor is not merely that the contract is negotiated away from business premises but that as a general rule it is the trader who initiates the contract negotiations, whereas the consumer is unprepared and often unable to compare quality and price of the products offered with those of similar products. This surprise element is common, not only to doorstep contracts but also to other contracts negotiated away from his business premises. To balance the position of trader and consumer, the consumer is therefore given a right to cancel the contract within seven days, giving him time to make a les pressured assessment of the contract. The consumer has to be informed about this right in writing.

3. The Directive is a minimum harmonisation measure, explicitly allowing introduction or maintenance of laws providing a higher level of consumer protection, including the possibility to prohibit the conclusion of contracts away from business premises completely if a Member State regards this to be in the interests of consumers[7].

## Mapping the implementation

[6] Preliminary programme of the European Economic Community for a consumer protection and information policy, OJ No C 92 of 25th April 1975, p. 2; second programme of the European Economic Community for a consumer protection and information policy, OJ No C 133 of 3rd June 1981, p. 1.
[7] *Biswell, K.* "Consumers and Standards: increasing influence", Consumer Policy Review 2004, 111-185.

The Directive is implemented in the UK by the Consumer Protection (Cancellation of Contracts Concluded away from Business Premises) Regulations 1987, SI 1987/2117, which came into force 1st July 1988.

**Article 1 – scope of application**

3. Article 1 defines the scope of application of the directive. It is implemented by regulation 3 of the 1987 regulations.

4. The Directive applies to contracts for the supply of goods or services between trader and consumer, concluded

   - during an excursion organised by the trader away from his business premises [art. 1 (1)] or

   - during a visit by a trader to the

     a. consumer's home or home of another consumer [art.1 (1) (i)]

     b. consumer's place of work [art.1 (1) (ii)]

   provided that the visit does not take place at the express request of the consumer [art. 1 (1)]. If the consumer requested the visit, the Directive applies to contracts for the supply of goods or services other than those for which the consumer requested the visit if the consumer did not know or could not reasonably have known that these are also part of the trader's activities [art.1 (2)].

4. The Directive also applies to similar situations where a contract is not concluded during the visit[8], but where (i) an offer is made by consumer and is not binding on the consumer until the trader accepts [art.1 (3)] or (ii) the consumer is bound by his offer [art. 1 (4)].

**Implementation – regulation 3**

6. Regulation 3 provides that the regulations apply to a contract, other than an excepted contract, for the supply of goods or services by a trader to a consumer, which is made

[8] as in ECJ – *Buet v Ministere Public* – C-382/87, [1991] ECR I-1198; *Ministere Public v Roger Buet and Educational Business Services* [1988] 3 CMLR 426; case comment in: European Competition Law Review 1989, 318-320; ECJ – *France v Di Pinto* – C-361/89, [1991] ECR I-1189; comment in: European Law Monitor 1993, 11-12.

during an unsolicited visit. Regulation 3 (3) defines "unsolicited visit" as a visit by a trader (whether or not he is the trader who supplies the goods or services) which does not take place on the express request of the consumer, including a visit following an unsolicited phone call by trader where trader indicates willingness to visit the consumer [regulation 3 (3) (a)] or a subsequent visit following an unsolicited visit [regulation 3 (3) (b)]

7. The language of reg 3 differs from that of the corresponding provision of the directive. In particular, unlike the Directive it mentions the exceptions from the regulations' scope, but this does not make any substantive difference[9]. The definition of "unsolicited visit" in the Regulations is more detailed than that in the directive, but again the extra detail does not broaden the scope of application as it describes situations where there is no express request for a visit from the consumer. The extra detail merely ensures that the implementation does not leave any loopholes.

**Article 2 – definitions "trader" and "consumer"**

8. Art. 2 of the Directive defines the terms "consumer" and "trader". A consumer is a natural person who, in transactions covered by the Directive, is acting for purposes which can be regarded as outside his trade or profession[10]. A trader is a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, as well as anyone acting in the name or on behalf of a trader.

**Implementation – regulation 2**

9. The Regulations contain definitions of the terms "trader" and "consumer" but in addition also define the term "business". Furthermore, regulation 2 (1) defines a number of other terms, as "enforcement authority", "goods", "land mortgage", "notice of cancellation", "security", and "signed". The latter definitions refer to definitions in other legislation and aim to ensure a coherent application and interpretation of those terms. The definition of "goods" refers to the Sale of Goods Act 1979, that of "signed" to the Consumer Credit Act 1974.

10. The definition of "business" includes a trade or profession [regulation 2 (1)] and corresponds to the definition in the Directive. A "trader" is defined as a person who is acting for the purposes of his business, and anyone acting in the name or on behalf

[9] details under art. 3 of the Directive.
[10] ECJ – *Bayerische Hypotheken- und Wechselbank AG v Dietzinger* – C-45/96, [1998] ECR I-1199; case comment in: EU Focus 1998, 16-17.

of such person. A "consumer" is a person, other than a body corporate who is acting for purposes which can be regarded as outside his business. The addition of "other than a body corporate" ensures that, as in the definition of the Directive and European consumer law directives in general, only natural persons are defined as consumers.

**Article 3 – Exclusions**

11. The Directive in Art. 3 (1) allows Member States to exclude contracts where the price does not exceed a specified amount – the amount is subject to a regular revision by Commission and Council, but has not been amended as yet and allows the exclusion of contracts where the price does not exceedi60 ECU (Euros).

12. Furthermore, a number of specified contracts are explicitly excluded from the Directive. Those are as follows:

- Contracts for the construction, sale and rental of immovable property or other rights relating to immovable property – art. 3 (2) (a). This may include timeshare-contracts, depending on the individual contract[11]. Following the ECJ decision in *Heininger*, an agreement for a loan secured by a charge over property is covered by the Directive[12].

- Contracts for supply of foodstuffs or beverages or other goods intended for current consumption in the household and supplied by regular roundsmen – art. 3 (2) (b)

- Contracts for supply of goods or services if all three of the following conditions are met:

    - The contract is concluded on the basis of the trader’s catalogue, if the consumer had proper opportunity of reading in absence of trader's representative – art. 3 (2) (c) (i)

    - Intended continuity of contract for subsequent transactions – art. 3 (2) (c) (ii)

    - Clear information about right to return goods within a period of not less than seven days of receipt or cancellation within same period – in catalogue as well as in contract – art. 3 (2) (c) (iii)

[11] ECJ – *Travel-Vac SL v Antelm Sanchis* – C-423/97, [1999] All ER (EC) 656.
[12] ECJ – *Heininger v Bayerische Hypo und Vereinsbank* – C-481/99, [2001] ECR I-9945; case comments in Commercial Law Practitioner 2002,64; EU Focus 2002, 10-11; European Legal Forum 2002, 31-34; In-House-Lawyer 2002, 45-46; EU Focus 1998, 16-17; *Habersack, M.* "The Doorstep Selling Directive and mortgage loan contracts", European Business Law Review 2001, 392-402.

- Insurance contracts – art. 3 (2) (d)
- Contracts for securities – art. 3 (2) (e)

Member States may also exclude contracts if the visit was requested by the consumer and the goods or services are directly connected with those for which the visit was requested– art. 3 (3)

**Implementation – regulation 3 (2)**

13. The Regulations implement all the explicit exclusions and also exclude contracts of a value under £ 35.00, the sterling equivalent of ECU 60 (Euros).

14. The Regulations exclude:

- any contract
    - For the sale or other disposition of land, or for a lease or land mortgage – regulation 3 (2) (a) (i)
    - For the finance of the purchase of land – regulation 3 (2) (a) (ii)
    - For a bridging loan in connection with purchase of land – regulation 3 (2) (a) (iii)
    - For the construction or extension of a building or other erection on land – regulation 3 (2) (a) (iv)
- Any contract for the supply of food, drink or other goods intended for current consumption or use in the household and supplied by regular roundsmen – regulation 3 (2) (b)
- any contract for supply of goods or services if all the following conditions are satisfied:
    - the terms of the contract are contained in a trader's catalogue and the consumer can study the catalogue in the trader's absence before the conclusion of the contract – regulation 3 (2) (c) (i);
    - the parties intend that there shall be maintained continuity of contract in relation to the transaction in question or any subsequent transaction – regulation 3 (2) (c) (ii);

  - both the catalogue and the contract contain a prominent notice indicating the consumer's right to withdraw and the withdrawal period as well as liability issues – regulation 3 (2) (c) (iii)

- Insurance contracts – regulation 3 (2) (d)

- Any agreement the making or performance of which by either party constitutes a relevant regulated activity – regulation 3 (2) (e)

- Any contract (if not a consumer credit agreement[13]) under which the total payments to be made by the consumer do not exceed £ 35 – regulation 3 (2) (f)

- Any contract under which credit within the meaning of the Consumer Credit Act 1974 is provided not exceeding £ 35 other than a hire-purchase or conditional sale agreement – regulation 3 (2) (g)

15. The Regulations do not implement the possible exclusion of Art. 3 (3) of the Directive, namely the possibility to exclude contracts for the supply of goods or services which have a direct connection with the goods or services concerning which the consumer requested a visit of the trader. For those contracts, the Regulations will therefore be applicable.

16. Regulation 3 (3) defines the term "unsolicited visit"[14].

17. Regulation 3 (4) defines the scope of the term "regulated activity" and defines in regulation 3 (4) (a) the term "relevant regulated activity" which refers to the term "investment" which is then defined in regulation 3 (4) (b). The effect is to exclude from the scope of the regulations contracts for securities as permitted by the directive.

18. "Relevant regulated activity" is defined as:

- dealings in investments

- arranging deals in investments

- managing investments

- safeguarding and administering investments

[13] Consumers have separate rights to cancel regulated consumer credit agreements under the Consumer Credit Act 1974.
[14] This has been dealt with above.

- establishment of collective investment scheme

18. "Investments" means

- shares
- instruments creating or acknowledging indebtedness
- government and public securities
- instruments giving entitlement to investments
- certificates representing securities
- units in a collective investment scheme
- options
- futures
- contracts for differences
- rights to or interests in investments

All these definitions have to be read in conjunction with regulation 22 of the Financial Services and Markets Act 2000; any relevant order under section 22 and schedule 22 to the Financial Services and Markets Act 2000 [regulation 3 (5) (a)-(c)].

**Article 4 –cancellation right**

a. Arts. 4 and 5 of the Directive give the consumer a right to cancel any doorstep contract[15]. Art. 4 deals with the information the trader is obliged to give to the consumer whereas Art. 5 sets out the conditions under which the consumer can cancel the contract. The trader has to give the consumer a written notice of their right of cancellation which has to state the cancellation period and, the name and address of the person against whom the right may be exercised – art. 4 (1st sentence). The notice has to be dated and contain particulars of the contract – art. 4 (2nd sentence). The notice has to be given

[15] *McMahon, L.* "Contracts negotiated away from business premises and the 1997 Distance Selling Directive" Irish Law Times 1999, 139-141; *Holgate, G.* "Curbing doorstep selling", Trading Law & Trading Law Reports 1999, 33-36; *Scanniccio, N.* "Italy: Sales methods – doorstep sales – right of withdrawal" Consumer Law Journal 1996, 11-12.

at the time of conclusion of contract if the trader visits the consumer's home or the home of another consumer, or the workplace of the consumer – art. 4 (3rd sentence) (a).

19. If the contract is for goods or services other than those for which the consumer had requested a visit of the trader the notice has to be given not later than the time of conclusion of the contract – art. 4 (3rd sentence) (b).

20. Where no contract is concluded but the consumer makes an offer during the visit, the notice must be given when the offer is made by the consumer, whether the consumer is bound by that offer or not – art. 4 (3rd sentence) (c).

21. Member States have to ensure appropriate consumer protection measures in case the information is not supplied – art. 4 (4th sentence).

**Article 5 – notification period**

22. Art. 5 of the Directive creates the right for the consumer to withdraw from/cancel (the directive use the expression "renounce the effect of his undertaking") any doorstep contract within a period of not less than seven days from receipt of the written notice outlining the rights and how to exercise the right. The procedure for exercising this right is a matter for national law – art. 5 (1) (1st sentence). It is sufficient for the consumer to dispatch the notice within the withdrawal period – art. 5 (1) (2nd sentence).

23. If the required notice of the right to cancel is not given at the correct time the contract remains cancellable until seven days after it is given. Failure to give the notice therefore extends the cancellation period, potentially without limit.

24. The effect of the consumer's cancellation notice is to release the consumer from any obligations under the cancelled contract. Implementation – regulation 4

25. Arts. 4 and 5 of the Directive are implemented in regulation 4. Reg 4(1) provides that a doorstep contract shall not be enforceable against a consumer unless the trader has given the consumer notice in writing in accordance with the regulations of his right to cancel the contract.

26. Part I of the Schedule to the Regulations specifies the information to be provided:

- Name of trader

- Trader's reference number, code or other details to enable the contract or offer to be identified

- Statement that the consumer has a right to cancel and that the right can be exercised by sending or taking written notice of cancellation within the period of seven days following the making of the contract

- Name and address of a person to whom notice of cancellation may be given

- Statement that consumer can use cancellation form provided if he wishes

28. Regulation 4 (3) requires the information to be easily legible. If the notice is incorporated in the contract or other document, the information shall be afforded no less prominence than that given to any other information in the document (apart from heading, names of parties and any information inserted in handwriting) – regulation 4 (3).

29. Part II of the Schedule to the Regulations provides a cancellation form which has to be included in notice of cancellation rights.

30. The notice shall be dated and delivered to consumer – regulation4 (4) – either at the time of making of the contract or the time of the making of the consumer’s offer , whichever is earlier.

31. The contract shall not be enforceable if the required information is not supplied – regulation 4 (1). Excepted from this rule are consumer credit contracts regulated by the Consumer Credit Act 1974 as well as contracts with an agreed – non-mandatory – cancellation right – regulation 4 (2). This effectively implements the directive, which requires that the contract should remain cancellable until seven days after the trader’s notice is given. The implementation goes further than the directive because if the trader’s notice is not given at the proper time it is not given in accordance with reg 4, as required, and the contract is unenforceable. It is not possible, as under similar cancellation provisions, for the trader to cure his default.

32. The cancellation period is 7 days – regulation 4 (1).

33. The written notice of cancellation operates to cancel the contract – regulation 4 (5). Except otherwise provided, the cancelled contract shall be treated as if it had never been entered into by the consumer – regulation 4 (6).

34. The consumer's notice of cancellation sent by post is deemed to have been served at the time of posting, whether or not it is actually received – regulation 4 (7). In effect,, therefore, the Regulations adopt the so-called "postal rule".

35. Further details of the service of documents are specified in regulation 11. A document may be served under the Regulations on a person by:

- delivering or sending it by post to, or leaving it with the person, at his proper address addressed to him by name.
- if the person is body corporate, serving it on the secretary or clerk of that body.
- if the person is a partnership, serving it on a partner or on a person having the control or management of partnership business.

35. A document sent to the address last known to the server of the document shall be treated as being sent to the proper address – regulation 11 (2).

36. Regulation 4A – 4H provide sanctions for failure to comply with the regulations, thereby implementing Art. 4 ($4^{th}$ sentence), the duty to ensure appropriate consumer protection measures if the required information is not provided.

37. Regulation 4A makes it an offence for a trader to enter into a doorstep contract without delivering the notice with the required information in writing. It is also an offence if the notice is not delivered in time. Regulation 4B provides a due diligence defence. If another person is commissioned by the trader, that person will be held responsible. In the case of a body corporate, the responsible natural person as well as the body corporate is held liable – regulation 4C. Enforcement authorities are the weights and measures authorities (and the Department of Economic Development for Northern Ireland) – regulation 4D. Regulation 4E outlines the enforcement powers for the enforcement authorities. Regulation 4F and 4H deal with obstruction or failure to comply with requirements throughout the inquiry.

**Article 6 – mandatory rules**

38. The consumer may not waive the rights conferred on him.

**Implementation – regulation 10**

39. Regulation 10 (1) prohibits contracting out and declares any provision inconsistent with the Regulations void. Inconsistent also are provisions in the contract imposing any additional duties or liabilities on the consumer – regulation 10 (2).

**Article 7 – effects of renunciation**

40. The legal effects of renunciation are to be governed by the national laws of the Member States, in particular consequences relating to reimbursement of payments and return of goods.

**Implementation – regulation 5 – 8**

*Recovery of money paid by consumer – regulation 5*

41. Regulation 5 (1) states that any sum paid by or on behalf of the consumer shall become repayable upon cancellation. Any goods in possession of the consumer or any other person on the consumer's behalf, shall be subject to a lien in favour of the consumer for any sum repayable by the trader – regulation 5 (2). Any security provided by the consumer must be returned – regulation 5 (3).

*Repayment of credit – regulation 6*

42. Any linked credit contract shall remain in force so far as it relates to repayment of credit and payment of interest – regulation 6 (1). If the consumer repays the whole or part of the credit following cancellation and either within one month following service of the notice of cancellation or before the first instalment for an instalment credit is due, the consumer is not required to pay any interest on the amount repaid – regulation 6 (2). Repayment shall be treated as duly made if it is made to any person on whom a notice of cancellation could have been served – regulation 6 (4).

*Return of goods by consumer after cancellation – regulation 7*

43. Where the consumer has acquired possession of any goods prior to cancellation he must restore them to the trader, and pending restoration retain possession of the goods and take reasonable care of them.

    The consumer is not under a duty to restore to the trader

    - perishable goods

- goods for consumption which were consumed before the cancellation
- goods supplied to meet an emergency
- goods which had, before the cancellation, become incorporated into realty (reg 7(2)).

In these cases, the consumer is under a duty to pay for those goods as well as any services in connection with the supply of the goods in accordance with the contract.

44. The consumer is not required to deliver the goods except at his own premises (regulation 7 (3)). If the consumer delivers or sends the goods to the trader, he is discharged from any duty to retain possession of the goods or restore them to the trader (regulation 7 (4)). The consumer only has to take reasonable care to ensure the goods reach the trader and prevent damage in transit, but has no further duty to take care of the goods (regulation 7 (5)). The consumer has to allow the trader to collect the goods within 21 days following the cancellation. If the trader does not collect the goods within 21 days, the consumer's duty to take care of the goods ends (regulation 7 (6)). If a security has been provided, the consumer's duty to restore any goods is not enforceable before the trader has discharged any duty imposed on him (regulation 4 (7)).

*Goods given in part-exchange – regulation 8*

45. Where goods have been given in part-exchange, those have to be returned to the consumer within ten days following the cancellation in a condition substantially as good as when they were delivered to the trader, failing which the consumer is entitled to recover a sum equal to the part-exchange allowance from the trader (regulation 8 (2)). Until the return of part-exchange goods the consumer has a lien on other goods related to the cancelled contract in his possession (regulation 8 (3)).

**Article 8 – minimum harmonisation**

46. The Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field covered by the Directive.

**Implementation**

47. No explicit implementation is required.

**Article 9 – implementation**

48. Member States are required to inform the Commission of their measures implementing the directive within 24 months of notification (23 December 1985).. Member States shall communicate texts of main provisions of national law to the Commission

**Implementation**

49. The Regulations came into force on 1st July 1988; the implementation period ended 23 December 1987 – the implementation was therefore late, but the implementing measures were adopted within the implementation period.

**<u>Impact of Unfair Commercial Practices Directive (UCPD – Directive 2005/29/EC)</u>**

50. Although directive 1985/577 contains a minimum harmonisation clause, little use has been made of it in the UK implementation. The 1987 regulations do go further than the directive in three respects, (i) by spelling out the consequences of the consumer's cancellation, (ii) by requiring the trader to include with the notice of the cancellation right a cancellation notice in a specified form and (iii) in the consequences of failure to give the required notice of cancellation rights at the proper time

51. However, the additional detail of the effects of cancellation is required to provide effective implementation of the directive and indeed is required by art 7 of the directive, which provides that "the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received."

52. Insofar as measures providing for a higher level of protection than the directive are based on the minimum harmonisation clause and fall within the scope of the UCPD, they must be capable of being justified under art 3.5 UCPD as being essential to ensure that consumers are adequately protected.

53. Requiring the trader to provide a cancellation notice in a prescribed form could be said to be more favourable to consumers than the provisions of art 4, which does not include any such requirement, in which case the requirement would have to be capable of being justified in order to benefit from the time limited derogation in the UCPD.

54. The provision of information relating to cancellation rights is material information for the purposes of the UCPD (art 7(4)(e)) . Arguably requiring the provision of a cancellation notice in a particular format is an extension of the duty of information under the Directive. This type of information falls within the scope of the UCPD and may therefore require to be notified to the Commission and justified as essential for purposes of consumer protection. If this is an additional requirement it might be thought to be *de minimis* but it no doubt imposes an additional burden on business.

55. As noted above, the regulations are stricter than the directive in their treatment of the trader's failure to give notice of cancellation rights at the proper time. Under the directive the consumer may cancel at any time within 7 days of receipt of the trader's notice, so that a late notice is effective to stop time running. Under the implementing regulations a late notice is wholly ineffective and the consequence of the notice being given late is that the contract is unenforceable. It may be that this provision could be said to be justified by art 4 which provides that "Member States shall ensure that their national legislation lays down appropriate consumer protection measures in cases where the information referred to in this Article is not supplied." Information about cancellation rights is material for the purposes of the UCPD, but the imposition of sanctions for failure to provide information and the actual right of cancellation itself fall outside the field of the UCPD. We conclude, therefore, that the provision does not fall within the scope of UCPD art 3.5.,

55. A separate question is whether the introduction of the UCPD will provide any scope for replacing the provisions of the Doorstep Selling directive by those of the UCPD by way of rationalisation. It is clear that rules on cancellation rights are outside the UCPD altogether, and there will continue to be a need for a provision establishing a right to cancel. Whether this is retained in this Directive, or in a consolidated consumer protection measure adopted once the *acquis* review has been concluded, is a policy question to be addressed elsewhere.

56. As we have noted, failure to provide notice of a right of cancellation would be a misleading omission for purposes of the UCPD. However, the UCPD only envisages administrative action against the offending party. Under the 1987 Regulations, failure to give the required notice renders the contract with the consumer unenforceable. This is an additional remedy which may be retained in domestic law (cf. Art 11(1) UCPD).

# Chapter 2

# Package Travel

## Background

1. Prior to implementation of the Package Travel Directive (90/314/EEC), there was no specific legislative framework for package holidays. Instead, the general common law rules on contracts, including the law of misrepresentation, needed to be utilised to deal with any problems, but its application caused some difficulties. Moreover, the generally applicable consumer protection statutes, such as the Trade Descriptions Act 1968 or Part III of the Consumer Protection Act 1987 were available to deal with particular problems.

## Mapping the implementation

2. The Package Travel Directive was implemented by the adoption of the Package Travel, Package Holiday and Package Tours Regulations 1992 (PTR). In general, the PTR do no more than implement the Directive's requirements. The scope of the PTR mirrors that of the Directive.

## Article 1

3. This sets out the general purpose of the Directive. A corresponding statement has been included in Regulation 3(1) PTR.

## Article 2

4. The definitions of "package", "organiser", "retailer", "consumer" and "contract" for the purposes of the Directive are contained in Article 2. On the whole, the corresponding definitions in the PTR follow those in the Directive. It may be noted that in the PTR, the phrase "the other party to the contract", is usually substituted for the phrase "the organiser and/or the retailer" found in the Directive. This does make it difficult, on occasion to identify whether liability falls on the retailer, the organiser, or both (see Grant & Mason, Holiday Law (3rd edition, 2003).

5. The wording of the definition of “package” in the PTR differs slightly from that in the directive. The key aspect of the definition is that a package is a “pre-arranged combination of at least two components”, such as transport, accommodation or other tourist services. In the PTR, it contains an additional element to emphasise the fact that where a package is put together at the request of the consumer and in accordance with his specific instructions, it will still be regarded as pre-arranged.

6. In addition, the term “brochure”, which is not defined in the Directive, has been given a definition in Regulation 2 PTR, but this is rather basic and simply states that a brochure is “any brochure in which packages are offered for sale”. There is also a separate definition of “offer”, to reflect the fact that what may be regarded as an offer in other European jurisdictions would be regarded as an invitation to treat in English law. For the purposes of the PTR, such invitations to treat are to be understood as offers.

Article 3

7. Article 3 contains two general information requirements. Art.3(1) states that any description of the package given to the consumer by the organiser or retailer must not be misleading. Art.3(2) specifies the items of information that must be contained in any brochure given to the consumer. This information is binding on the organiser/retailer unless any changes have been communicated to the consumer before conclusion of the contract, or agreed subsequently.

8. Art.3(1) has been implemented in Regulation 4(1) PTR. The wording is different from that in the Directive, but there is no substantive difference. It may be noted here that the PTR specify a sanction for failing to comply with this requirement, which is to compensate the consumer for any loss suffered as a result of having been given misleading information. Although there is no mention of reliance in Reg.4(2), it is presumably the case that such compensation will only be payable if it is clear that the consumer has relied on the misleading information and has suffered a loss as a result.

9. Art.3(2) is transposed in Regulation 5(1) PTR and Schedule 1. Although these provisions follow the substance of the Directive, once again, the wording chosen is different. Moreover, whereas Art.3(2) seems to require the provision of the specified information in all brochures, Reg.5(1) contains the proviso that such information

must only be given "to the extent that those matters are relevant to the packages so offered". However, whilst this does add a gloss to the requirement in Art.3(2), it does not seem to constitute a shortcoming in the implementation of this provision. If a particular item of information is not applicable, then it cannot be listed. Of course, it is conceivable that Art.3(2) requires a clear statement that certain matters are not available, rather than simply omitting any information on this aspect. Schedule 1, which implements parts of Art.3(2), specifies the items of information that must be included in the brochure. With the exception of minor linguistic variations, this corresponds with the Directive and does not contain any additional information requirements. A failure to provide this information is regarded as a criminal offence and a fine is payable on conviction (Regs. 5(3)/(4)).

10. The binding nature of these items of information is confirmed by Regulation 6(1), which implies the information presented in the brochure as terms (warranties) into the contract with the consumer, with the exception of information about repatriation in the event of insolvency.

<u>Article 4</u>

11. This Article contains further information requirements. Art.4(1)(a) specifies information which must be provided before a contract is concluded (passport and visa information, health formalities). This has been implemented in Reg.7 PTR. The items of information are the same, although there is an additional requirement in Reg.7 not contained in Art.4(1)(a) (arrangements for security for money paid over, and repatriation in the event of insolvency). This is not, strictly speaking, to be provided prior to conclusion of the contract; however, Article 7 requires that the organiser and/or retailer must provide "evidence" of such security and arrangements, and including information about this in Reg.7 PTR is one way of ensuring that such evidence is provided. Although it does seem that the UK has included an additional information requirement here, the better view is that this is based on Article 7 and does not, therefore, go beyond what is required by the Directive.

12. Article 4(1)(b) lists those items of information that need to be provided in good time before the start of the journey. This has been implemented in Regulation 8. The items of information are generally the same as in the Directive, although there are some variations. Thus, Art.4(1)(b)(ii) refers to "the organiser's and/or retailer's local representative", whereas Reg.8(2)(b)(i) refers to "the representative of the other party

to the contract". This seems to be linguistic rather than substantive and therefore unproblematic. Art.4(1)(b)(iv) requires "information on the optional conclusion of an insurance policy to cover cancellation by the consumer or the cost of assistance, including repatriation in the event of accident or illness". Reg.8(2)(d) has added a proviso that this information must be provided "except where the consumer is required as a term of the contract to take out" such an insurance policy. Finally, Art.4(1)(b)(iii) refers to "minors", whereas Reg.8(2)(c) refers to a "child under the age of 16", but that is only a clarification of the position as it obtains in domestic law.

13. Failure to provide information in accordance with Reg.7 and Reg.8 is also treated as a criminal offence punishable by a fine (Regs.7(3) and 8(3) respectively).

14. Article 4(2) deals with information to be included in the contract itself. Thus, Art.4(2)(a) requires that a contract must contain the items listed in the Annex to the Directive. This has been implemented in Regulation 9(1)(a) PTR, which refers to a list of items specified in Schedule 2 to the Regulations. These are the same as the items listed in the Annex to the Directive.

15. Art.4(2)(b) states that all these terms must be set out in writing and communicated to the consumer before the contract is concluded; moreover, the consumer must be given a copy of these terms. This has been implemented in Regs.9(1)(b) and (c) PTR in accordance with the Directive.

16. Art.4(2)(c) provides that the conclusion of last-minute contracts should not be precluded by these requirements in Art.4(2)(a) and (b). This aspect is expressed in rather vague terms, and in the corresponding implementing provision, it is stated that where the interval between entering into the contract and departure is so short that it is impracticable to comply with the requirement to provide a written copy of the contract to the consumer, the requirement does not apply (Reg.9(2) PTR)). This appears to be a sensible interpretation of Art.4(2)(c) and seems to be a better reflection of what was intended by that provision.

17. The obligation to provide information under Reg.9(1) is deemed to be a condition (Reg.9(3)), which has the effect that a failure to comply with it permits the consumer to terminate the contract. This seems to be a slightly odd way of providing a remedy to the consumer. Its objective, presumably, is to regard a failure to comply with Reg.9(1) as a breach of contract which is so serious as to enable the consumer to

terminate the contract. It is surprising that this was not expressed in this way in the Regulations, and there may be scope for clarification here. The technical meaning of "condition" as an important contract term, breach of which justifies termination of the contract may be familiar to lawyers but may be less so to consumers.

18. Article 4(3) permits the transfer of a booking to another person satisfying the conditions applicable to the package; both transferor and transferee are liable for the costs of the package and any additional costs arising from the transfer. This has been implemented in Reg.10 PTR. It is noteworthy here that, once again, use has been made of the implied term-technique, which seems a little strange. Thus, in each contract subject to the PTR, there is an implied term that the booking may be transferred. However, it seems that this does not constitute a substantive difference from the Directive, and it is therefore unlikely to be problematic in terms of compliance with EC law.

19. Article 4(4) deals with price variations. There is a basic prohibition of price variations in Art.4(4)(a), except where there is a contract term which expressly provides for this and states precisely how such revisions are to be calculated; in any event, such variations may only be made as a result of changes in transportation costs, taxes or fees, or the exchange rates applied to particular packages. This has been implemented in Regulations 11(1) and (2) PTR. Again, this substantively corresponds with the Directive, although the wording of Reg.11(1) amplifies the provision in Art.4(4)(a) by stating that "any term in a contract to the effect that the prices laid down in the contract may be revised shall be void and of no effect…", unless the term in question corresponds with the narrow conditions specified in Art.4(4)(a) as implemented in Reg.11(2) PTR. It seems that there has been some use of the minimum harmonisation clause in this regard; thus, it is provided that a price increase of less than 2 per cent may not be imposed on a consumer; if the contract specifies a greater percentage, then that percentage sets the threshold below which no increase may be made (Reg.11(3)(ii) PTR).

20. Article 4(4)(b) prohibits a price increase during a period of twenty days before departures. This has been implemented in Regulation 11(3)(i), although here, in accordance with the minimum harmonisation clause, the period has been increased to 30 days.

21. According to Article 4(5), if the organiser needs to alter significantly any of the essential terms of the contract, the consumer must be notified quickly in order to take appropriate decisions, including whether to withdraw from the contract, or to accept a variation. The corresponding domestic provision is Regulation 12, which follows the wording of the Directive. The consumer is also required to inform the organiser/retailer of his decision as soon as possible; this is implemented in Reg.12(b). There is no departure from the Directive in this regard, although, again, it should be noted that these provisions utilise the "implied term" technique.

22. Article 4(6) deals with the consequences of withdrawing from the contract under Art.4(5), or of cancellation by the organiser for any reason other than the consumer's fault. The consumer may be offered a substitute package of equivalent, or higher value; or one of lower value if the difference is refunded. Alternatively, he may decide not to take another package, in which case he is entitled to a refund. Moreover, the consumer may be entitled to compensation, unless the cancellation was due to an insufficient number of bookings, or (except for overbookings) because of force majeure. This has been implemented in Regulation 13 PTR, although it should be noted that Reg.13(3)(b) avoids the use of the phrase "force majeure", instead referring simply to "unusual and unforeseeable circumstances beyond the control of the party by whom this exception is pleaded, the consequences of which could not have been avoided even if all due care had been exercised". This is taken verbatim from Art.4(6). In this regard, therefore, the PTR also follow the Directive.

23. Article 4(7) contains provisions on the non-availability of a significant proportion of services contracted for after the consumer has departed. The organiser is required to make alternative arrangements and compensate the consumer for any difference in the value of the services contracted for and those provided. Where such alternatives cannot be made or where they are unacceptable to the consumer for a good reason, the organiser must provide the consumer with transport back home. This has been implemented in Regulation 14, which follows the wording of Art.4(7). It should be noted that, once again, use is made of the "implied term" approach, and this provision becomes a term of the contract.

24. Overall, it may be concluded that the PTR accurately implement the requirements of Article 4 as a whole. There are two small instances where use appears to have been made of the minimum harmonisation clause, but other than that, Regulations 7-14 correspond substantively with the Directive and go no further than its requirements.

One may quibble over the approach adopted by the UK in giving effect to many of these provisions: the various requirements of Art.4 are generally given effect not as free-standing rules in the PTR, but rather as terms implied into the contract by the PTR. Whilst this is a familiar approach from legislation such as the Sale of Goods Act 1979 (see ss.12-15), it does seem surprising that this approach was adopted. It does not, however, seem to affect the effectiveness of the implementation in any way.

Article 5

25. Article 5(1) holds the organiser and/or retailer responsible for the proper performance of the contract. This has been transposed in Regulation 15(1) PTR, which corresponds with Art.5(1) except that instead of the words "organiser and/or retailer", the PTR use the term "other party to the contract".

26. Article 5(2) deal with compensation for the improper performance of the contract, except where such failure to perform is due to the consumer's actions or those of a third party unconnected with the contract, or due to force majeure. In the latter two instances, the organiser/retailer has to give prompt assistance to a consumer in difficulty. Member States are given the option to limit the compensation payable in accordance with international conventions, as well as for damage other than personal injury provided that such a limitation is not unreasonable. These provisions have been implemented in the UK in Regulations 15(2), (3), (4) and (7) and, in their substance, correspond with the Directive.

27. Art.5(3) prohibits the exclusion of liability beyond the limits specified in Arts.5(1) and (2); this has been implemented in Regulation 15(5). Finally, Art. 5(4) obliges the consumer to communicate any failure in the performance of the contract to the organiser/retailer in writing or any other appropriate form at the earliest opportunity; this obligation should be stated clearly in the contract. Regulation 15(9) is the corresponding domestic provision.

Article 6

28. This provision obliges the organiser/retailer to make prompt efforts to find appropriate solutions where there has been a failure in the performance of the services contracted for. This requirement has been implemented in Regulation 15(8) PTR.

Article 7

29. Article 7 requires the organiser/retailer to provide sufficient evidence that security has been put into place to deal with refunds of moneys paid in case of insolvency, and to deal with the repatriation of the consumer in such circumstances. This basic requirement is implemented through Regulation 16(1). The PTR then go on to lay down a fairly detailed scheme by which the appropriate security can be established. These do not apply if the person with whom the consumer has contracted is established in a Member State other than the United Kingdom, and the package is subject to the rules implementing Article 7 in that Member State; furthermore, these rules do not apply where the contracting party is subject to specific civil aviation regulations (see paragraph 33, below). There is, however, nothing more specific on the repatriation of consumers in the event of insolvency.

30. Under the PTR, there are different mechanisms for establishing a security to protect pre-payments. Thus, the person with whom the consumer has contracted could put into place a bond between an institution authorised to provide bonds and what is called an "approved body" of which the trader is a member, to cover the repayment of moneys to consumers for services not provided. There are different rules depending on whether the approved body has a reserve fund or insurance to cover payments made by a consumer. There are rules for the calculation of the bond required in Regulations 17 and 18.

31. It is also possible for the organiser/retailer to take out an insurance policy which would provide refunds to consumers of any money paid over. Under such policies, the consumer would be the insured person.

32. A further mechanism for security is to pay any sums received into a trust fund. The money would be held by a trustee and not be available for use by the organiser/retailer until the package has been performed. Criminal penalties are imposed on a trader if he provides incorrect information resulting in the release of sums from the trust fund. Grant and Mason (*Holiday Law* (3rd edition, 2003) have commented that the inclusion of this option in the PTR was surprising, but note that it is attractive for some providers for whom the costs involved in the bonding procedure or appropriate insurance products are too high.

33. The Civil Aviation (Air Travel Organisers' Licensing) Regulations 1995 (S.I. 1995/1054)[16] deal with he protection of pre-payments for package holidays which include flights. It does not matter whether the flights form part of a package, or are booked as "split contracts", i.e., by booking flights and accommodation as separate contracts. The Regulations require a person who sells a package involving flights to hold an ATOL (Air Travel Organiser's Licence), issued by the Civil Aviation Authority (CAA). ATOL holders must lodge a bond with the CAA to protect their customers against insolvency. Reg.16(2)(b) PTR disapplies the PTR in respect of packages where the organiser is subject to the ATOL Regulations.[17] Where a travel agent simply sells a total package arrangement on behalf of an ATOL holder, the agent is not required to hold a separate ATOL. However, if a travel agent puts together a package himself or offers a choice of flights and accommodation which may be combined at the consumer's request, the travel agent will need an ATOL himself.[18] As the vast majority of package holidays will involve flights, the majority of package travellers will be protected by the ATOL scheme.

**Impact of Unfair Commercial Practices (UCPD- Directive 2005/29/EC)**

34. The Package Travel Directive is one of the key contract law directives. As such, it might be thought that its rules fall squarely within Art.3(2) UCPD, which states that the UCPD is "without prejudice to contract law, and, in particular, to the rules on the validity, formation or effect of a contract". As such, it may seem that its provisions would be unaffected by the UCPD. However, Art.3(5) UCPD contains a time-restricted derogation on rules which are more restrictive than the UCPD and which implement directives containing minimum harmonisation clauses. It may be presumed that any conflict between the UCPD and these directives will be resolved by the European Commission as part of its *acquis*-review project, although we will consider where there might be possible overlaps in Part 2 of this report.

35. Of more immediate concern are provisions of domestic law which exceed the requirements of the directive on the basis of the minimum harmonisation clause. As the preceding discussion of the implementation of the Package Travel Directive has

[16] As amended by the Civil Aviation (Air Travel Organisers' Licensing)(Amendment) Regulations 2003 (S.I. 2003/1741)
[17] Note that in Reg.16(2)(b) PTR, the reference to the 1972 Regulation should be read as if referring to the 1995 Regulations.
[18] For further details, see Civil Aviation Authority, *Guidance Note 26: Sale of Air Package Arrangements: Advice on the need to provide consumer protection* (March 2005); available from www.caa.co.uk.

demonstrated, the UK implementation generally does not go further than required by the Directive, with the exception of two minor aspects: Reg.11(3)(i) on price increases extends the period during which no price increase may be made from 20 days in the Directive to 30 days, and Reg.11(3)(ii) prohibits price increases in respect of variations which would produce an increase of less than 2 per cent. Both have the effect of putting the consumer into a more favourable position than under the Directive itself and are therefore based on the minimum harmonisation clause.

36. The questions that arise, therefore, are (i) whether price variation within the meaning of the Package Travel Directive falls within the UCPD, and (ii) whether the provisions of domestic law going beyond the Directive are more restrictive than the UCPD.

37. We must note first of all that the UCPD does apply to commercial practices before, during, and after a commercial transaction in relation to a product (Art.3(1)). Moreover, a "transactional decision" is "any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right in relation to a product, whether the consumer decides to act or to refrain from acting" (Art. 2(k)). The decision to vary the price will usually be made after a commercial transaction in relation to the product, i.e., once the contract for the package holiday has been concluded, and could cause the average consumer to decide to make payment in whole for the product, i.e., pay the revised price. A decision to vary a price will therefore be a commercial practice, but the question remains whether this would be unfair or misleading.

38. Under the Directive/PTR, price variations are only permissible if it is made clear how the variation is to be calculated, and where this is based on variation in the cost of specified items. Art.6(1)(d) UCPD regards it as a misleading action if the consumer is given information which deceives, or is likely to deceive, him with regard to the way the price is calculated. If the conditions for price variation are clearly stated and justified, then it is difficult to see how a consumer could be mislead, unless the consumer is given incorrect information about the nature of the variations in the cost of the items specified.

39. The UCPD does not prohibit post-contractual price variations. The Package Travel Directive prohibits these except in defined circumstances. If a price is varied in accordance with these provisions, it is unlikely to be an unfair commercial practice. It would potentially be unfair if misleading information about the calculation of the

revised price was given to the consumer and this would make it likely that the (average) consumer would pay the higher price. This, however, is different from the basic question of whether price variation itself is caught by the UCPD.

40. The two provisions in the PTR which make use of the minimum harmonisation clause qualify the availability of price variation. Consequently, these are not affected by the UCPD as such, and there is no question of these provisions being more restrictive than the UCPD. It would therefore not be necessary to make any changes in order to comply with the UCPD.

# Chapter 3

# Unfair Contract Terms

## Background

### *Background to the directive*

1. Directive 93/13/EC on unfair terms in consumer contracts was adopted by the European Commission and Parliament on 5th April 1993. During the 1970's, in a move from the traditional doctrine of freedom of contract, individual Member States began to introduce national legislation to control the use of unfair contract terms in contracts with consumers. By the 1980's it began to be perceived that differences between such national legislation could constitute an impediment to the emerging single market. Work was therefore recommenced on a directive to harmonise controls on unfair terms in consumer contracts, and a directive was finalised in 1993, albeit much narrower in scope than earlier proposals had been.

2. The Directive was adopted as a Single Market measure, under former art 100a of the Treaty of Rome (now art 95) albeit with reference to the need for high levels of consumer protection. Broadly speaking the Directive invalidates any unfair term in a contract between a seller or supplier and a consumer. A term is only subject to the test of fairness if it has not been "individually negotiated": negotiated terms fall outside the Directive's fairness controls. However, it is not necessary for the fairness test to apply that the contract as a whole be in standard form. All that is necessary is for the particular term under challenge to be non-negotiated. In the same way it is not necessary for the contract to be in writing: the fairness test applies to non-negotiated terms in oral as well as in written contracts.

3. In addition the Directive requires all written contract terms presented to consumers to be drafted in "plain and intelligible language." A limited range of contracts is excluded from the scope of the Directive; otherwise it is universal in its application.

4. The core of the Directive is therefore the "fairness test". A term is unfair if, contrary to the requirement of good faith, it creates a significant imbalance in the rights and obligations of the parties to the detriment of the consumer. Further guidance on the

application of the fairness test is contained in the recitals to the Directive and in an Annex which contains an "indicative list" of terms which may be considered unfair.

5. The Directive requires member states not only to allow an individual consumer to challenge a term as unfair in litigation against a seller or supplier, but also to provide for action against unfair terms to be taken on a representative basis by bodies or organisations with an interest in representing consumers.

6. The Directive is a minimum harmonisation measure. It therefore permits Member States to introduce or maintain in force measures which provide a higher level of consumer protection.

*UK background*

7. A difficulty for the UK in implementing the Directive was that there was already a body of common law and statutory rules applicable to unfair contract terms.

8. At common law it was established that an exclusion or similar clause in a contract would only be effective if the clause were validly incorporated into the contract. First and foremost that requires that the clause in question be introduced before or at the time of conclusion of the contract. Terms introduced after conclusion of the contract will be ineffective.

9. Subject to that, the general rule is that in the absence of fraud or grounds for a successful plea of *non est factum*, terms contained in a signed document will be incorporated in the contract. However, a party may not be able to rely on terms in a signed document if he misrepresents their scope or effect.

10. Where terms are contained in an unsigned document the general rule is that they will be incorporated into the contract if the person putting them forward has taken reasonable steps to bring to the attention of the other party that the document contains contract terms.

11. The general rule, therefore, is that terms in a document are either incorporated, or not incorporated, into the contract as a whole. However, this "all or nothing" rule of incorporation is qualified at common law by the so-called "red hand" rule, according to which where a document contains a term which is unusual in that class of contract,

or particularly onerous, or, possibly, unreasonable, that term is only incorporated into the contract if special steps are taken by the proferens to draw attention to it, for instance, it was suggested in a leading case, by printing it in red ink with a red hand pointing to it.

12. Even if validly incorporated into the contract an exclusion clause will only be effective to exclude liability if, on its proper construction, it covers the breach of contract/liability in respect of which the claim is made. The common law developed special rules of construction (interpretation) for exclusion clauses. In particular, exclusion and similar clauses are interpreted strictly, *contra proferentem* – strictly, contrary to the interests of the party putting the clause forward. In practice this meant that the clause would be given the narrowest possible interpretation.

13. The *contra proferentem* rule was applied strictly and often resulted in exclusion and similar clauses being interpreted artificially narrowly as a means of controlling them and denying effect to clauses considered inappropriate or unfair. Perhaps the most important aspect of the rule was that an exclusion would only be effective to exclude or limit liability caused by negligence if it clearly did so on its face. In practice this meant that the word negligence or some synonym therefor had to be used.

14. In addition the UK had already introduced its own statutory controls on certain types of unfair term in the form of the Unfair Contract Terms Act 1977 ("UCTA"). The scope of UCTA overlapped but was not coterminous with that of the Unfair Terms Directive. In some respects the scope of UCTA was narrower than that of the Directive. Most notably, despite its title, UCTA does not apply to all unfair contract terms but only to terms which have the effect if excluding or limiting liability for breach of contract. However, this point should not be overstated. UCTA does not apply only to exclusions worded as such but extends to a wide range of terms and clauses which have the effect of excluding or limiting liability.

15. In a number of other ways UCTA is wider in scope or provides greater protection against the types of term it covers than the Directive.

- Under UCTA some terms are rendered wholly ineffective; others are subject to a test of reasonableness; the Directive does not wholly invalidate any term but subjects all terms to a test of fairness.

- UCTA does not apply only to consumer contracts but applies also to some terms in business-business contracts. In general UCTA offers greater protection to consumers than it does to businesses. The directive only applies to terms in contracts between businesses and consumers.

- For the purposes of UCTA a limited company can qualify as a consumer if it makes a contract which is not integral to its activities or is outside its normal range of regular activities. That can never happen under the Directive for whose purposes a consumer must be a natural person and acting for purposes which are outside his trade, business or profession.

- UCTA applies not only to standard terms but also to some negotiated terms. Most importantly UCTA's core provision, s 3, applies a test of reasonableness to any exclusion clause or similar device in a contract between a consumer and a business, whether standard or negotiated. The directive applies only to standard terms – although if the particular term in question is standard there is no requirement that the terms as a whole be pre-formulated.

16. In addition to UCTA a number of other statutory provisions apply to exclusion and similar clauses in particular types of contract or which seek to exclude or limit particular types of liability.

17. In addition a number of other common law rules might apply to particular types of unfair term covered by the Directive. Thus, for instance, the Directive would apply to contract terms fixing the quantum of damages payable by the consumer in the event of a breach of contract; such terms would be subject to the common law rule against penalties which would invalidate a term under which the amount payable is excessive and not a genuine pre-estimate of the loss likely to be occasioned by breach.

18. There were therefore a number of existing rules occupying the territory covered by the Unfair Terms Directive. In many cases they provided consumers with equivalent or stronger protection than that provided by the Directive and the view was taken that it would be inappropriate to lower the level of protection consumers already enjoyed. At the same time the view was taken that it would be too difficult to attempt a synthesis of the Directive and the pre-existing rules within the time permitted by the Directive for implementation. The decision was therefore taken to implement the

directive by free-standing regulations alongside the existing rules, including UCTA. The currently relevant regulations are the Unfair Terms in Consumer Contracts Regulations 1999, SI 99/2083, replacing the earlier Unfair Terms in Consumer Contracts Regulations 1994, SI 94/3159. The 1994 Regulations largely followed the text of the Directive but departed from it in some significant respects and as a result failed properly to implement the Directive. The 1999 Regulations seek to remedy this failing and for the most part follow the wording of the Directive more or less verbatim. This minimises the risk of non-implementation but creates problems of its own, especially where the text of the Directive is unclear. In considering the implementation of the Directive it must also be borne in mind that, as noted above, the pre-existing statutory and common law rules concerning exclusion clauses and unfair terms remain in force. In many cases they provide greater protection against unfair terms than do the provisions of the Directive and the implementing regulations. Since the Directive is a minimal harmonisation measure this is permitted. However, as a result when considering the extent to which the UK implementation goes further than required by the Directive it is necessary to consider not only the implementing 1999 regulations but also the other rules which co-exist with them.

*Reform proposals*

19. The retention of the pre-existing legal rules – most especially UCTA – alongside the regulations implementing the Directive produced a regime of great complexity which has been widely criticised. As noted the two regimes overlap but differ in a number of significant respects, creating difficulties for businesses, consumers and their respective advisers. In an attempt to rectify this position the Law Commission has published proposals for reform of the law in this area. Broadly speaking the Commission proposes the following.

20. There should be a single statutory regime applicable to unfair terms in consumer contracts, combining the protections provided by the Unfair Terms Regulations and UCTA. Such a regime must comply with the requirements of the Unfair Terms Directive in order to satisfy the UK's European law obligations. In addition the Commission proposes that in general there should be no lessening of existing levels of consumer protection, so that to the extent that UCTA currently provides higher levels of protection than does the Directive that higher level would be maintained by the proposed unified regime. "Consumer" would be defined as a natural person, so that it would no longer be possible for a limited company to qualify as a consumer.

21. There should be a single regime applicable to business-business contracts. Broadly speaking it is proposed that where a contract is made on one party's standard terms of business a clause which seeks to exclude or limit liability for breach of contract should be valid only insofar as it satisfies a requirement of being a fair and reasonable tem to include in the contract.

22. There should be additional protection for small businesses. Thus, in addition to the general controls on exclusions in business-to-business contracts (above), a small business (defined as one having not more than 9 employees) would be able to challenge as unfair any term put forward during negotiations by the other party as one of its written standard terms of business if the substance of the term was not changed in favour of small business as a result of negotiations AND the term is detrimental to the small business. The term in question would be ineffective unless it satisfied the proposed "fair and reasonable" test. The significance of this proposal is that it would not be limited to exclusion clauses but would allow any standard term to be challenged, and would therefore give to small businesses protection against unfair terms broadly equivalent to that given to consumers by the Unfair Terms Directive.

23. At the time of writing these proposals have not been implemented. They will be considered below when evaluating domestic law against the Directive.

<u>Mapping the implementation</u>

24. As noted above, the Unfair Contract Terms Directive is implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR), replacing the Unfair Terms in Consumer Contracts Regulations 1994. However, in order to get a balanced view of the Regulations they must be considered in the context of the other domestic law provisions on unfair terms.

25. On the whole the UTCCR 1999 follow the language of the Directive more or less verbatim. In contrast the UTCCR 1994 departed from the language of the Directive in a number of significant respects and therefore (arguably) failed properly to implement the Directive. Generally where the language of the UTCCR 1999 departs from that of the Directive the effect is to clarify the drafting.

26. The substantive provisions of the UTCCR appear in regulations 3 – 15. Regulation 1 deals with citation and commencement; regulation 2 revokes the UTCCR 1994.

*Scope and purpose*

27. The purpose of the Unfair Terms Directive, as stated in art 1, is "to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer." In fact, however, as noted above, the scope of the Directive is narrower than this would suggest, being limited to non-negotiated terms.

28. Art 1.2 excludes from the directive's scope "terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area". The precise meaning of this provision is not clear. The original UK implementing legislation, the 1994 Regulations, omitted the word "mandatory" from its transposition. However, the thrust of the provision is clear enough: terms included in a contract to comply with domestic or international legislative requirements are not to be challenged as unfair. This view is confirmed by the recitals to the Directive (para 13).

29. Regulation 4 defines the scope of the application of the regulations. It closely follows the language of art 1 of the Directive; insofar as it departs from the wording of the Directive the differences do not appear to be significant.

*Definitions*

30. Art 2 contains definitions of the Directive's key terms: "unfair terms", "consumer" and "seller or supplier". They are transposed *verbatim* into English law by the 1999 Regulations.

31. Regulation 3 is the interpretation clause and defines key terms. "Unfair terms"[19], "consumer" and "seller or supplier" are defined in terms which follow verbatim the definitions of those terms in the Directive[20]. The definitions of "seller" and "supplier"

[19] "Unfair terms" are defined in regulation 5 to which regulation cross refers

[20] . In contrast the UTCCR 1994 defined seller and supplier separately as "seller of goods" and "supplier of goods and/or services", giving rise to an argument that the regulations did not apply to contracts for the creation or transfer of interests in land, including tenancies. It is now clear that the regulations do apply to such contracts and that, in effect, "seller or supplier" means simply "business".

are extended to make explicit that they include a distance supplier of financial services, a supplier of unsolicited financial services and a financial services intermediary. As explained below, these provisions, although not required for compliance with the unfair terms directive, form part of the implementation of Directive 2002/65/EC on the distance marketing and selling of financial services.

*The test of fairness*

32. Arts 3 and 4 are the key provisions of the Directive, defining and invalidating unfair terms. They are implemented by regulations 5 and 6 which follow them closely.

33. Art 3.1 sets out the test of fairness and provides that a term which has not been individually negotiated shall be considered unfair if, contrary to the requirement of good faith it creates a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

34. Art 3.2 expands on art 3.1 by defining when a term will be regarded as "individually negotiated". It provides that a term "shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract". It is clear therefore that a term which satisfies the criteria in art 3.2 will be regarded as not individually negotiated, but the provision is not entirely clear. In particular it is not clear whether the words "shall always" are intended to introduce a necessary or a sufficient condition. To put it another way, a pre-drafted term is not individually negotiated but can a specially drafted term be considered not to be individually negotiated if it is presented on a "take it or leave it" basis. It is submitted that this would be a natural and sensible reading of the Directive. Many such terms will, in any case, be pre-formulated.

35. What is clear is that, notwithstanding the reference to "a pre-formulated standard contract" the question under the Directive is whether the particular term was individually negotiated. It is not necessary, in contrast to the position under the UCTA, that the contract be on standard terms, or even that the individual term be "standard".

36. The converse point is made in the second paragraph of art 3.2. The fact that a particular term or part of a term has been individually negotiated does not preclude an assessment of the fairness of the rest of the contract "if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract." This is a slightly puzzling provision and suggests some confusion about the scope of the Directive. As noted, the thrust of art 3.2 appears to be that the test of individual negotiation is applied at the level of the individual term and there is no need that the contract as a whole be a standard term one.

37. The third paragraph of Art 3.2 is clearer. It allocates the burden of proving that a term was individually negotiated to the seller or supplier.

38. Art 3.3 refers to the indicative list of potentially unfair terms in the Annex to the Directive.

39. Regulation 5 contains the core definition of "unfair term". Reg 5(1) which defines "unfair term" adopts verbatim the language of art 3.1.

40. Reg 5(2) defines the circumstances in which a term will be regarded as not having been individually negotiated, and implements the first paragraph of art 3(2) of the Directive. It adopts the language of art 3(2) verbatim but omitting the final phrase, "particularly in the context of a pre-formulated standard contract". The omission does not appear to have any significant impact on the meaning of the provision, the omitted words merely providing a specific application of the general words which precede them. It is however clear on the face of the UTCCR that the test of fairness applies to individual non-negotiated terms and that it is not necessary that the contract as a whole be a standard form contract.

41. Reg 5(3) implements the second paragraph of art 3.2. It departs from the language of the Directive in some small matters of detail but the differences do not appear to affect the meaning.

42. Reg 5(4) implements the third paragraph of art 3.2 allocating the burden of proving that a term was individually negotiated to the seller/supplier. The language differs but not in a way which affects the sense of the provision.

43. Reg 5(5) corresponds in almost verbatim terms to art 3.3, referring to the indicative list of potentially unfair terms in Schedule 2 to the Regulations. That list adopts verbatim the wording of the Directive.

44. Regs 5(6) – 5(7) were added as part of the implementation of Directive 2002/65/EC on the distance marketing and selling of financial services, and provides that any contract term providing that a consumer bears the burden of proving that a supplier of financial services or intermediary complied with his obligations under that Directive or any implementing legislation is automatically unfair. This provision is not required in order to comply with the unfair terms directive but is required in order to comply with Directive 2002/65/EC.

45. Art 4 expands the test of unfairness. As under UCTA the test of fairness is to be made as at the time of conclusion of the contract, and should take into account the nature of the goods or services for which the contract was concluded, all the circumstances surrounding the making of the contract and all the other terms of the contract or "another contract on which it depends."

46. Art 4.2 contains what has been widely referred to as the core terms exemption. It provides that the assessment fairness of the terms is not to relate to "the definition of the main subject matter of the contract" or to "the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, so far as these terms are in plain intelligible language". The thrust of this provision is reasonably clear. It seeks to preclude the court from assessing the fairness of the core contractual exchange or, to put it another way, the sufficiency of the consideration provided by each party. However, this exemption applies only so far as the "core terms" are expressed in plain intelligible language.

47. Reg 6 expands on the effect of unfair terms and corresponds to art 4 of the Directive. Reg 6(1) adopts the language of art 4.1 almost verbatim. Reg 6(2) implements art 4.2. It reorganises the language of art 4.2 so as to present it in a more structured way but in a way which clarifies rather than changes its meaning.

*Plain intelligible language*

48. Art 5 is a slightly odd provision. It provides that

> "In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7(2)."

49. As a preliminary point we may note that Art 5 seems to be out of sequence in the Directive. Art 4 deals with the test of unfairness; art 6 deals with the consequences of a term being found to be unfair. Art 5 does not make a term unfair. It does two things. First, it imposes a mandatory requirement that terms presented to the consumer in writing be presented in "clear, intelligible language". Second, it imposes a rule of construction to the effect that in the case of ambiguity, a term shall be given the interpretation most favourable to the consumer. These provisions give rise to a number of difficulties.

50. First, it should be noted that, unlike the provisions of arts 3 and 4 dealing with unfair terms, art 5 is not limited to pre-drafted terms but appears to apply to all cases where a term or terms is/are presented to the consumer in writing. It would therefore seem to be capable of applying in the case of a written but negotiated term.

51. Second, it is not clear what test of "clear, intelligible language" is to be used, *viz* whether the test is subjective (i.e.: the language must be clear and intelligible to the individual consumer) or objective (i.e. the language must be clear and intelligible to the average reasonable consumer). The more natural reading of the provision would favour an objective interpretation (although it should be noted that subjective factors affecting the understanding of the particular individual consumer and known to the supplier would be relevant in applying the test of fairness under art 4).

52. Third, no sanction is provided for breach of the requirement that the terms be presented to the consumer in clear, intelligible language. It is clear that intelligibility may be a relevant factor in assessing the fairness of a term, in the context of both a challenge by an individual consumer and a pre-emptive challenge by a public enforcement body.

53. Fourth, the second provision in art 5, that in the case of ambiguity, a term shall be given the interpretation most favourable to the consumer, is not immediately clear.

Specifically it is not clear what interpretation is the most favourable to the consumer. The provision has been treated as an analogue of the common law *contra proferentem* rule, but it seems that it will generally operate in a different way to the traditional application of the *contra proferentem* rule. Traditionally the *contra proferentem* rule when applied to exclusion or similar clauses led to an ambiguous term being construed narrowly. However, in the context of the Directive giving a wider interpretation to a term will often increase the likelihood of the term being judged unfair and therefore being held to be ineffective. In the context of the Directive the interpretation most favourable to the consumer will therefore generally lead to an ambiguous term being construed widely rather than narrowly[21]. It is clear that the application of this provision is context sensitive, taking account of the circumstances of the individual consumer; hence it provides that the construction rule is not applicable in the context of a pre-emptive challenge by a representative body.

54. Reg 7 implements art 5 of the Directive. Again it presents the language in a more structured fashion but so as to clarify rather than change the meaning. However, it resolves none of the difficulties of art 5. Reg 7(1) imposes a duty on the seller/supplier to present written terms in plain, intelligible language; reg 7(2) provides for ambiguous terms to be given the meaning most favourable to the consumer.

*Effect of unfair terms*

55. Article 6.1 deals with the consequences of a term being found to be unfair. It requires Member States to provide that (1) unfair terms in a contract between a seller/supplier and a consumer shall not be binding on the consumer and (2) that the remainder of the contract shall remain in force and bind the parties if it is capable of continuing in existence without the unfair term. (It is not clear what happens if the contract is not so capable of continuing in existence.) There is therefore no power for the court to re-write an unfair term so as to make it fair: the term is either fair or unfair, in which case it is ineffective.

56. Art 6.2 contains an anti-avoidance provision and requires Member States to take "the necessary measures" to ensure that consumers are not deprived of the protection of the directive by a choice of law of a non-Member state as the governing law of the

[21] It should be noted that the same result may occur in domestic law as a result of the interaction of the common law rules of interpretation and the statutory rules in the UCTA.

contract if the contract has a "close connection" with the territory of the Member States.

57. Reg 8 deals with the effect of an unfair term. It corresponds to art 6.1. Again it presents the language in a more structured fashion but otherwise adopts the language of the Directive more or less verbatim. Reg 8(1) provides for an unfair term to be non-binding on the consumer; reg 8(2) provides for the remainder of the contract to continue to be binding on the parties if it can continue in force without the unfair term.

58. Reg 9 implements art 6.2 and provides for the UTCCR to apply to a contract notwithstanding the choice of the law of a non-Member State as the governing law of the contract if the contract has a close connection with the territory of the Member States.

*Administrative action*

59. Art 7 caused problems when the Directive was first implemented in the UK. One weakness of consumer protection measures is that their effectiveness depends on consumers, often without the benefit of legal advice, being aware of and invoking the measures. Significantly in the context of unfair terms a number of terms invalidated by the UCTA remained in use despite being made ineffective. In order to address this difficulty art 7 requires Member States to ensure that "adequate and effective means exist to prevent the continued use of unfair terms" in contracts concluded between consumers and sellers/suppliers. Such means are to include provisions enabling persons or organisations "having a legitimate interest under national law in protecting consumers" to take action "according to the national law concerned" before the courts or competent administrative bodies for a decision as to the fairness of a term to enable them to apply "appropriate and effective means to prevent the continued use of such terms", such means to include remedies directed not only at the particular seller/supplier but also remedies directed jointly at a number of sellers/suppliers in the same economic sector or at associations which use or recommend the use of the same or similar terms.

60. The thrust of this provision is clear enough: it requires Member States to provide some mechanism of pre-emptive challenge to unfair terms by representative bodies.

The problem is that it contains a number of open textured provisions – "legitimate interest", "action according to the national law", "appropriate and effective means".

61. Regs 10 – 15 have no direct analogue in the Directive. They are intended to satisfy the obligation imposed on Member States by art 7, to ensure that "adequate and effective means exist to prevent the continued use of unfair terms" in contracts concluded between consumers and sellers/suppliers, to include provisions enabling persons or organisations "having a legitimate interest under national law in protecting consumers" to take action "according to the national law concerned" before the courts or competent administrative bodies for a decision as to the fairness of a term to enable them to apply "appropriate and effective means to prevent the continued use of such terms". Initially the UK government argued that no steps were required to implement this in the UK because there were no bodies recognised as having "a legitimate interest *under national law*" in taking such action. In the original 1994 regulations enforcement power was given to the Director General of Fair Trading (DGFT); however, following the threat of a legal challenge by the Consumers' Association the government agreed to give enforcement powers to a number of other organisations, referred to in the regulations as "qualifying bodies", in addition to the OFT. The qualifying bodies entitled to take action under the regulations are listed in Schedule 1 to the Regulations[22]. Reg 10 obliges the OFT[23] to consider any complaint that a term drawn up for general use is unfair unless the complaint is frivolous or vexatious or is being considered by a qualifying body. A complaint can also be made to a qualifying body. Such a body is obliged to consider the complaint if it notifies the OFT that it agrees to do so (reg 11). In addition to enforcing the regulations in its own name the OFT is charged with overseeing and co-ordinating their enforcement by other bodies.

62. Enforcement is ultimately by means of application to the court for an injunction to restrain the continued use of an unfair term, and reg 12 gives the OFT and qualifying bodies power to apply to the court for such an injunction,[24] and imposes procedural requirements on any such application.

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[22] The qualifying bodies listed in the Schedule are statutory regulators of individual industries such as water and energy, trading standards departments and the Consumers' Association.
[23] The OFT now exercises the enforcement powers previously vested in the DGFT by virtue of the Enterprise Act 2002.
[24] There is power for the OFT to accept an undertaking in lieu of seeking an injunction. In practice most complaints are dealt with by negotiation and the giving of undertakings.

63. Reg13 gives the OFT and qualifying bodies power to demand the production of documents of the purposes of facilitating complaints about unfair terms. Reg 14 requires qualifying bodies to notify the OFT of any undertaking given to it or the outcome of any application it makes to the court, to enable the OFT to perform its co-ordinating role. Finally, reg 15 gives the OFT power to publish details of applications made to the court, court orders made and undertakings given under the regulations.

64. Art 8 contains the minimum harmonisation provision and enables Member States to adopt or retain "the most stringent provisions compatible with the Treaty" in the area covered by the Directive "to ensure a maximum degree of protection for the consumer".

65. The remaining provisions deal with procedural matters. Art 9 requires the Commission to present a report on the application of the Directive not later than five years after the date for its implementation. Arts 10 and 11 deal with the procedures for implementation of the Directive.

Comparative analysis

66. The policy of adopting verbatim or almost verbatim the language of the Directive means that there are no instances in which the UTCCR may be said unequivocally to give wider or higher levels of protection than required by the Directive. The most significant linguistic difference between the two instruments would seem to be the omission from the end of reg 5(2) of the words "particularly in the context of a pre-formulated standard contract" which appear in art 3.2 of the Directive. However, it is not easy to see what these words add to art 3 – at most they add emphasis – and their omission therefore does not seem to alter the sense of reg 5.

67. However, in comparing domestic law with the Directive it must be borne in mind that the UTCCR are only one strand of the domestic law control on unfair terms. Account must also be taken of the effect of the UCTA and, where appropriate, the common law and in a number of respects the UCTA provides higher levels of protection to a wider class of contractors than do the UTCCR. The significance of this will be more obvious if the Law Commission's current proposals to produce a single unified regime of controls over unfair terms are implemented.

*Present situation*

68. As noted earlier the provisions of the UTCCR to some degree overlap the common law rules relating to the incorporation and construction of exclusion and similar clauses and the common law rules relating to penalties. To a large degree the common law rules replicate the effects of the UTCCR: both give the court a wide discretion and although the discretions may be structured differently (the UTCCR give the court a discretion to determine whether a pre-drafted term should be judged fair or unfair; in contrast the rule against penalties automatically invalidates a term judged to be a penalty, but the court enjoys a wide discretion to decide whether to classify a given term as a penalty or as a valid liquidated damages provision. In the same way the "red hand rule" invalidates a term to which insufficient notice is given by deeming it not to be incorporated in the contract but the court has discretion to determine whether the term requires special notice and, if so, how much), the effect of their application will generally be the same. The UTCCR go further than the common law rules in that they are applicable to all pre-drafted terms, but the common law rules may be said to give wider protection than do the UTCCR in two important respects. First, where they apply they apply not only to pre-drafted but also to negotiated terms[25].

69. Secondly, the application of the common law rules is not limited to contracts with consumers but are equally capable of being applied to business-business contracts[26].

70. In practice, however, the statutory controls in the UCTA are more significant than the common law controls. In one significant respect those controls are narrower in scope than are those in the UTCCR, in that on the whole they apply only to clauses which seek to exclude or limit liability or which tend to have that effect[27]. The Act's widest provision is s 3 which provides that where one party deals as a consumer or on the other's written standard terms of business, the other party cannot by reference to any

[25] It may be expected that the rules will generally be applied more stringently to non-negotiated than to negotiated terms. Note that not all the common law rules are applicable to negotiated terms. It is not clear that the red hand rule would be applicable to negotiated as opposed to per-drafted terms. Its objective appears to be to provide protection against a contractor being unfairly surprised by a contract term. In Canada the rule has been applied to a term in a signed document. There is no corresponding application of the rule in England but if the rationale is as suggested there appears to be no reason why the rule should not be applied in the same way in England.

[26] Indeed there appears to be nothing to prevent their being applied to purely private contracts.

[27] The scope of the Act is considerably extended by s 1 which applies it to a range of terms which have the effect of excluding or limiting liability or making its enforcement more difficult, including for certain purposes terms drafted as duty defining terms which seek to exclude liability by preventing the relevant duty arising.. The courts have also …

contract term either (i) when in breach of contract exclude or restrict his liability for the breach of contract, unless such a term satisfies the requirement of reasonableness or (ii) claim to be entitled to render a contractual performance substantially differently from that reasonably expected of him, or, in respect of the whole or part of his contractual performance, to render no performance at all. Notwithstanding its apparent width, s 3 is narrower in scope than are the UTCCR and Directive. It has been held that whilst it applies to terms in a contract between A and B by which A purports to be entitled to render a reduced performance, it does not apply to terms by which A claims to be entitled to demand an increased performance from B[28]. The net result is that there are some terms which are caught by the UTCCR which are not caught by the UCTA.

71. In other respects, however, the UCTA both is wider in scope and offers a higher level of protection against unfair terms than does the Directive.

*Wider scope.*

72. The UCTA is wider in scope than the Directive in three important respects. First, its provisions are not limited to the protection of consumers but also protect businesses. Thus, although the protection offered to consumers is greater, ss 2, 3, 6 and 7 all apply not only to terms in consumer contracts but also to terms in business to business contracts – and, as the law presently stands, ss 2, 6 and 7 apply to terms in such contracts even where the relevant term – or even the whole contract – is negotiated.

73. Second, the definition of "consumer" in the UCTA is wider than that in the Directive and, significantly, is not limited to natural persons. As a result it has been held that a limited company – and therefore a business – can deal as a consumer for the purposes of the UCTA if it is not acting "in the course of" a business. This will happen where the contract in question is not integral to the business or is not of a kind which the business makes with sufficient regularity.

74. Third, section 2 of the UCTA, which applies to exclusion of liability for loss caused by negligence, does not apply only to contract terms but applies also to non-contractual notices.

[28] *Paragon Finance Ltd v Nash*

75. Insofar as these provisions provide businesses with protection against unfair terms they may be said to occupy territory not covered by the Directive and to represent a separate and deliberate policy decision by the UK to extend such protection to businesses. It should also be borne in mind that the relevant provisions pre-date the Directive and were therefore not introduced in response to it. However, where they apply they give businesses much the same protection as is provided to consumers by the UTCCR, subjecting exclusion and similar terms to a test of reasonableness which in many respects can be expected to apply in much the same way as the test of fairness under the UTCCR.

*Higher levels of protection*

76. More significantly in at least two important respects the UCTA provides consumers with higher levels of protection than do the Directive and UTCCR. First, where UCTA applies it protects those who "deal as consumer" (which, as noted, may include a company or other business acting in a way which is neither integral to nor a regular part of its business activities) even in relation to fully negotiated terms, whereas the UTCCR has no application to terms unless they are pre-drafted. Second, whilst the UCTA subjects some terms to a test of reasonableness, others are rendered wholly ineffective. Sections 2(1), 5, 6 and 7 wholly invalidate terms to which they apply; there is no question of such terms being upheld as reasonable or fair. Insofar as these provisions apply in favour of consumers they may therefore be said to provide higher levels of protection than required by the Directive. This is, of course, permitted by the Directive; moreover it should be noted that the total invalidation of the terms to which ss 6 and 7 apply is required by Directive 99/44 on the sale of consumer goods and associated guarantees[29].

Other provisions.

77. Mention should be made of one other set of statutory provisions. Sections 89 – 91 of the Arbitration Act 1996 subject to the UTCCR any agreement between a seller or supplier and a consumer to refer disputes to arbitration. Such an agreement is conclusively presumed to be unfair if the amount in dispute does not exceed the "specified amount", currently fixed, by the Unfair Arbitration Agreements (Specified

[29] Indeed, these provisions do not go far enough fully to implement the requirements of the sales directive: see below.

Amount ) Order 1999 (SI 1999/2167) at £5,000. In effect therefore these provisions automatically invalidate the terms to which they apply. Such a provision is not required by the unfair terms directive and therefore provides another example of English law going further than required by EC law. This is again a result of a deliberate policy decision by the UK to protect consumers. The clear rationale is that a requirement to refer claims, especially small claims, to arbitration rather than to the courts, may impose disproportionate costs on the consumer and therefore deter consumers from bringing claims[30].

The Law Commission's Proposals

78. The essential elements of the Law Commission's 2005 proposals for the reform of the law on unfair terms – a single, unified regime to govern consumer contracts, replacing the existing UCTA and UTCCR, a separate regime for business – business contracts and special provision to protect small businesses - have been outlined above. Insofar as the proposals relate to consumer contracts the Commission was guided by two basic principles: first, that the unified regime must be sufficient to comply with the requirements of the unfair terms directive, and second, that there should be no reduction in existing levels of protection. Thus insofar as the law currently provides higher levels of consumer protection than required to comply with the directive, it would continue to do so. There would therefore be provisions corresponding to UCTA ss 2(1), 6 and 7 wholly invalidating clauses seeking to exclude liability (1) for personal injury or death caused by negligence, or (2) for breach of the terms relating to the seller's right to sell the goods and the goods correspondence with description and sample, quality and fitness for purpose, implied by statute into contracts for the sale and supply of goods[31].

79. All other terms other than those defining the main subject matter of the contract or the contract price[32], would be subject to a test of fairness, whether pre-drafted or individually negotiated. Similarly the controls on exclusions of liability for loss caused by negligence would apply to notices as well as to contract terms. The proposals would therefore continue to provide consumers with higher levels of protection than required by the directive and in one significant respect they would go

[30] There was already legislation in place to control arbitration agreements in consumer contracts prior to 1996, in the form of the Consumer Arbitration Agreements Act 1988.
[31] As noted above, these provisions are required to comply with the consumer sales directive 99/44/EC.
[32] This exclusion would apply only in so far as the term is not substantially different from what the consumer reasonably expected and is stated in plain language.

even further than the present law. As the law stands consumers are protected against pre-drafted unfair terms of all kinds by the UTCCR and against exclusion clauses and similar provisions in all cases, whether pre-drafted or not, by virtue of UCTA s 3. The Commission's proposals would protect consumers against unfair terms in all cases, whether pre-drafted or not. The significance of this can be illustrated with a simple example. As noted above, at present UCTA s 3 protects consumers against a wide range of exclusion and similar clauses, whether pre- drafted or not. However, whilst it applies to terms whereby a business dealing with a consumer purports to be entitled to reduce its own obligations, it does not apply to a term which purports to allow the business to be able to demand an increased level of performance from the consumer, such as a clause allowing the business to increase the price payable by the consumer. Such a term is subject to a test of fairness under the UTCCR (and such terms are included in the indicative list of potentially unfair terms in the Schedule to the Regulations, in effect raising a presumption, albeit a non-legal one, that they are unfair) but only where it is pre-drafted. The Commission's proposals would therefore increase the level of protection for consumers against such terms[33] .

80. At present the UTCCR subject terms to which they apply to a test of fairness. UCTA subjects terms to a test of reasonableness. Although the two tests are expressed in different terms they tend to produce much the same effect – i.e. a term which is judged unreasonable under UCTA us likely to be judged unfair under the UTCCR and *vice versa*. The Commission proposes that under the proposed new legislation terms should be subject to a "fair and reasonable" test –i.e.: a term should be a fair and reasonable one to include in the contract. The Commission proposes that the new legislation contain guidelines as to the application of this test, similar to those contained in UCTA as well as an indicative list of terms which may be considered unfair. This would be based on that in the Directive but would be reformulated in order to make it more comprehensible to a domestic audience, and there would be power for the Secretary of State to add to it.

81. Although the proposed fair and reasonable test would be expressed in different terms from that in the Directive, and the indicative list of unfair terms would be capable of being expanded beyond that in the Directive, we think that, on the whole, the

[33] Note, though, that the significance of this may be more apparent than real. Although price increase and similar clauses are not at present subject to UCTA s 3, their exercise is subject to control at common law.

terminological differences would not produce any substantive difference in the treatment of similar terms.

82. As we have noted above, the Commission also proposes a regime of protection against unfair terms for business – business contracts and a special additional regime to protect small businesses. As we have noted above, such regimes are not required in order to comply with the Directive and represent a separate policy decision that such contracts need some external control. We would add only two observations.

    a) Under the Commission's proposals a consumer would have to be a natural person. It would therefore no longer be possible for a business to be treated as "dealing as a consumer".
    b) The test of fairness under the Commission's proposals would be the same under each of the three proposed regimes – consumer, business-business and small business. In each case the test would be whether the term is a fair and reasonable one to include in the contract. This tends to reinforce the impression that the consumer protection regime is being extended to consumers. However, for the reasons outlined above we think this is a mistaken impression and the different regimes should be viewed as distinct.

Impact of the UCPD

87. We have noted a number of respects in which domestic law goes further than required by the Unfair Terms Directive, either by providing broader protection (eg: by protecting businesses against unfair terms) or by providing consumers with a higher level of protection than is required by the directive (eg: by wholly invalidating certain classes of exclusion).

88. Insofar as measures providing for a higher level of protection than the directive are based on the minimum harmonisation clause and fall within the scope of the UCPD, they must be capable of being justified under art 3.5 UCPD as being essential to ensure that consumers are adequately protected.

89. The extension of protection against exclusions to businesses falls outside the scope of the unfair terms directive and thus does not need to be justified in this way.

90. The absolute prohibition on contract terms excluding or limiting liability for death or injury caused by negligence can arguably be justified as being essential for the

protection of consumers. However, we would argue that the legal controls on exclusions form part of the law of contract and are therefore wholly unaffected by the UCPD by virtue of the general exclusion in art 3.2.

91. For the same reason there is no overlap between the provisions of the UCPD and those of the Unfair Terms Directive. There is therefore no scope for replacing the provisions of the Unfair Terms Directive by reliance on those of the UCPD.

# Chapter 4

# Timeshare

Background

1. The main aims of Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis are the proper operation of the Internal Market and the avoidance of distortions of competition[34]. Consumer protection is not in itself an aim but the means to an end. The Directive will ensure that the Internal Market operates properly by establishing minimum rules throughout the Community and this will lead to the protection of purchasers[35]. The directive requires the supply of information to the purchaser and provides timeshare purchasers with a right to cancel the contract; it has no impact on other, contractual issues such as the definition of “contract” or the rules on contract formation[36].

2. The directive covers the following main areas.

   (a) Supply of information

   The directive requires the supply of certain information as a minimum an requires it to be incorporated in the contract[37]. The information must be accurate and complete. The consequences of non-compliance are a matter for the national law of the Member States.

   (b) Contract language

   The contract must be in one of the official languages of the Community. Subject to that the contract may be in one of the official languages of the purchaser's country of residence or, if the law of the state of residence permits, his nationality.

   (c) Right of cancellation

[34] Recital 1
[35] Recital 2
[36] Recital 4
[37] Recitals 7 and 8

The purchaser should have the opportunity to rethink the contract after conclusion. The Directive therefore establishes a right to cancel or withdraw from the contract. This right can be exercised without giving any reason.

(d) No advance payments

Advance payments before the end of the withdrawal period are prohibited, in order to ensure that the purchaser's exercise of the right to cancel is not inhibited.

(e) Credit agreements

If the main contract is cancelled, any credit agreements made with the seller or a third party with whom the seller is affiliated is also cancelled.

(f) Forum shopping

The Directive also contains provisions to prevent the consumer being deprived of his rights by forum shopping.

The directive is implemented in the UK by the Timeshare Act 1992, Timeshare (Cancellation Notices) Order 1992 – SI 1992/1942, Timeshare (Repayment of Credit on Cancellation) Order 1992 – SI 1992/1943 and Timeshare (Cancellation Information) Order 2003 – SI 2003/2579

Mapping the implementation

*Article 1 – scope*

2. Article 1 1st sentence describes the aim of the Directive. The main aim is said to be the approximation of provisions on timeshare and the protection of purchasers.

3. The 2nd sentence of article 1 deals with the scope of application. The Directive covers only the supply of information on the constituent parts of a contract and the arrangements for the communication of that information, and procedures and arrangements for cancellation and withdrawal. The Member States remain competent for other matters, such as the determination of the legal nature of the rights which are the subject of the contracts covered by the Directive.

4. There is no need for any explicit transposition of the provisions of art 1

*Article 2 – definitions*

5. Article 2 provides definitions for some of the terms used in the Directive:" timeshare contract", "immovable property", "vendor" and "purchaser".

6. A timeshare contract is a "contract relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis" ("contract") and is "any contract or group of contracts concluded for at least three years under which, directly or indirectly, on payment of a certain global price, a real property right or any other right relating to the use of one or more immovable properties for a specified or specifiable period of the year, which may not be less than one week, is established or is the subject of a transfer or an undertaking to transfer" (Art. 2, 1st indent).

7. Immovable property is "any building or part of a building for use as accommodation to which the right which is the subject of the contract relates" (Art. 2, 2nd indent).

8. The vendor is "any natural or legal person who, acting in transactions covered by this Directive and in his professional capacity, establishes, transfers or undertakes to transfer the right which is the subject of the contract" (Art. 2, 3rd indent). This definition is a slight variation of the definitions of sellers or providers in other consumer law related Directives. Essentially therefore the Directive, like other consumer protection measures, only applies to contracts between business (professionals) and consumers, not between two consumers. The slightly different wording does not result in a significantly different definition as the same parameters apply.

9. The purchaser is "any natural person who, acting in transactions covered by the Directive, for purposes which may be regarded as being outwith his professional capacity, has the right which is the subject of the contract transferred to him or for whom the right which is the subject of the contract is established" (Art. 2 4th indent). This definition of a purchaser largely corresponds with that of “consumer” in other directives. The purchaser has to be a natural person acting for the contract in question outside his professional capacity.

10. The definitions are not transposed directly, and the terminology used in the transposition is different. Section 1 (4) of the Timeshare Act 1992 defines the term "timeshare agreement" as "an agreement under which timeshare rights are conferred or purport to be conferred to any person". The phrase "timeshare rights" is defined in s.s. 1 (1) (b) as "rights by virtue of which a person becomes or will become a timeshare user, being rights exercisable during a period of not less than three years". Section 3A adds that a person may become a timeshare user on payment of a global

price. Although the terminology is different those definitions cover the key points from Art. 1 1st indent of the Directive.

11. The term immovable property is not used in the implementing legislation, the Timeshare Act 1992 uses the terms "accommodation" and "timeshare accommodation" instead. Accommodation is defined in s.s. 2 (a) of the Act as "accommodation in a building or in a caravan (as defined in section 29 (1) of the Caravan Sites and Control of Development Act 1960)". Timeshare accommodation means "any living accommodation, in the United Kingdom or elsewhere, used or intended to be used, wholly or partly, for leisure purposes by a class of persons ("timeshare users") all of whom have rights to use, or participate in arrangements under which they may use, that accommodation, or accommodation within a pool of accommodation to which that accommodation belongs, for a specified or ascertainable period of the year". These definitions go further than the Directive required. Since the Directive follows the minimum harmonisation principle and the extended UK definition does increase the standard of protection for consumers or purchasers, this is certainly permitted by the Directive. The Timeshare Act 1992 includes caravans which are not included in the definition in the Directive referring to building or part of a building. Together with the word "immovable" this indicates that caravans are not included. However, although the UK legislation goes further than the directive in applying to caravans, several of the Act's main provisions do not apply to caravans, so that the scope of the extension of protection is less than might appear. The restriction on use for leisure purposes appears to be more restrictive than the Directive but this is in line with the definition of purchaser and the purpose of the contract as being for private use. Private use will include at least partly use for leisure purposes. The restriction on leisure purposes is therefore compatible with the Directive.

12. Section 1 (7) of the 1992 Act specifies the scope of the Act's application to timeshare contracts and provides that it applies to; (i) contracts governed by the law of the United Kingdom or a part thereof; (ii) contracts where, when the agreement is entered into, one or both of the parties are in the United Kingdom; (iii) contracts where the accommodation is situated in the United Kingdom; (iv) contracts where the accommodation is situated in another EU Member State and the parties are to any extent subject to the jurisdiction of any court in the United Kingdom; or (v) if, when

the agreement is entered into, the offeree is ordinarily resident in the United Kingdom and the accommodation is situated in another EU Member State. This goes beyond the Directive but is compatible with the Directive as it restricts the possibility for forum shopping.

13. The terms vendor and purchaser are not explicitly defined in the transposing legislation, but the provisions implementing the Directive only apply to an offeror acting in the course of a business and the offeree is the person on whom the timeshare rights are conferred, or purport to be conferred [Section 1 (4) (a)]. As mentioned above, the use of the accommodation must be at least partly for leisure use. This indicates private use and will usually exclude businesses as purchasers.

*Article 3 – Information*

14. Article 3 of the Directive establishes information requirements. The vendor must provide any person requesting information with a document providing a general description of the property as well as at least brief and accurate information on the particulars referred to in the annex and on how further information may be obtained [Art. 3 (1)]. Such information shall form an integral part of the contract [Art. 3 (2)]. Unless the parties expressly agree otherwise, only changes resulting form circumstances beyond the vendor's control may be made to the information document and any such changes have to be communicated to the purchaser before the contract is concluded. The contract shall expressly mention any such changes [Art. 3 (2)]. Any advertisement shall indicate the possibility of obtaining the document and where it may be obtained [Art. 3 (3)].

15. **s.**Section 1A of the 1992 Act implements Article 3 of the Directive. Section 1A (1) states that the offeror (in the course of a business) must provide minimum information in a document to any person requesting information on the proposed accommodation. This document has to provide a general description of the proposed accommodation [s.s. 1A (2) (a)], brief information specified in Schedule 1 of the Act [s.s. 1A (2) (b)], information about the cancellation right and the effect of cancellation on any related credit agreement [s.s. 1A (2) (ba)], as well as information on how further information can be obtained [s.s. 1A (2) (c)].

16. Section 1A (3) and (4) establish that whenever subsequently a timeshare agreement is concluded with an individual not acting in the course of a business, the information which was provided on request of the purchaser or would have been provided had a request been made before the conclusion of the contract will be deemed to be a term of the agreement. This transposes art. 3 (2) of the Directive which requires that the information provided in the document before the conclusion of the contract has to be an integral part of the contract. Section 1A (5) states that any changes communicated in writing to the purchaser before entering into the agreement are deemed to be part of the contract if the change either arises from circumstances beyond the offeror's control [s. 1A (5) (a)] or the parties expressly agree to the change before entering into the agreement [s. 1A (5) (b)].

17. Section 1B of the Act deals with advertisements and states that the advertisement has to indicate the possibility of obtaining the document with the information specified above and where this document can be obtained [s.s. 1B (1)].

Article 4 – writing

18. Article 4 of the Directive requires the contract to be in writing. The contract has at least to include the items referred to in the annex.

19. The language of the contract and the information document has to be in one of the languages of the Member State where the purchaser is resident or of which he is a national, at the purchaser's option. The Member State of the purchaser's residence may require that the contract has to be in (one of) its language and the vendor can be obliged to provide the purchaser with a certified translation in the language of the Member State in which the immovable property is situated. All the languages referred to have to be official languages of the Community.

Implementation – s.s. 1C, 1D and 1E

20. Section 1C of the Timeshare Act 1992 deals with obligatory terms of timeshare agreements, s. 1D with the form of the agreement and the languages used for brochure and agreement. Section 1E regulates the translation of agreements.

21. Section 1C (1) requires the offeror to include certain specified information in the agreement and prohibits the entry into a timeshare contract unless the information requirement has been satisfied. It is a criminal offence to contravene s 1C(1). The information required is specified in Schedule 1 to the Act. The information required in Schedule 1 corresponds to the information required in the Annex to the Directive. If the information is not given correctly, or is incomplete, or inconsistent with the information given in the brochure, the "deemed terms" will replace the differing terms in the contract [s. 1C (2)]. This implementation follows the standards established in the Directive.

22. Section 1D (1) requires the agreement to be in writing as well as following the rules about the information document and language requirements. If the buyer is resident in an EU Member State, the agreement must be in (one of) the language(s) of the state of his residence, or the state of his nationality as long as those are official languages of the EU [s.s. 1D (3)]. If more then one language fulfils these requirements, the purchaser can choose the language [s.s. 1D (4)]. Section 1D (5) requires the agreement to be drawn up in English whenever the offeree is resident in the United Kingdom (in addition to any other language). This transposes the requirements of the Directive and uses the possibility given to the Member States to require the contract to be drawn up in their language.

*Article 5 – cancellation right.*

23. Article 5 of the Directive gives the purchaser the right to withdraw from, or cancel, the contract without giving any reason within 10 calendar days of both parties signing or both parties signing a binding preliminary contract [art. 5 (1) 1st indent]. If the 10th day is a public holiday, the period shall be extended to the first working day thereafter [art. 5 (1) 1st indent]. If the necessary information is not included in the contract at the time of signing, the purchaser shall have the right to cancel within three months thereof [art. 5 (1) 2nd indent]. If the information is provided within those three months, the purchaser's withdrawal period of 10 calendar days shall then start [art. 5 (1) 2nd indent]. If by the end of the three-month period the purchaser has not exercised the right to cancel and the contract does not include the information

referred to in the Annex, the withdrawal period begins with the day after the end of that three-month period [art. 5 (1) 3rd indent]

24. To exercise the right the purchaser must notify the person whose name and address appear in the contract by a means which can be proved (according to the national law) in accordance with the procedure specified in the contract. If the notification is in writing, dispatch of the document before expiry of the deadline is sufficient [art. 5 (2)]. The purchaser only has to bear the expenses which incurred as a result of the conclusion and withdrawal and those expenses shall be expressly mentioned in the contract [art. 5 (3)]. Where the purchaser exercises the right of withdrawal without the necessary information being provided to him, he shall not bear any expenses in any event [art. 5 (4)].

25. **s.s.**Section 5 of the Timeshare Act 1992 implements art 5. Section 5 (1) states that a timeshare agreement may not be enforced before the cancellation period expires. The cancellation period is specified in s. 5 (3) to be at least fourteen days beginning with the day on which the agreement is entered into. This expands the cancellation period of the Directive which required a minimum period of ten calendar days to fourteen days (meaning calendar days). The purchaser may give notice of cancellation at any time before or on the last day of the cancellation period. Section 2 (2) (a) requires the agreement to state the cancellation right as well as a date until which the purchaser can cancel the agreement. This date may be a day falling not less than fourteen days after the day the agreement is entered into.

26. If the information prescribed by the Act is not provided in the contract, s. 5 (2), (3) and (3A) apply. Section 5(2) provides that the contract cannot be enforced against him and the offeree my give notice of cancellation at any time [s. 5 (2)]. This extends the rights granted by the Directive but is restricted again by s. 5 (3), which provides that if the offeree affirms the agreement at any time after the expiry of a period of fourteen days, the agreement can be enforced against him and he cannot subsequently exercise the right to cancel. This is a significant restriction to the very generous cancellation right and on its face is inconsistent with the Directive which requires a longer cancellation period of three months in this case. However, s 5(3) is itself qualified by s 5 (3A) which is restricted to B2C contracts on accommodation in buildings (excluding caravans) and provides that in those circumstances failure to

provide the required information allows the offeree to cancel during the period of up to three months and ten days, and the offeree's right to cancel cannot be lost by his affirmation of the contract until expiry of that period.. If in this case, the last day of the cancellation period falls on a public holiday, the cancellation period shall end on the end of the next working day after the public holiday [s. 5 (3B)]. The UK implementation therefore does follow the minimum requirements established in the Directive, albeit in a roundabout way. Section 5 (4) regulates the effects of a cancellation notice. The cancellation notice is effective to cancel the agreement without further action by any party. If the notice of cancellation is given before entering into an agreement, the notice is regarded as a withdrawal of any offer to enter into the agreement, no matter when the offer becomes effective [s. 5 (5)].

27. Section 5 (6) deals with the effects of cancellation. The agreement shall not be enforceable. Any sum paid shall be recoverable from the offeror by the offeree and shall be due and payable at the time the notice of cancellation is given [s. 5 (8) (a)] but no sum shall be recoverable from the offeree by the offeror in respect of the agreement [s. 5 (8) (b)]. Any agreement on payment of provision for providing credit shall remain enforceable [s. 5 (9)].

28. If the agreement is a B2C agreement [s. 5A (4)], the information specified in Schedule 1 is not given, the agreement may not be enforced before the end of a period of three months and ten days, beginning with the day the agreement was entered into. The offeree can give notice of cancellation at any time during this period [s. 5A (1)].

29. If the information specified in Schedule 1 is provided within a period of three months following the entering into the agreement, the offeree can withdraw within ten days beginning from the day he received the information [s. 5A (2) (a)], not at any time later [s. 5A (2) (b)]. If the last day of the cancellation period is a public holiday, the cancellation period ends with the end of the first working day after the public holiday [s. 5A (3)].

*Article 6 – advance payments*

30. Advance payments before the end of the withdrawal period shall be prohibited (art 6).

31. The prohibition of advance payments is transposed in s. 5B (1). This prohibition is restricted to B2C contracts on accommodation in buildings. Caravans are therefore excluded from the prohibition [s. 5B (4)].

*Article 7 – credit arrangements*

32. If the price is fully or partly covered by credit granted either by the vendor or by a third party on the basis of an agreement between the third party and the vendor, the credit agreement shall be cancelled without penalty if the purchaser exercises the right of withdrawal (art. 7, 1st sentence).

33. The Member States shall lay down detailed arrangements to govern the cancellation of credit agreements (art. 7, 2nd sentence).

34. **s.**Section 6 of the Timeshare Act 1992 provides that where the offeree has entered into a "timeshare credit agreement" - a credit agreement related to a timeshare agreement – he may cancel the credit agreement on similar terms to those which govern the cancellation of the timeshare agreement.

35. Section 6 does not satisfy art 7 of the directive, which requires cancellation of a timeshare agreement automatically to cancel a related credit agreement. Section. 6A of the Act therefore transposes art. 7 of the Directive and is restricted to B2C contracts on accommodation in buildings [s. 6A (4)], so caravans are again excluded. Section 6A (1) provides that the notice of cancellation cancelling the timeshare agreement shall automatically have the effect of cancelling any related credit agreement. A related credit agreement is a credit agreement that covers the price for the purchase of the timeshare fully or partly. The offeror has to inform the creditor about the cancellation [s. 6A (2)].

Article 8 – mandatory rules

36. Exclusion clauses in contracts contrary to the minimum requirements of the Directive shall not be binding on the purchaser, following the conditions laid down by national law.

Implementation – s. 12 (4)

37. Section 12 (4) of the Timeshare Act 1992 provides that the Act shall have effect in relation to any timeshare agreement or timeshare credit agreement notwithstanding any agreement or notice.

Article 9 – conflicts

38. If the property is situated within the territory of a Member State, the Directive shall set a minimum standard, whatever the applicable law may be, and the purchaser shall not be deprived of the protection afforded by the Directive.

Implementation – s. 1 (7)

39. The Timeshare Act 1992 is applicable to any timeshare agreement or timeshare credit agreement if the agreement is to any extent governed by the law of the United Kingdom or a part of the United Kingdom or when the agreement is entered into while one or both of the parties are in the United Kingdom [s. 1 (7)]. The Act also applies if the accommodation is situated in the United Kingdom or another EU Member State and the parties are to any extent subject to the jurisdiction of any court in the United Kingdom in relation to the agreement, or if the offeree is ordinarily resident in the United Kingdom at the time of entering into the agreement and the accommodation is situated in another EU Member State.

Article 10 – non-compliance

40. The Member States shall make provision in their legislation for the consequences of non-compliance with the Directive.

Implementation – enforcement

41. Section 10 of the Timeshare Act 1992 provides that Schedule 2 to the Act (which makes provision about enforcement) shall have effect. Section 10A deals with civil proceedings, s. 11 with the time limit for prosecutions.

Article 11 – minimum harmonisation

42. The Directive shall not prevent Member States from adopting or maintaining provisions which are more favourable as regards the protection of purchasers.

Article 12 – implementation

43. The Directive had to be implemented in the Member States within 30 months after publication in the Official Journal [art. 12 (1)].

44. The Member States shall include references to the Directive or shall accompany them with such references on their official publication [art. 12 (1)] and communicate the transposition and possible amendments to the Commission [art. 12 (2)].

Implementation

45. This requirement arising from the Directive has not been implemented.

Annex

46. The Annex contains a minimum list of items to be included in the contract referred to in Article 4

    a) Identities and domiciles of parties, including specific information on the vendor's legal status and identity and domicile of the owner – annex (a)

    b) Exact nature of the right to cancel and a clause setting out the conditions governing the exercise of that right – annex (b)

    c) When the property has been determined, an accurate description of that property and its location – annex (c)

    d) Where the property is under construction – annex (d)

        - The state of completion

        - A reasonable estimate of the deadline for completion of the property

        - Where it concerns a specific immovable property, the number of the building permit and the name and full address of the competent authority

- State of completion of the services rendering the property fully operational (gas, electricity, water and telephone)
- A guarantee regarding completion of the property or a guarantee regarding reimbursement of any payment made if the property is not completed and the conditions governing the operation of those guarantees

e) The services (lighting, water, maintenance, refuse collection) to which the purchaser has or will have access and on what conditions – annex (e)

f) The common facilities, such as swimming pool, sauna etc., to which the purchaser has or may have access, and, where appropriate, on what conditions – annex (f)

g) The principles on the basis of which the maintenance of and repairs to the property and its administration and management will be arranged – annex (g)

h) The exact period within which the right which is the subject of the contract may be exercised and, if necessary, its duration; the date on which the purchaser may start to exercise the contractual right – annex (h)

i) The price to be paid by the purchaser to exercise the contractual right; an estimate of the amount to be paid by the purchaser for the use of common facilities and services; the basis for the calculation of the amount of charges relating to occupation of the property, the mandatory statutory charges (for example, taxes and fees) and the administrative overheads (for example, management, maintenance and repairs) – annex (i)

j) A clause stating that acquisition will not result in costs, charges or obligations other than those specified in the contract – annex (j)

k) Whether or not it is possible to join a scheme for the exchange or resale of the contractual rights, and any costs involved should an exchange and/or resale scheme be organised by the vendor or by a third party designated by him in the contract – annex (k)

l) Information on the right to cancel or withdraw from the contract and indication of the person to whom any letter of cancellation or withdrawal should be sent, specifying also the arrangements under which such letters may be sent; precise indication of the nature and amount of the costs which the purchaser will be required to defray pursuant to Article 5 (3) if he exercises his right to withdraw; where appropriate, information on the arrangements for the cancellation of the

credit agreement linked to the contract in the event of cancellation of the contract or withdrawal from it – annex (l)

m) The date and place of each party's signing of the contract – annex (m)

Implementation – Schedule 1

47. The specified information as stated in the annex to the Directive has been transposed into Schedule 1 of the Timeshare Act 1992 without substantial changes. The terminology used follows the terminology used in the Timeshare Act 1992 rather than the terminology in the Directive. The term "property" as used in the Directive is replaced by "timeshare accommodation" in the Timeshare Act 1992. The term "purchaser" is replaced by "offeree" and "contract" by "agreement". Together with the definitions in the Act it becomes clear that this does not result in any substantial change.

**Impact of Unfair Commercial Practices (UCPD- Directive 2005/29/EC)**

48. For the most part the implementation tracks the directive, but in two respects it widens the scope of or provides a higher level of protection than does the directive. First, it extends the application of the directive to caravans; second it provides for a basic cancellation period of 14 rather than 10 days

48. Insofar as measures providing for a higher level of protection than the directive are based on the minimum harmonisation clause and fall within the scope of the UCPD, they must be capable of being justified under art 3.5 UCPD as being essential to ensure that consumers are adequately protected.

49. Although the regulations extend the sphere of application to include caravans, they then disapply some of their main provisions to caravans. However, whilst the key provisions in art 3 relating to the supply of information seem to fall within the scope of the UCPD, this extension broadens the scope of the implementing legislation beyond that of the Directive and is therefore not based on the minimum clause.

50. The consequences of failing to comply with the obligation to provide information in respect of caravans may, however, fall within the UCPD, but will do so independently of the Directive and therefore not be within Art.3(5).

51. The extension of the cancellation period clearly does provide a higher level of protection than does the directive but it falls outside the area covered by the UCPD and therefore does not require justification.

52. A separate question is whether the introduction of the UCPD will provide any scope for replacing the provisions of the Timeshare directive by those of the UCPD by way of rationalisation.

53. As we have noted, failure to provide notice of a right of cancellation would be a misleading omission for purposes of the UCPD. However, the UCPD only envisages administrative action against the offending party. The Timeshare Act utilises criminal sanctions where there has been a failure to comply with the various duties. Such remedies may be retained under the UCPD if they provide an effective remedy to ensure compliance with that Directive (see Art.11(1) UCPD).

54. It is a misleading omission under the UCPD for a trader to fail "to supply the consumer with 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." Arguably therefore the information required by arts 3 and 4 of the Timeshare directive would be required by the UCPD. Annex II of the UCPD explicitly includes Art. 3 (3) of the Timeshare Directive as a provision covered by the UCPD. The provision in Art. 3 (3) which requires that any advertisement shall indicate the possibility of obtaining the information document as well as where this document can be obtained, is regarded as material. However, the Timeshare directive is specific in its requirements; moreover failure to supply the prescribed information has consequences *inter partes*, extending the cancellation period. There is therefore no scope for replacing the provisions of the Timeshare directive with those of the UCPD.

# Chapter 5

# Distance Selling

Background

1. Directive 97/7EC on the protection of consumers in respect of distance contracts was adopted on 20 May 1997 to regulate aspects of the distance selling of goods and services. The Directive is based on Art. 100a (now Art. 95) of the Treaty[38], the power to adopt harmonisation measures in the course of the establishment and functioning of the Internal Market. Recitals 3 and 4 of the Directive read:

   "(3) Whereas, for consumers, cross-border distance selling could be one of the main tangible results of the completion of the internal market, as noted, inter alia, in the communication from the Commission to the Council entitled "Towards a single market in distribution"; whereas it is essential to the smooth operation of the internal market for consumers to be able to have dealings with a business outside their country, even if it has a subsidiarity in the consumer's country of residence;

   (4) Whereas the introduction of new technologies is increasing the number of ways for consumers to obtain information about offers anywhere in the Community and to place orders; whereas some Member States have already taken different or diverging measures to protect consumers in respect of distance selling, which has had a detrimental effect on competition between businesses in the internal market; whereas it is therefore necessary to introduce at Community level a minimum set of common rules in this area."

2. Although adopted as a Single Market measure, one aim of the Directive is to provide a high level of consumer protection. Consumers are recognized as a fundamental part of the Internal Market and distance selling offers them opportunities to participate in the Internal Market and cross-border trade to a significant degree.

3. The existence of common minimum standards of protection in relation to distance transactions throughout the EU enables the consumer to predict roughly how the process will work and what are his or her rights. This however does not mean that

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[38] Grundmann, S *Europäisches Schuldvertragsrecht* (Berlin, New York, 1999) p227

the Directive applies only to cross-border transactions. It applies also to domestic internal transactions and to cross-border transactions with third countries[39]

4. The directive does not apply only to traditional distance selling methods such as mail order telephone and fax but also covers other means of electronic communication. Annex 1 of the directive contains an indicative list of the means of distance communication covered by the directive. It includes videotext, video telephone, telefax, tele-shopping and electronic mail, but since the list is only indicative the directive is technically neutral and can also be applied to electronic communications such as online transactions and to potential future technological developments.

5. The directive is general in its scope and applies to all distance sales and supplies of all forms of goods and services, but in accordance with article 13 it applies only insofar as there are no specific EU legislative provisions applying to particular types of distance contract in their entirety, in which case the provisions of the directive are displaced in favour of the special rule. Where specific rules only cover certain aspects of a particular form of supply, those rules apply in preference to those of the directive in accordance with the principle of the priority of the special rule.

6. The Directive follows the minimum harmonisation approach, giving Member States the option of maintaining or introducing a higher level of consumer protection. This may include a ban on the marketing of certain goods or services, in the general interest. The Directive here explicitly mentions medicinal products, but is not restricted to medicinal products[40.]It has been questioned if this approach is effective in producing a higher level of consumer protection or if, especially in distance sales and online transactions, businesses may choose a Member State with a minimum standard of consumer protection, thereby ending the minimum harmonisation approach in a "race to the bottom"[41]. It seems that recent developments, possibly at least partly following reviews of the Directive on Distance Selling[42], favour a

39 Micklitz, H –W in “Micklitz and Reich, Die Fernabsatzrichtlinie im deutschen Recht“ (1998), 2; Groeschke, P and Kiethe, K “Die Ubiquität des europäischen Verbraucherleitbildes – Der europäische Pass des informierten und verständigen Verbrauchers“ (2001) WRP, 230

40 Koenig, C, Müller, E and Trafkowski, A “Internet-Handel mit Arzneimitteln und Wettbewerb“ im EG-Binnenmarkt (2000) EWS, 97

41 EMOTA, Comparative Study on the Implementation of Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts, p. 6; Reich, N “Competition between legal orders: a new paradigma of EC law?” (1992) C.M.L.Rev., 861

42 Like the EMOTA study "Comparative Study on the Implementation of Directive 97/7/EC of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts. In the

maximum harmonisation approach. Whereas the E-Commerce Directive also follows the minimum harmonisation approach, the most recent Directive on Distance Marketing of Financial Services follows the maximum harmonisation approach.

7. In the UK, the Directive has been implemented by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, which came into force on 31st October 2000, and in part by the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426.

Mapping the Implementation

*Definitions and Scope*

8. Art 1 of the directive sets out its objective as being "to approximate the laws, regulations and administrative provisions of the Member States concerning distance contracts between consumers and suppliers." It is not transposed in the implementation.

8. Art 2 defines key terms and thus delineates the scope of the directive. According to art 2(1) a "distance contract":

> "means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded".

9. Means of distance communication includes all channels that can be used for the conclusion of a contract without simultaneous physical presence of the contracting parties.

10. The term "exclusive use" does not imply that only one method of communication could be used during the negotiations and the conclusion of the contract. Consumer and supplier can use different methods of distance communication during their contact. Certain channels may only be offered for specific communications, for example, enquiries by phone, fax or e-mail, and contractual offers only by phone or fax. As a rule, so long as distance selling is generally offered the Directive is

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commentary section of the review a maximum harmonisation approach is clearly favoured for all distance sales, as it would create "a more level legal playing field on a EU wide level", p. 5

applicable[43]. "Exclusive use" means that it must be possible that all steps necessary for the conclusion of the contract are done by means of distance communications (these include telephone and e-mail!)[44]. If only information or advertising is communicated by means of distance communication and the contract itself can only be concluded with simultaneous physical presence of the contracting parties, the Directive does not apply. In practice, in most cases the advertisement or information will offer one, or other way, to contracting over distance as this will mostly be the purpose of the information or advertisement.

11. It is not necessary that the supplier makes a binding contractual offer when contacting the consumer in the first instance. It is sufficient if the communication from the supplier aims towards the conclusion of a contract.

12. The distance sales or service-provision scheme has to be run by the supplier as an organized scheme. This restrictive provision aims only to exclude the occasional use by the supplier of distance communications for a contract and therefore has to be interpreted narrowly. To fulfil this requirement it is necessary that the supplier aims to do all or a part of his business by means of distance communication, not only agree to use it on an explicit request from the consumer. If a shop occasionally takes an order over the phone and delivers the goods in the neighbourhood, this cannot be regarded as an organised scheme. If it is done on a more regular basis, however, it will be an organised scheme, even if it is only using one means of distance communication. It does not matter if the distance sales are a significant part of all transactions or not, whenever it is not rather unusual and the supplier has got some sort of organisation for distance sales.

*Implementation – regulation 3 (1)*

13. The term "distance contract" is defined in regulation 3 (1) which adopts the language of art 2(1) verbatim. "Means of distance communication" is also defined as "any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties". Schedule 1 contains the indicative list set out in the Annexe to the directive.

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43 MacDonald, M "Defining distance contracts" (2002), J.L.S.S., 34; Clark, K "Eur. Council" (2000), 59

44 For contracts between solicitors and their clients: Bürger, M "Das Fernabsatzrecht und seine Anwendbarkeit auf Rechtsanwälte" (2002) NEUE JURISTISCHE WOCHENSCHRIFT, 465; AG Wiesloch, Zum Widerrufsrecht bei Abschluss eines Anwaltvertrages durch Fernkommunikation" judgement of 16 November 2001 1 C 282/01, (2002) JZ , 671

14. Art 2(2) defines “consumer” as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession"; “Supplier” is defined in article 2 (3) as "any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity".

*Consumer*

15. The definition of “consumer” is similar to that in other Directives, especially the Unfair Contract Terms Directive 93/13. As the transactions are carried out over distance and without a personal contact between the supplier and the consumer it will often be very difficult to ascertain the status of the party he deals with, but it governs the applicability of the Directive. Many goods or services can be used for private or commercial and professional purposes. As all actions are carried out over distance, the person and the purpose of contract will in most cases not be known to the supplier who is obliged to comply with the special requirements for consumer contracts according to the Distance Selling Directive. If however, it is obvious from the amount of the transaction or the speciality of the goods or services, that the use is mainly for commercial or professional purposes, the Directive does not apply.

*Implementation – regulation 3 (1) Distance Selling Regulations*

16. The term consumer is defined in regulation 3 (1) as “any natural person who is acting for purposes which are outside his business.” The term “business” is also defined, as including a trade or profession.

*Supplier*

17. The Directive is only applicable in contracts between a consumer and a supplier but not to contracts between two consumers or between businesses. The definition of a supplier, however, is rather wide. It includes all representatives or agents of the supplier [45] of goods or services. It is irrelevant if the transaction carried out is legal or if restrictions for distance sales apply, i.e. for legal advice or pharmaceuticals. If however, the transaction is governed by a special regime for distance transactions, that regime takes precedence over the Directive and stay in force[46].

*Implementation – regulation 3 (1) Regulations*

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[45] Although, other than in the Doorstep-selling Directive this is not mentioned explicitly here; Micklitz H –W and Reich, N “Die Fernabsatzrichtlinie im deutschen Recht“ (1998), Baden-Baden, 14

[46] see Art. 14 (2)

18. The Consumer Protection (Distance Selling) Regulations 2000 define the term supplier following the wording of the Directive as “any person who is acting in his commercial or professional capacity.”

*Exemptions – art. 3*

19. The Directive excludes a number of transactions for various reasons, the most important being financial services as these are now regulated separately, by Directive 2002/65 on distance marketing of financial services. The Directive gives in annex II a non-exclusive list of financial services, including investment services, insurance and reinsurance operations, banking services, and operations relating to dealings in futures or options.

20. Other exemptions are according to Art. 3 No.1 contracts:

    - "concluded by means of automatic vending machines or automated commercial premises
    - concluded with telecommunications operators through the use of public payphones,
    - concluded for the construction and sale of immovable property or relating to other immovable property rights, except for rental,
    - concluded at an auction."

21. Contracts concluded by using an automatic vending machine are distance sales contracts following the definition of the directive but it would not be possible or at all useful to apply the provisions of the Directive to these contracts. The contract is fulfilled immediately with the use of the machine and is normally for everyday goods the consumer is familiar with.

22. As regards the use of public payphones a similar argument applies. It would be neither necessary nor practical to apply the Directive to those contracts.

23. Regarding immovable property the situation is different. In most Member States contracts on immovable property or rights therein have to be concluded in person, in writing or through a notary. With these requirements contracts on immovable property are not eligible for distance sales means and the Member States ought not to be required to allow distance sale of immovable property.

24. Contracts concluded at an auction are exempted as well. With a growing number of Internet auctions this seems problematic[47] . Two issues are important here, firstly the term "auction" itself and secondly the requirements for the conclusion of a contract. The term auction is not defined in the Directive, it is defined in the laws of the Member States but these definitions may differ slightly, with European Law having to be interpreted autonomously. Usually at Internet auctions the highest bid is accepted automatically after lapse of time. As distinct from 'traditional' auctions the on-line auctioneer does not play an active role in the conclusion of the contract, the only function in Internet auctions is the provision of the platform. It follows then, that on-line auctions are typically not auctions, no matter what they are called.

25. The conclusion of the contract itself is not regulated in the Directive. For Internet auctions one contract (on the provision of a service) is concluded between the provider of the platform and the supplier of the goods, and another between the provider of the platform and the customer who wishes to purchase the goods. The actual sales contract is concluded between the offeror and the purchaser. Only the latter contract is a contract concluded at an auction and therefore exempted from the Directive, the contracts between the service provider and seller or purchaser, are not concluded at an auction. In many cases the offeror will be a private rather than a business supplier and the Directive would not be applicable on this ground either.

*Implementation – regulation 5*

26. Regulation 5 (1) of the Regulations defines which contracts are fully exempted from the application of the Regulations, and these follow almost verbatim the exemptions in the Directive. The regulations expand on the directive in one respect. The term "rental agreement" as referred to in regulation 5 (1) (a) is extensively defined according to whether the land is situated in England and Wales, or Scotland or Northern Ireland [regulation 5 (2)]. Under regulation 5 (3), land subject to a rental agreement outside the United Kingdom is subject to the provisions of the Regulations.

*Partly exempted contracts: art 3(2)*

27. Other types of contracts are partly exempted from the Directive. For these contracts the information requirements and the right of withdrawal [Art. 4, 5, 6 and 7 (1) of the Directive] shall not apply. The partly exempted contracts are:

[47] Zscherpe, K "Germany: internet auctions: the right of withdrawal under distance selling" World Internet Law Report 2004, 12

- "contracts for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home of the consumer, to his residence or to his workplace by regular roundsmen,
- contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period; exceptionally, in the case of outdoor leisure events, the supplier can reserve the right not to apply Article 7 (2) in specific circumstances."

28. Foodstuffs and beverages are everyday goods which the consumer generally knows well and as they have a limited shelf life a longer withdrawal period would be impracticable.

29. Following this wording package tours are also excluded, but they are subject to the package tour Directive[48] which secures certain consumer rights. For the other exempted contracts[49] application of the directive would be too restrictive for the supplier as these require special arrangements for the specified date or period and the possible grounds for withdrawal are grounds that lay only in the sphere of the consumer and not in the service itself.

*Implementation – regulation 6*

30. Regulation 6 of the Regulations implements the partial exemptions and provides similar exemptions as in the Directive, but also excludes timeshare agreements and specifies that the package holidays sold in the EU are not covered by the provisions of the Regulations with regard to performance (except for the obligation of performing the contract within 30 days, unless otherwise agreed) and the effects of non-performance on related credit agreements. The exception provided in the Directive with regard to outdoor leisure events is provided by regulation 19 (8).

*Pre-contractual Information – art. 4*

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48 Directive 90/314 on Package Travel, Package Holidays and Package Tours

49 Walker, C "Distance selling" E-Commerce Law Reports 2004, 15; Pryke, M "ECJ offers clarification on distance selling regulations" World Internet Law Report 2005, 4; Briskman, S / Walker, C "Distance Selling: easyCar proves its point" Practical Law Companies 2005, 10; Haggart, G " Has ECJ boosted online travel sector?" Electronic Business Law 2005, 16; Hörnle, J "European Court of Justice – car hire – distance selling" Electronic Business Law 2005 13; Pryke, M " EasyCar drive a hole through the Distance Selling Regulations" Computers & Law 2005, 24.

31. Whenever the Directive is applicable and the contract is not explicitly exempted the supplier has to provide the consumer with certain specified information[50]. Article 4 of the Directive requires this information to be given "in good time prior to the conclusion of any distance contract". The latest possible point of time for providing this information is just before the last step necessary for the binding conclusion of the contract, according to national laws.

32. The information required is as following:

    a) The identity of the supplier (and additionally the address if prior payment is required):
    This is particularly important for contracts concluded over the Internet. Unfortunately the address is only required if prior payment is required and not in all cases. For contracts concluded over the Internet usually payment by credit card is offered (or required). Even if the supplier promises to charge the amount only after delivery, this has to be considered as prior payment as it is completely at the discretion of the supplier.

    b) The main characteristics of the goods or services:
    This requirement is fairly obvious and will in most Member States be essential for the contract but this information has also to be given prior to the conclusion of the contract.

    c) The price of the goods or services including all taxes:
    The price is also an essential issue for the consumer and needs to be as detailed as possible. As the price has to be mentioned including all taxes, the taxes have to be added to the price of the goods or services and cannot be noted separately or as a percentage rate. If a supplier is contracting with consumers as well as businesses he may show the taxes separately.

    d) Delivery costs, where appropriate:
    Delivery costs are another crucial issue in distance contracts and depending on

[50] Lodder, A R and Voulon, M B "Intelligent agents and the information requirements of the Directives on distance selling and e-commerce" (2002) I.R.L.C.T., 277; Rose, A *Distance Selling and the Internet* (Paisner I.P.B. 1997) 12; Lawson, R "E-Commerce and distance selling" (2002) C.S.R., 94; Hornle, J "Germany – distance selling – information requirements and withdrawal right" (2002) E.B.L., 14; Newton, J "Distance selling: keeping the customer in the know" (2001) E.B.L., 16; OLG Frankfurt/M., "Pflichtangaben beim Fernabsatz, judgement of 17 April 2001, 6 W 37/01" (2001) MMR, 529

the goods or services and their origin may be a high percentage of, or even higher than, the value of the goods.

e) The arrangements for payment, delivery or performance:
Payment and delivery arrangements are also important at the pre-contractual stage. In an extreme case an arrangement for delivery could be that the consumer has to collect the goods at the supplier's premises – and the consumer ought to be informed about this before he enters into a contract.

f) The existence of a right of withdrawal, except in the cases referred to in Article 6 (3):
The right of withdrawal is one of the main features of the Directive and the consumer has to be informed about its existence prior to the conclusion of the contract. The information about the existence of the right does not include the information about the details of the right and also not the information that a right of withdrawal does not exist in a particular case. The cases referred to in Article 6 (3) are cases in which the consumer may not exercise the right of withdrawal unless the parties have agreed otherwise for example goods made to the consumer's specification, products dependant on fluctuations in the financial market, or, if performance of a service contract has begun with the consumer's consent.

g) The cost of using the means of distance communication, where it is calculated other than at the basic rate:
The normal communication costs (i.e. telephone) are foreseeable for the consumer and beyond the supplier's knowledge and control, whereas the consumer needs information about all other costs (i.e. special telephone numbers or costs for using databases which will be charged through the telephone companies) to enable him or her to decide if they wish to enter into the contract in question.

h) Where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently:
This ensures that the consumer is informed about the fact that the contract runs over a longer period as well as the length of the period itself. Where other provisions exist (i.e. for standard contract terms) and the minimum length is generally restricted, these provisions remain in force. The notice period does not necessarily have to be mentioned at the pre-contractual stage.

44. All information has – according to article 4 (2) - to be given in a clear and comprehensible manner, appropriate to the means of distance communication used. This means that the information can, and shall, be given differently on a website than in a telephone conversation[51]. The language in which this information has to be given is not specified[52] and therefore it must not necessarily be the first language of the consumer but the information must also be given with due regard to the principles of good faith in commercial transactions[53.] Information given in a language other than the first language of the consumer (or his country of residence), the language of the origin of the supplier, a commonly understood language or the language of the advertisement, or the contract would offend against these principles.

*Implementation – regulation 7*

33. Regulation 7 (1) (a) implements Article 4 (1) almost verbatim but for a few minor differences in terminology. Regulation 7 (1) (b) and (c) also state that the consumer has to be informed of the possibility to be provided with substitute goods or services by the supplier of equal price and quality in case the ordered items are not available and that the consumer should also be informed that the cost of returning these substitute goods is borne by the supplier in the event of cancellation by the consumer. Regulation 7 (2) implements the requirement of clear and comprehensible information, appropriate to the means of distance communication used. Due regard shall be given in particular to the principles of good faith in commercial transactions as well as the protection of minors. The supplier has to make the commercial purpose clear when providing the information [regulation 7 (3)]. Regulation 7 (4) requires the supplier in the case of a telephone communication to give his identity and make the commercial purpose of the call clear at the beginning of the conversation.

*Written confirmation – art. 5*

34. Article 5 of the Directive requires that written confirmation of the information has to be provided to the consumer. This does not necessarily require a written document. The information can either be given "in writing", commonly interpreted as "hard copy", or on another durable medium available and accessible to the consumer. "Durable medium" is not defined in the directive, but is also used in the Directive on

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[51] Meads, P "E-Consumer Protection – Distance selling" (2002) I.C.C.L.R., 179, 180

[52] Downes, N and Heiss, H, "Sprachregulierungen im Vertragsrecht: Europa- und internationalprivatrechtliche Aspekte" (1999) ZvglRWiss 98, 28

[53] Mankowski, P "Verbraucherschutzrechtliche Widerrufsbelehrung und Sprachrisiko" (2001) VuR, 359

distance marketing of financial services 2002/65/EC54, which requires in Art. 10 (3) that contract terms and general conditions to be provided to the recipient must be made available in a way that allows him to store and reproduce them. This obviously includes forms other than paper, such as text delivered on floppy disc, or compact disc. It is thought that presentation only on a website would not be sufficient. The requirement seeks to ensure that the consumer gets the opportunity to read the information once the contract is concluded. The wording of the Directive "the consumer must receive" should be interpreted that it is the supplier's duty to ensure that the consumer receives the information. It would therefore not be sufficient for the supplier only to allow or ask the consumer to download the information from the website and save it on his computer. The statement that the consumer has to "receive the information" also seems not to allow exclusive presentation on the website, and it is also questionable whether a website is a durable medium. As the information has to be available and accessible to the consumer there could also be doubts as to whether it is sufficient to send the information by e-mail or e-mail attachment. In such a form, the information would indeed be sent to the consumer and available, but its accessibility is dependent on the capacity of the server on which the consumer's e-mails are stored. As the Directive aims to encourage distance selling and rapid legal transactions it would at least for some contracts, like contracts which are not only concluded but also fulfilled electronically, be an obstacle if the information has to be send by post – therefore, taking into account the reference in the E-Commerce Directive to information supplied in a durable medium being be made available in a way that allows the consumer to store and reproduce it, it should be sufficient to send the information by e-mail or as an e-mail attachment. It is important, however, that the consumer receives the information; this requires that the information be sent to him individually.

35. The time for the written confirmation is the time of delivery at the latest. Again, the language is not regulated but following the general rules it should be in the language of the negotiations.

36. The information to be provided is the pre-contractual information required in article 4 (1) (a) to (f) and:

    i) The conditions and procedures for exercising the right of withdrawal, including possible exemptions

[54] See below

j) The geographical address of the place of business of the supplier to which the consumer may address any complaints

k) Information on after-sales services and guarantees which exist

l) The notice period for contracts for unspecified duration or a duration exceeding one year.

37. Excluded are services supplied on only one occasion which are performed through a means of distance communication and invoiced by the operator of the communication means but the consumer must still be able to obtain the geographical address of the place of business to which he can address any complaints [art. 5 (2)].

38. This information shall enable the consumer to exercise the right of withdrawal without further investigation.

*Implementation – regulation 8*

39. Regulation 8 (1) requires the written confirmation of the information to be in writing or in a "durable medium". What exactly the term "durable medium" means is not defined. However according to the Department of Trade and Industry this includes confirmation by e-mail. The regulations transpose verbatim the list of information that has to be confirmed in writing. The time for the confirmation also exactly follows the Directive [regulation 8 (1)]. With regard to the information about the conditions and procedures for exercising the right of withdrawal the supplier is obliged to provide a written confirmation indicating whether the supplier or the consumer would be responsible for the costs of returning the goods [regulation 8 (2) (b) (ii)]. For services, the supplier also has to inform the consumer prior to the conclusion of the contract in writing or in another durable medium available to the consumer that he will not be able to cancel the contract once the performance of the services have begun with his agreement [regulation 8 (2) (iii)]. The geographical address to which the consumer may address any complaints [regulation 8 (c)], information about any after-sales services and guarantees [regulation 8 (d)] as well as the conditions for exercising any cancellation rights for a contract concluded for an unspecified duration or a period exceeding one year [regulation 8 (e)].

40. The exemption provided for in article 5 (2) of the Directive (services performed through a means of distance communication) is transposed by regulation 9, following the wording of the Directive.

*Right of withdrawal – art. 6*

41. The right of withdrawal in Article 6 of the Directive is the most important part of the Directive[55]. Art. 6 (1) allows the consumer to withdraw from all distance contracts to which the Directive is applicable within a period of, as a minimum, seven working days without incurring any charges. The only charge that may be made is the direct cost of returning the goods.

*The right of withdrawal and the time limit*

42. According to the Directive, the right of withdrawal is only granted once a contract is concluded. Should a consumer change his mind before the contract is concluded and withdraw from his declaration the usual mechanisms in force in the national laws –eg as to revocation of offers - will apply, so depending on the national laws the consumer may be bound by his declaration and can only withdraw from the contract upon conclusion. This will probably not become relevant very often in practice, but, if it does, the declaration of withdrawal of the consumer should be interpreted as a withdrawal from the contract immediately after its conclusion.

43. The right of withdrawal can be exercised without stating any reasons and shall not lead to the consumer incurring any charges[56]. The only charge that may be made to the consumer is the direct cost of returning the goods. This not only excludes damages for breach of contract, but also imposed lump-sums under penalty clauses. The consumer therefore is not liable for any other costs or compensation, i.e. for loss of value due to the opening of the packaging or the possibility to use the goods. As the right of withdrawal is granted generally for all distance contracts it does not matter if the consumer has paid for the goods in advance or by credit card. The way the money has to be refunded is not regulated in the Directive and therefore follows the national laws of the individual Member States.

*Implementation – regulation 10*

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55 Rott, P “Widerrufsrechte ernst genommen – eine Botschaft zur rechten Zeit“ (2001) VuR, 389; Lawson, R “E-Commerce and distance selling“ (2002) C.S.R., 94; Steins, C T *Distance selling and German law* (Comps. & Law 2000) 37; Klingsporn, B “Zum Widerruf telefonisch angebahnter Haustürgeschäfte“ (1997) NEUE JURISTISCHE WOCHENSCHRIFT, 1546; OLG Frankfurt “Widerruf eines darlehnsfinanzierten Computerkaufs im Fernabsatzhandel, judgement of 28 November 2001“ 9 U 148/01, (2002) CR, 638; Tonner, K “Probleme des novellierten Widerrufsrechts: Nachbelehrung, verbundene Geschäfte, Übergangsvorschriften“ (2002) BKR, 856

56 Arnold, A and Dötsch, W “Verschärfte Verbraucherhaftung beim Widerruf?“ (2003) NEUE JURISTISCHE WOCHENSCHRIFT, 187

44. Regulation 10 outlines the cancellation right in general, the cancellation periods are dealt with in regulation 11 for goods and 12 for services. Regulation 10 (1) gives the consumer a right to cancel and states that the notice of cancellation shall cancel the contract[57]. The effect of the notice of cancellation – regulation 10 (2) – is that the contract will be treated as if it had never existed. The notification can be made in writing or another durable medium (available and accessible to the supplier) which indicates the intention of the consumer to cancel the contract [regulation 10 (3)].No specific form of words is required to be used.

*Commencement of the time limit*

45. The commencement of the period for the exercise of the right of withdrawal is also subject to very detailed regulation. For contracts for goods it commences when:

    a) the consumer has received the confirmation of information either in writing or on another durable medium - and

    b) the consumer has received the goods

    This ensures that the consumer has got the goods in his or her hands and can test them and also has got all relevant information needed for the exercise of the right of withdrawal.

46. For contracts for services the period commences either

    a) from the day of the conclusion of the contract or

    b) if later, from the day on which the information requirements were fulfilled and the written confirmation received.

47. If the supplier fails to fulfil the information requirements, the period will be three months beginning for contracts on goods from the day of receipt of the consumer and for contracts for services from the day of the conclusion of the contract.

*Implementation – regulation 11 and 12*

48. The "cooling off" period for products under regulation 11 (1) is seven working days, commencing on the day the contract is concluded[58]. When the supplier provides for

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57 Hörnle, J "The Complexities of distance selling" Electronic Business Law 2004, 6

58 Walker, C "Distance selling from the UK: changes to the "cooling off" provisions" World Internet Law Report 2005, 7

the written confirmation, the period begins the day after the day the consumer receives the goods [regulation 11 (2)].

49. If the supplier does not provide the confirmation on time, but does provide the confirmation within three months following the day the consumer received the goods, the seven days start the day following that on which the consumer received the information [regulation 11 (3)]. However, if the information is not supplied at all, then the right to withdraw can be exercised for up to three months and seven days, commencing the day following that on which the goods were received according to regulation 11 (4).

50. Regulation 12 covers cancellation of contracts for the supply of services. The respective time periods are calculated from the day on which the contract was concluded.

51. Regulation 14 (1) states that on cancellation the consumer shall be reimbursed for any sum paid without any charge. All reimbursements have to be made within 30 days of the notice of cancellation being given [regulation 14 (3)]. Unlike in the Directive, the Regulations refer explicitly to any sums paid on behalf of the consumer or otherwise in relation to the contract. Although the wording seems to go beyond the Directive, it seems clear that the Directive would be interpreted in the same way, and will – despite the lack of explicit reference – include all payments made on behalf of the consumer. Any securities provided have to be returned forthwith [regulation 14 (4)].

52. The only case in which the supplier may make a charge is where the consumer was obliged to return the goods at his expense, and did not return the goods or returned them at the expense of the supplier,. The maximum amount the supplier can then charge is the direct costs of recovering the goods [regulation 14 (5)].

53. The supplier cannot make any charge, however, if the consumer cancelled the contract by exercising the right to reject the goods under a term of the contract [regulation 14 (6) (a)]. The consumer is also not liable for any costs in cases whereby the consumer cancels the contract in the light of an "unfair term", as defined by the Unfair Terms in Consumer Contracts Regulations 1999[59], even if he would otherwise be required by contract to bear the direct costs of the goods being returned to the supplier [regulation 14 (6) (b)].

[59] S.I. 1999/2083

54. Regulation 17 requires the consumer on cancellation to restore the goods to the supplier and until then to retain possession and take reasonable care of them. There are detailed provisions governing how restoration is to be effected.

55. Regulation 18 deals with the situation where the consumer has given goods in part exchange under the contract and exercises the right to cancel. In that case the part exchange goods must be returned to the consumer within 10 days of the notice of cancellation in a condition substantially as good as when they were delivered to the supplier, failing which the consumer must be reimbursed a sum equal to the part exchange allowance.

56. There are no provisions equivalent to these in the directive but the detailed operation of the right to cancel is a matter for the Member States.

*Exemptions from the right of withdrawal*

57. Following Article 6 (3) some contracts are exempted from the right of withdrawal. For these contracts the consumer may not exercise the right of withdrawal unless the parties have agreed otherwise. These are:

    a) For the provision of services if performance has begun, with the consumer's agreement, before the end of the withdrawal period.

    b) For the supply of goods made to the consumer's specifications or clearly personalised or which cannot be returned[60] or are liable to deteriorate or expire rapidly; as well as the supply of newspapers, periodicals or magazines.

    c) For the supply of audio or video recordings or computer software, which were unsealed by the consumer: Unsealing of these goods constitutes an implied waiver of the right of withdrawal. The consumer may not be aware of this as he does not have to be informed about the fact before the conclusion of the contract but only with the written confirmation of the information and these can be sent at the latest together with the delivery of the goods. It is very unlikely that the consumer will read the information before inspecting the goods and although the purpose of this provision, to prevent the consumer copying the data and thereafter exercising the right of withdrawal, is well founded, the aim of the Directive can only be achieved if the consumer is reasonably well informed. The supplier

[60] OLG Dresden, "Unzulässiger Ausschluss des Widerrufsrechts nach FernabsG für elektronische Bauteile, judgement of 23 August 2001" 8 U 1535/01, (2002) CR, 180

therefore has to make sure that the average consumer is likely to take notice of this information before unsealing the goods. This can be achieved by either informing the consumer in good time before the conclusion of the contract, together with the other pre-contractual information, or by ensuring that the consumer is likely to take notice of the information when he gets the goods, i.e. by a sticker with the information on the goods. This cannot apply to software or data sent online as it cannot be sealed. Regularly these contracts will however be service contacts performed (with the consumer's agreement) before the end of the withdrawal period and accordingly exempted from the right of withdrawal on this ground.

d) For the supply of goods or services the price of which is dependent on fluctuations in the financial market which cannot be controlled by the supplier: The field of application for this provision remains unclear as financial services are generally exempted from the Directive[61] and prices other than for financial services are not dependent on the fluctuations in the financial market.

e) For gaming and lottery services as these would otherwise become impossible to market through means of distance communication.

*Implementation – regulation 13*

58. Regulation 13 provides that certain contracts are exempted from the right of withdrawal, unless agreed otherwise. The listed contracts are all possible exemptions as provided for by the Directive.

*Payment Cards*

59. Although the right of withdrawal regulations are very detailed the exercise of the right will be problematic in practice in many cases[62]. Whenever the consumer pays by payment card, a payment method generally appropriate to all means of distance communication, the payment involves a third party, the provider of the payment card. Neither the Directive, nor other EU law, provides or any recourse against the provider of the payment card. The Consumer Credit Directive allows a recourse only for linked transactions and not if a card is used for payment.

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[61] Now regulated in the Directive 2002/65/EC on distance marketing of financial services

[62] Payment Systems, Dickie, J *Internet and Electronic Commerce Law in the European Union* (Oxford, 1999) 15ff

60. Most credit card providers nowadays offer charge-back systems allowing quick and efficient refunds without any costs for the consumer,[63] although the Directive does not require this apart from Article 8, which regulates the cases of fraudulent use of the card.

61. Fraudulent use does not exclusively mean fraud in the definition of criminal law but has to be interpreted widely as a private law term for the purposes of the Directive as any use that is not approved by the bearer of the card. In case of fraudulent use, the consumer shall have a right to request cancellation of a payment and be recredited or have the money returned.

*Implementation – regulation 15*

65. Art 4(2) of the directive requires that where the consumer cancels a contract financed by a related credit agreement, the credit agreement shall also be cancelled without penalty. The detailed rules governing cancellation of the credit agreement area matter for the Member States. These requirements are satisfied by reg 15 and 16. Reg 15 defines a related credit agreement as "an agreement under which fixed sum credit which fully or partly covers the price under a contract cancelled under regulation 10 is granted--

    (a) by the supplier, or
    (b) by another person, under an arrangement between that person and the supplier."

63. Reg 15 transposes the provisions of art 4(2), providing that where the consumer exerts the right to cancel, any related credit agreement is automatically cancelled with the cancellation of the distance contract.

64. Reg 16 requires the consumer on cancellation to repay any credit advanced to him. Provided he does so within one month of cancellation, or before the date for repayment of the first instalment of the credit, no interest is payable. Where the consumer has provided security in connection with a related credit agreement he need not repay any sum until the security is restored to him.

65. Reg 22 implements art 8 on fraudulent use of a payment card and provides that the consumer may cancel a payment made by a person other than his authorised agent making fraudulent use of his payment card. The burden of proving that a payment was authorised is on the card issuer.

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[63] Rothchild, J "Making the Market Work" (1998) J.C.P., 279, 296

*Performance*

66. Entirely new to EU legislation is the provision on performance in Article 7. Prior to the Distance Selling Directive, the regulation of performance had always been left to the law of the Member States.

67. Article 7 of the Directive requires the supplier to perform ("execute") the contract within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier. The parties can agree otherwise. Art 7(2) qualifies this general duty and provides that if the supplier cannot perform because the goods or services ordered are not available, he must inform the consumer about this and refund any sums the consumer has already paid as soon as possible but in any case within 30 days.

68. Art 7(3) permits Member States to lay down in their law that the supplier may provide the consumer with goods or services of equivalent quality and price, provided the consumer was informed about this possibility in a clear and comprehensible manner prior to the conclusion of the contract or, at the latest, in the contract. In this case the costs for returning the goods must be borne by the supplier and the consumer must be informed of this. Outside this situation the supply of goods other than those ordered by the consumer, even if of equivalent quality and price, would constitute inertia selling which is prohibited by Article 9 with the consequence that the supplier would have no right to payment for the goods.

*Implementation – regulation 19*

69. Following article 7 of the Directive, regulation 19 (1) requires performance of the contract within 30 days, unless otherwise agreed by the parties. The time limit commences the day after the day the consumer sent the order, which may not necessarily be the day the supplier received it.

70. Regulation 19 (2) provides that if the supplier cannot perform the contract because the goods or services are unavailable within the period for performance, the supplier has to inform the consumer and reimburse any payment made with regard to the contract [regulation 19 (2).

71. Regulations 19 (3) to 19 for (6) set out further details of the consequences of failure to perform. A contract which has not been performed within the period for

performance shall be treated as if it had not been made, save for any rights or remedies which the consumer has under it as a result of the non-performance (19(5)). Such rights would include a claim for damages for breach of contract where the supplier's failure to perform has caused the consumer loss or damage, including any additional cost of obtaining substitute goods from an alternative source.

72. Any reimbursements have to be made as soon as possible but within 30 days after the ending of the period for performance at the latest [regulation 19 (4)]. The same applies for security provided by the consumer [regulation 19 (6)].

73. If the supplier does not perform within the period for performance, the contract shall be treated as if it had never been made, save for any rights or remedies which the consumer has under it as a result of non-performance [regulation 19 (5)].

74. The UK chose to adopt the option permitted by article 7(3). Regulation 19 therefore permits the supplier to supply alternative goods provided that the possibility was provided for in the contract, and prior to the conclusion of the contract the consumer was informed in a clear and comprehensible manner [regulation 7 (1) (b) and (c), regulation 7 (2)].

*Inertia selling – art. 9*

75. Article 9 prohibits "inertia selling". It requires Member States to "take the measures necessary to prohibit the supply of goods or services to a consumer without their being ordered by the consumer beforehand, where such supply involves a demand for payment" and to exempt the consumer from paying for an unsolicited supply, "the absence of a response not constituting consent".

*Implementation – regulation 24*

76. The UK already had legislation which regulated inertia selling, in the form of the unsolicited Goods and Services Act 1971. The Act required some amendment to bring it into line with the directive, and that amendment is effected by a regulation 24. The sending of unsolicited goods is not prohibited as such, but the effect of the 1971 Act, as amended, is that the recipient of unsolicited goods may treat them as an unconditional gift as between himself and the sender unless he agrees to pay for or return them. In addition, the Act makes it an offence, punishable by fine, for any person to demand payment for unsolicited goods or services, or to take other steps

with a view to enforcing or obtaining payment for what he knows are unsolicited goods or services, including by threatening to bring legal proceedings, placing or causing to be placed the name of any person on a list of defaulters or debtors, or threatening to do so, or invoking any other collection procedure. The 1971 Act goes further than the directive in that its provisions apply to the unsolicited supply of goods and services to businesses as well as consumers.

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*Restrictions on the use of certain means of distance communication – art. 10*

77. Distance communications are an excellent and (especially the new technologies like e-mail and SMS), a very cheap means of marketing goods or services. Art 10 imposes restrictions on the use of certain forms of distance communication. In general the use of means of distance communication is, in B2C relations only permitted if the consumer did not object clearly to such use - art. 10 (2). For some means the prior consent of the consumer is required. These are automated calling systems without human intervention and fax[64] - art. 10 (1).

*Implementation – Privacy and Electronic Communications (EC Directive) Regulations 2003*[65]

78. Art 10 is not implemented in the Consumer Protection (Distance Selling) Regulations 2000 The Privacy and Electronic Communications (EC Directive) Regulations 2003 however, provide specific and detailed regulation for the use of different means of distance communication. Regulations 19 and 20 implement art. 10 of the Directive and regulate the use of automated calling systems and facsimile machines. Automated calling systems are defined in regulation 19 (4) as systems capable of automatic initialisation of calls to more than one destination in accordance with instructions stored in that system, and transmitting sounds which are not live speech for reception by persons at some or all the destinations. Regulation 19 (1) prohibits the use of automated calling systems generally. The only exception is stated in

[64] If these means are used nevertheless the sanctions are different in the Member States, they may include criminal sanctions; Schmittmann, J M "Sachbeschädigung (§ 303 StGB) durch Telefaxübermittlung von Werbung" JurPC Web-Dok. 45/2002; Winter, R "Zur Mitstörerhaftung bei unverlangter 0190-Telefaxwerbung" JurPC Web-Dok. 254/2002; Winter, R "Unverlangte E-mail Werbung: Gedanken zur Wiederholungsgefahr" JurPC Web-Dok. 177/2002; Berlin, Beweislast für Zustimmung zum Empfang von Werbe-E-Mails, judgement of 16 May 2002, 16 O 4&02, CR 2002, 606; KG, Unzulässigkeit unaufgefordert zugesandter E-Mail-Werbung, judgement of 8 January 2002, 5 U 6727/00, CR 2002, 759

[65] SI 2003/2426

paragraph (2) as where a subscriber explicitly consents to the use of automated calling systems (opts in).

79. Regulation 20 of the Privacy and Electronic Communications (EC Directive) Regulations prohibits the use of fax machines for unsolicited communications. Paragraph (1) prohibits the use in all cases for communications with individuals [regulation 20 (1) (a)], unless the individual has explicitly agreed to the use [regulation 20 (2)] (opt in), to corporate subscribers, if they have notified the sender that they do not wish to receive any such communication [regulation 20 (1) (b)] (opt out), or to any subscriber who has explicitly opted out for any unsolicited commercial communication [regulation 20 (1) (c)].

80. Insofar as this restriction applies to businesses as well as to consumers, it goes beyond the requirements of the directive.

81. Regulation 21 of the Privacy and Electronic Communications (EC Directive) Regulations 2003 allows the use of unsolicited telephone communication unless the user has notified the caller or signed up to a register kept by OFCOM66. This register is introduced by regulations 25 and 26. This again goes beyond the requirements of the directive by including businesses within the scope of its application. The protection of consumers however, is the minimum required in the Directive.

82. Regulation 22 deals with the use of e-mail for commercial communications. Regulation 22 only applies to individual subscribers. Regulation 22 (2) creates a general prohibition on the use of unsolicited e-mails for marketing purposes; regulation 22 (3) however exempts a number of cases from this general rule. The use of unsolicited e-mail for marketing purposes is allowed if the sender has obtained the contact details of the recipient in the course of the sale or negotiations for a sale of a product or service to that recipient [regulation 22 (3) (a)], the marketing is in respect of the sender's similar products and services [regulation 22 (3) (b)], and the recipient is given a simple means of refusing the use of his contact details for such marketing [regulation 22 (3) (c)]. The possibility of refusal must be given at the time of the initial communication as well as each subsequent communication and has to be free of charge (except for the costs for the communication of the refusal.

[66] Kemp, R "Mobile marketing: the new legal frontier" International Sports Law Journal 2004, 46; Boardman "Direct marketing – the new rules" Hertfortshire Law Journal 2004, 3

83. Regulation 24 requires certain information to be provided in case of unsolicited communication. This goes beyond the requirements in the Distance Selling Directive, but fulfils requirements from the E-Commerce Directive for electronic communications and creates one coherent system for all means of distance marketing.

84. These provisions replace earlier controls in the Telecommunications (Data Protection and Privacy) Regulations 1999, Part V, on the Use of Telecommunications services for Direct Marketing Purposes implementing provisions with regard to the use of means of distance communication. Regulation 22 of the Telecommunications Regulations established an opt-in system for automated calling systems regardless of whether the line is of an individual or a company (corporate). Regulation 24 established an opt-in model for the use of faxes for unsolicited direct marketing purposes with regard to individual consumers. Regulation 25 established an opt-out system with regard to telephone communications and created in Regulation 27 an obligation for the caller to provide certain information.

*Redress – art. 11*

85. The Distance Selling Directive was the first consumer related directive introducing an obligation for the Member States not only to implement the Directive, but also to ensure that a remedy be provided for breach of the provisions of the Directive in national law. The Directive also regulates judicial or administrative redress, but not jurisdiction.

86. Article 11 (1) of the Directive requires the Member States to ensure adequate and effective means to ensure compliance with the Directive in the interests of consumers. This general rule goes further than the general obligation to implement the provisions of the Directive into national law.

87. Article 11 (2) provides that such means include the possibility for at least one of the specified bodies to take action under national law before the courts or the competent administrative bodies. The specified bodies are

    f) public bodies or their representatives;

    g) consumer organisations having a legitimate interest in protecting consumers, or

    h) professional organizations having a legitimate interest in acting.

88. Following the wording it would be sufficient to allow only one of these bodies to take action, but most Member States allowed at least two of these. As the wording says "include", these enumerated means cannot be the only means for redress. The other important method is individual redress. These mechanisms can, and do in most Member States, follow the normal procedural system for individual claims if the provisions of the Directive are implemented into national law.

89. The Member States may following Article 11 (3) (a) stipulate that the burden of proof concerning the existence of prior information, written confirmation, compliance with time limits or consumer consent can be placed on the consumer. This provision has been used, or was already in force, following the procedural rules in some Member States. For example, it might be difficult for the consumer to prove that information has not been supplied whereas it is relatively easy for the supplier to ensure proof that it was provided.

90. The Member States are, according to Article 11 (3) (b), obliged to take the measures needed to ensure that suppliers and operators of means of communication comply with the provisions adopted pursuant to this Directive. This provision seems redundant but it ensures the implementation of the provisions of the Directive in practice.

91. Article 11 (4) allows the Member States to provide for voluntary supervision by self-regulatory bodies and recourse to such bodies for the settlement of disputes. On the EU-level the Extra-Judicial-Network has been introduced in the meantime. This is a voluntary dispute settlement system, designed for consumer complaints intended to work cross-border.

*Implementation – regulations 26 – 28*

92. Regulation 26 deals with complaints, and regulation 27 with injunctions, and regulation 28 with the notification to the OFT.

93. Regulation 26 (1) states that an enforcement authority is obliged to consider any complaint unless it is frivolous or vexatious, or another enforcement authority has notified the OFT that it agrees to consider the complaint. Notification to the OFT commits the enforcement authority to considering the complaint [regulation 26 (2)]. Enforcement authorities have to give reasons for their decisions [regulation 26 (3)].

94. Regulation 27 (1) gives the OFT or any other enforcement authority – if it has notified the OFT and the OFT consents [regulation 27 (2)] – the right to apply for an injunction (including an interim injunction) against a person who appears to be responsible for a breach. Regulation 27 (3) gives the court power to grant an injunction on such terms as it thinks fit to secure compliance with the Regulations.

*Binding nature – art. 12*

95. Article 12 (1) of the Directive prohibits any waiver by the consumer of any of the rights conferred on him by the Directive and its transposition into the national laws. Additionally, Article 12 (2) requires the Member States to ensure that the consumer does not lose the protection granted by virtue of the choice of the law of a non-member country whenever the contract has a close connection with the territory of one or more Member States. This provision restricts the choice of law in consumer contracts to prevent avoidance of the Directive. Following the wording of the Directive the choice of the law of another Member State, regardless of whether there is a close connection, should be possible as the law of all Member States have to grant a minimum standard of protection for consumers. The Private International Law of the Member States may, however, forbid or restrict choice of law clauses in consumer contracts generally.

96. However, Article 12 (2) only restricts the choice of law. If the law of a non-member country is applicable on objective grounds the minimum standard is not granted. Especially in e-commerce where it is relatively easy to construct an objective connection to a non-member state or any off shore jurisdiction this is a severe gap in the legal protection and opens the possibility for avoidance of the provisions of the Directive.

*Implementation – regulation 25*

97. Regulation 25 (1) provides that any contractual term that is inconsistent with the regulations is void to the extent it is inconsistent. This means that contractual clauses may be reduced to the statutory minimum and will otherwise remain valid. Paragraph (2) prohibits the imposition on consumers of any other contractual liability or obligations than stated by the regulations. Paragraph (5) excludes the choice of law of a non-Member State if the contract has a close connection with the territory of a Member State. The wording "close" connection implies that it does not necessary

have to be the closest connection which restricts the choice of law in accordance with the Directive.

**Impact of Unfair Commercial Practices (UCPD- Directive 2005/29/EC)**

98. The legislation implementing directive 97/7/EC (the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, and the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426) are more detailed than the directive in a number of respects. Thus, for instance, the Distance Selling Regulations contain considerably more detail of the mechanics of the operation of the right to cancel than does the directive. On the whole, however this additional detail does not involve going beyond the directive but involves the implementation "filling in gaps" in the directive and is contemplated by the directive. Thus for instance the directive expressly provides for member states to determine the detailed rules governing cancellation of credit agreements.

99. There are only four instances in which the implementation goes beyond the directive.

- Art 14 provides for reimbursement to the consumer of sums paid on his behalf as well as sums paid by him. We have suggested above that the directive would be interpreted as requiring the same.
- The regulations permit the supplier to recover the costs of recovery of the goods only if that right is reserved in the contract (reg 14(5)); there is no express corresponding restriction in the directive, but we would suggest that since the directive such a right to reimbursement mandatory (art 6.1 says that such a charge *may* be made), it could only arise from and would therefore need to be sanctioned by the contract.
- The provisions on inertia selling go further than those in the directive since in some circumstances they protect businesses as well as consumers.
- The provisions of the PECR similarly go further than those in the directive since in some circumstances they protect businesses as well as consumers.

100. We have suggested above that the first two of these are consistent with the proper interpretation of the directive; the latter two broaden the scope of implementation beyond that of the directive and therefore do not depend on the minimal clause.

101. As a result none of these provisions is affected by the UCPD.

102. A separate question is whether the introduction of the UCPD will provide any scope for replacing the provisions of the Distance Selling directive by those of the UCPD by way of rationalisation.

103. The position is similar to that in relation to the Doorstep Selling and Timeshare directives. It is a misleading omission under the UCPD for a trader to fail "to supply the consumer with 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", including notice of cancellation rights. The information requirements of arts 4 and 5 are included in the indicative list of material information requirements in Annex 2 to the UCPD and would therefore be considered material. Again, however, the Distance Selling directive is specific in its requirements and failure to supply the prescribed information has consequences *inter partes*, extending the cancellation period. There is therefore no scope for replacing the information provisions of the Distance Selling directive with those of the UCPD.

104. Making "persistent and unwanted solicitations by telephone, fax, e-mail or other remote media except in circumstances and to the extent justified under national law to enforce a contractual obligation" is included in the list of aggressive commercial practices in the first Annex to the UCPD, but this is expressed to be "without prejudice to Article 10 of Directive 97/7/EC".

# Chapter 6

# Unit Prices

Background

1. Directive 98/6 EC was adopted on 16 February 1998. Its stated purpose is to "stipulate indication of the selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices" (art 1). By so doing it is anticipated that it will enhance the bargaining power of consumers and competition.

2. The United Kingdom had already adopted legislation on pricing in the Prices Acts 1974-1975 before the Directive was adopted. Under the Act, the Secretary of State can make orders regulating prices for certain types of food, although no such orders are now in existence. Of greater relevance is s.4 of the Prices Act 1974, which empowers the Secretary of State to make orders regarding the way prices are marked and indicated. Section 5 of the Act deals with "price range notices", but, again, there are no orders in force.

3. The order-making powers in s. 4 were used to implement Directive 98/6. After consultation, the initial implementing regulations were updated in 2004 and the relevant legislation is now the Price Marking Order 2004.

Mapping the implementation

*Article 1*

4. Article 1 of the Directive merely specifies the purpose of the Directive (above), and did not require implementation.

*Article 2*

5. Article 2 contains the definitions of various key terms used in the Directive. These definitions have been implemented in Article 1(2) of the Price Marking Order 2004. The definition of "consumer" is the same as in the Directive. The same is true of the

definitions of "selling price", i.e., "the final price for a unit of a product, or a given quantity of a product, including VAT and all other taxes".

6. The definition of "trader" varies slightly from that in the Directive, but is substantively equivalent to it. Thus, a trader in the Directive is "any <u>natural or legal person</u> who <u>sells or offers for sale</u> products which fall within his commercial or professional activity", whereas the Order defines this as "any <u>person</u> who <u>sells or offers or exposes for sale</u> products which fall within his commercial or professional activity". In English law, the term "person" is already understood to encompass natural and legal person, and the omission of these words does not alter the substance of the definition. The additional words "exposes for sale" takes into account the fact that in English law, goods on display in a shop are not "offered" for sale, and the expression is commonly used for this purpose in domestic legislation.

7. The definition of "unit price" in the Order is not the same as in the Directive. The Directive's definition is "the final price, including VAT and all other taxes, for one kilogramme, one litre, one metre, one square metre or one cubic metre of the product or a different single unit of quantity which is widely used in the Member State concerned in the marketing of specific products", whereas the Order defines this as "the final price, including VAT and all other taxes, for one kilogramme, one litre, one metre, one square metre or one cubic metre of a product except (i) in respect of the products specified in Schedule 1, where unit price means the final price including VAT and all other taxes for the corresponding units of quantity set out in that Schedule; and (ii) in respect of products sold by number, where unit price means the final price including VAT and all other taxes for an individual item of the product". Schedule 1 to the PMO specifies the units of quantity (either grams or millilitres) which should be used in providing the unit price for particular products. Once again, there is no substantive difference; rather, the Order spells out those instances where there are different units of quantity widely used in the United Kingdom.

8. A further variation from the Directive can be seen in the definition of "products sold in bulk". Instead of the words "… measured in the presence of the consumer...", the UK's definition includes the words "weighed or measured at the request of the consumer…". One may quibble as to whether this difference is significant – arguably, a consumer might "request" that goods are measured without being present when this is actually done.

*Article 3*

9. The basic requirement to indicate the selling price and unit price has been implemented through Articles 4(1) (selling price) and 5(1) (unit price) of the Order respectively. The proviso in the second sentence of Article 3(1) of the Directive that the unit price need not be indicated if it is identical to the selling price is implemented in Article 5(3)(b) of the Order.

10. The UK has made use of the option in Article 3(2) of the Directive to exclude certain transactions from the scope of Article 3(1), and the Order does not apply to products which are supplied in the course of the provision of a service, nor to sales by auction, nor to sales of works of art or antiques (Article 3 of the Order). One may note that the Directive provides the option to exclude these transactions from the scope of Article 3(1) only, whereas in the implementing provision, such transactions are fully excluded. This is unlikely to cause any problems in practice.

11. Article 3(3) of the Directive provides that where products are sold from bulk, only the unit price must be indicated. This has been transposed by disapplying Article 4(1) of the Order (dealing with the obligation to provide the selling price). Although the technical route by which this provision is implemented may be different from the approach taken in the Directive, the practical effect is identical and there is no difficulty with this.

12. The requirement in Article 3(4) of the Directive that advertisements mentioning a selling price must also include the unit price is transposed in Article 5(4) of the Order. As with other provisions, the wording used here is different from the Directive, because the obligation to provide selling and unit prices contained in one single paragraph in the Directive was implemented through two separate Articles in the Order. However, there is no substantive difference from the Directive in this regard.

*Article 4*

13. Article 4(1) of the Directive provides that selling and unit prices must be unambiguous, easily identifiable and clearly legible. This was implemented, without substantive difference, in Article 7(1)(a) of the Order. There is a special provision in Article 9 of the Order, dealing with circumstances where there has been a reduction of the selling or unit price previously indicated. This requires that the details of the reduction are displayed in a similar unambiguous, easily identifiable and clearly

legible manner. This is a provision based on the second sentence of Article 4(1), which gives Member States an option to provide that the maximum number of prices to be indicated be limited.

14. The provision in Article 4(2) of the Directive that the unit price must refer to a quantity declared in accordance with national and Community provisions, and that it is sufficient to indicate the unit price of the net drained weight of pre-packaged items, was implemented through Article 8 of the Order, as well as Schedule 1.

*Article 5*

15. The UK has exercised the option in Article 5(1) of the Directive to waive the obligation to indicate the unit price of products where this would not be useful due to the products' nature or use, or where this would be liable to create confusion. This has been done in Article 5(3)(a) of the Order, giving effect to Schedule 2 which contains a list of products to which this exemption applies. This list was established on the basis of Article 5(2) of the Directive. The list in Schedule 2 includes radio, television and cinema advertisements, goods which have been reduced because they are damaged or perishable, products comprising an assortment of different items in a single package, and products the unit price of which is 0.0 pence as a result of applying the rules on rounding of unit prices in the Order (see below). There is no variation from the requirements of the Directive here.

*Article 6*

16. The UK has made use of the derogation provision in Article 6, exempting small shops, itinerant traders, and goods sold through vending machines, from the obligation to display unit pricing. Small shops are those with a relevant floor area ("internal floor area of the shop excluding any area not used for the retail sale of products or for the display of such products for retail sale" – Article 1(2) of the Order) of no more than 280 square metres. Itinerant trader is defined as a trader "who, as a pedestrian, or from a train, aircraft, vessel, vehicle, stall, barrow, or other mobile sales unit, offers products to consumers other than by means of pre-printed material" (Article 1(2) of the Order). These definitions are not found in the Directive, and it is, at least in theory, possible that these definitions might conflict with an interpretation given to these terms by the European Court of Justice. However, there is no judgment by the ECJ on this, and even if there was, it would seem unlikely that this would significantly conflict with the definitions included in the Price Marking Order.

*Article 7*

17. This requires that persons concerned are informed about the implementing legislation; this has been done through the Explanatory Notes accompanying the Order, a guidance note for traders published on the DTI's website, and a transposition table indicating how the various requirements of the Directive have been implemented into domestic law.

18. Prices must be given in sterling, the UK's currency. If a trader is willing to accept a foreign currency in addition to sterling, he must provide the selling and unit prices in the same way, and also identify clearly the conversion rate he applies and any commission which may be charged, except where payment is made with a payment card, where a different conversion rate will be applied by the payment scheme processing the transaction.

*Article 8*

19. Member States are required to lay down penalties for any infringements of the implementing legislation. Under the Order, enforcement is effected through the procedure contained in the Schedule to the Prices Act 1974. Accordingly, a breach of the Order can result in prosecution which, if successful, will result in the imposition of a fine. The obligation to enforce the Order falls on Trading Standards Departments (also known as Weights and Measures Authorities).

20. It should be noted that there is a second enforcement procedure in Part 8 of the Enterprise Act 2002. For the purposes of the Enterprise Act, a breach of the Order is a "domestic infringement", provided that it harms the general interests of consumers. To be precise, it is only s.4 of the Prices Act 1974 that is specified as a measure subject to the domestic infringement provisions, but as this is merely a provision containing order-making powers, it must be the case that any orders adopted under s.4 of the 1974 Act must be included.

*Articles 9, 10, 11, 12, 13 and 14*

21. These are provisions dealing with transitional periods, implementation deadlines and obligations on the European Commission to report on the application of the Directive. They do not require any specific action by the UK government as part of the implementation process.

Additional provisions

19. The Price Marking Order contains a number of additional provisions which do not arise directly from the Directive, but assist in the application of the rules introduced into domestic law as a result. Because these rules do not seem to constitute rules which are "more favourable as regards consumer information and comparison of prices", they are not based on Article 10 of the Directive, nor can they be taken as broadening the scope of the implementing legislation – they merely "enhance" its scope.

20. We have already noted, in passing, Article 9 on general reductions. Article 10 contains special provisions relating to precious metals. Article 11 contains provisions dealing with changes in the rate of Value Added Tax or any other tax, and resulting price changes. According to Art.11(a), there is a fourteen-day period during which a general notice informing consumers about the price change suffices to comply with the requirement. After that, presumably, all prices must be displayed in accordance with Articles 4 and 5, taking full account of the changes.

21. Finally, Articles 12 and 13 contain provisions on decimal places and rounding of unit prices. It is conceivable that these rules could be understood to improve the provision of information to consumers, but they do not really constitute rules which are more favourable than the rules in the Directive. As noted above, these provisions should be regarded as enhancing the scope of the Order by clarifying some of its rules.

Impact of Unfair Commercial Practices (UCPD- Directive 2005/29/EC)

22. The UCPD contains several provisions dealing with the provision of information about pricing. Thus, Art.6(1) UCPD regards it as a misleading action to provide false information which is therefore untruthful, or if the action in any way deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to a number of specified elements, and in either case causes, or is likely to cause, him to take a transactional decision he would not have taken otherwise. One of the elements listed in Article 6 is "the price or the manner in which the price is calculated, or the existence of a specific price advantage" (Art.6(1)(d) UCPD).

23. Thus, if a trader does something which has the effect of deceiving, or makes it likely to deceive, the average consumer about the price of a product, then this will be

regarded as a misleading action (provided that the remaining elements of Art.6(1) are also satisfied) and therefore an unfair commercial practice.

24. It may first be noted that the requirement to provide unit and selling prices in itself does not inevitably deal with situations where a consumer is deceived, or likely to be deceived. The absence of unit prices and selling prices in itself does not have this effect. However, in combination with other actions, the lack of this information could make it more likely that an average consumer may be deceived. For example, assume that a 250g tin of beans is offered for sale at £0.47, and a multi-pack of 12 is offered for sale at £6.99. Next to the multi-pack, there is a notice along the lines of "buy in bulk and save money". This may cause a consumer to buy the multi-pack rather than 12 individual tins, and therefore spend £1.35 more. Assuming that (at least some) average consumers would be likely to be deceived by this action, which relates to the price or existence of a specific price advantage, this would constitute an unfair commercial practice. If the unit price was displayed alongside the selling price, then it is at least arguable that an average consumer would be less likely to be deceived by the notice, and not buy the multi-pack.

25. The point is that the absence of a unit price in itself is unlikely to be regarded as a misleading action, but in combination with other factors, could render an action misleading that might not be so where the unit price has been provided. Art.6(1) UCPD could therefore not simply replace the provisions of Directive 98/6/EC.

26. The second key provision in the UCPD is Article 7 on misleading omissions. An action is regarded as a misleading omission 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 he would not have taken otherwise.

27. In particular, where there is an invitation to purchase (defined as "commercial communication which indicated characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase" (Art.2(i)), specified items of information are regarded as material, including the price (Art.7(4)(c)). Moreover, information requirements established by Community Law are regarded as material (Art.7(5)).

Annex II of the UCPD contains a non-exhaustive list of such requirement; this list includes Art.3(4) of Directive 98/6/EC. This is the provision which requires the inclusion of the unit and selling price in advertisements.

28. As with the requirement in Art.6(1), it does not seem that the requirement to provide the unit price could simply be subsumed into the provisions on misleading omissions in the UCPD. The inclusion of the unit price in advertisements is designated as an item of material information, but the Directive goes beyond the provision of pricing information in advertisements. It seems unlikely that it would be arguable that the average consumer would regard the provision of the unit price as material.

29. We noted above that there are a number of additional provisions in the PMO for which there is no corresponding provision in the Directive itself, but that these do not seem to constitute matters which can be said to be based on Article 10. They are therefore unlikely to be affected by the time-restricted derogation in Art.3(5) UCPD.

30. We may therefore conclude that the UCPD cannot be used to replace Directive 98/6/EC, although there is some overlap in how the respective provisions of the directives may operate in practice. Moreover, the provisions of domestic law which add to the requirements in the directive are unlikely to be caught by the provision in Art.3(5) UCPD.

# Chapter 7

# Injunctions

## Background

1. Directive 98/27/EC on injunctions for the protection of consumers' interests (the Injunctions Directive) was adopted on 19 May 1998. Its stated purpose is "to approximate the laws, regulations and administrative provisions of the Member States relating to actions for an injunction … aimed at the protection of the collective interests of consumers … with a view to ensuring the smooth functioning of the internal market".

2. Before the Directive was adopted, the UK had a fairly restricted system of regulatory enforcement of consumer protection law. This was contained in Part III of the Fair Trading Act 1973, and empowered the then Director-General of Fair Trading to act where a trader had persisted in a course of conduct which was (a) detrimental to the interests of consumers and (b) regarded as unfair to consumers. However, unfairness was defined narrowly as involving a course of conduct contravening a specific legal rule, such as a breach of contract, or of specific consumer legislation. The DGFT had the power to obtain formal court orders to prevent the continuation of such conduct, but he could also accept undertakings from the trader concerned not to continue with the course of conduct. The right to enforce consumer legislation by this route was not available to any other body interested in consumer protection, whether public or private.

3. The Directive therefore required a change of approach to the enforcement of consumer law in the UK. It was initially implemented by statutory instrument, the Stop-Now Orders Regulations 2001. These were replaced when the Enterprise Act 2002 came into force. Part 8 of the Act was designed to modernise the enforcement regime for consumer protection generally, and effectively combines, in improved form, Part III of the 1973 Act and the 2001 Regulations.

4. Part 8 therefore includes some provisions giving effect to the requirements of the Injunctions Directive, which is limited to infringements of legislation implementing

specific EC consumer law directives, and other provisions dealing with domestic consumer law generally. In this section of this report, we will not discuss the full extent of Part 8 and concentrate instead on those provisions which implement the Injunctions Directive. However, where appropriate, reference will be made to other provisions.

Mapping the implementation

*Article 1*

5. This Article sets out the general objective of the Directive, which is to harmonise the rules relating to injunctions aimed at the protection of the collective interests of consumers. These interests are those included in the various consumer law directives listed in the Annex to the Directive. It should be noted that this Annex has been updated regularly since the adoption of the Directive to include the various consumer law directives that have come into effect since 1998.

6. In the Enterprise Act, this provision has been implemented in s.212(1), which defines “Community infringement”. Part 8 of the Enterprise Act distinguishes between “domestic” and “Community” infringements. In essence, the sections dealing with “Community infringements” give effect to the requirements of the Injunctions Directive. However, there is no clear-cut separation between these two categories, as will be seen below when discussing the different types of entity qualified to bring an action for an injunction before the UK courts.

7. Section 212(1) repeats the requirement that an infringement must harm the collective interests of consumers, and then goes on to specify that such an infringement must contravene the legislation implementing a listed Directive in a member state of the European Economic Area (EEA), including provisions which provide “additional permitted protections”. Section 212(2) explains that such additional permitted protections must be based on a minimum harmonisation clause in the Directive concerned.

*Article 2*

8. This Article sets out the orders for which the “qualified entities” may apply. These are: (i) an order requiring the cessation or prohibition of an infringement; (ii) the publication of the decision and/or a corrective statement; and (iii) order for payments

to the public purse for failing to comply with an order terminating or prohibiting an infringement.

*(i)* *Cessation or prohibition of an infringement*: This has been implemented in s.215(5) and s.217(5) of the Enterprise Act. The legal mechanism available here is an enforcement order, which is the equivalent of an injunction. Section 215(5) specifies the courts which have jurisdiction to deal with applications for enforcement orders. Section 217(5) (read in combination with s.217(2)) states that an enforcement order must indicate the nature of the conduct at issue. It must also direct the person against whom the order is sought to comply with s.217(6), which requires that person not to continue or repeat the conduct, nor engage in such conduct in the course of his business or another business.

*(ii)* *Publication*: The possibility to require the person against whom an order is made to publish that order and/or a corrective statement has been implemented in s.217(8).

*(iii)* *Payments for failure to comply*: This has not been implemented specifically into domestic law, it seems. Section 220 deals with further proceedings, which include proceedings for failing to comply with an enforcement order. That section only accepts that further proceedings may be brought, but it does not specify the consequences of a failure to comply with an enforcement order. It may therefore be assumed that the court will exercise its power to find the person against whom the order was made in contempt of court and to impose a penalty accordingly.

*Article 3*

9. This Article defines the entities who are qualified to take action under the Directive. These must have a legitimate interest in ensuring that the various directives on consumer law are complied with, and include independent public bodies as well as other organisations.

10. In the Enterprise Act, this provision has not been transposed in a straightforward manner, which is mainly due to the fact that Part 8 deals with the enforcement of consumer legislation generally, and not merely the legislation implementing the various consumer directives. In Part 8, there are three types of enforcer: general

enforcers,[67] designated enforcers,[68] and Community enforcers. There are also two types of infringements: domestic and Community. General enforcers can act in respect of all infringements (s.215(2)), and designated enforcers can act in respect of those infringements for which they have been designated as enforcers.

11. Community enforcers can only act with regard to Community infringements (s.215(4)). Section 213(5) defines "Community enforcer" as a qualified entity for the purposes of the Injunctions Directive, as specified in the list published in the Official Journal as required by Article 4(3) of the Directive, but which is not a general enforcer. The Enterprise Act therefore defaults to the official list of qualified entities as published in the Official Journal. This may be problematic insofar as an organisation from another Member State which meets the relevant criteria, but is not included in an (updated) list in the Official Journal, may not be able to take action before the UK courts. However, the qualification "for the time being" in s.215(4) suggests that the published list is not exclusive, and there may not be a problem in practice. Article 4(2) requires that Member States notify the Commission of their qualified entities, and provided that this has happened, any absence from the published list should not be a bar to taking action in the UK.

*Article 4*

12. This provides that qualified entities from another Member State should be entitled to take action in the Member State where an infringement originates. The list of qualified entities published in the Official Journal is conclusive evidence of *locus standi* for such an entity, although, as noted above, it will presumably also be possible for an entity from another Member State to gain *locus standi* where its status as a qualified entity in its home Member State has been notified to the Commission.

13. The relevant provisions of domestic law which give effect to this provision are s.212(1) (general definition of "Community Infringement"), s.215(1) (specifying person who has engaged, is engaging or is likely to engage in conduct which constitutes a Community infringement), and s.215(4) (power for Community enforcer to apply for an enforcement order in respect of a Community infringement). Although

[67] The Office of Fair Trading, local weights and measures authorities in Great Britain, and the Department of Enterprise, Trade and Investment in Northern Ireland.

[68] These are specified by secondary legislation, and their power to act will be specified in such legislation. See Enterprise Act 2002 (Part 8) (Designation Of The Financial Services Authority As A Designated Enforcer) Order SI 2004/935, designating the FSA as an enforcer for all infringements, and Enterprise Act 2002 (Part 8) (Designation Of The Consumers' Association) Order 2005, SI 2005/917, doing the same for the Consumers' Association (now known as Which?).

the structure of the implementing legislation is more complex than the Directive, there appears to be no obvious shortcoming in the transposition of Article 4 of the Injunctions Directive.

*Article 5*

14. This Article contains an option for the Member States to require a person seeking an injunction for the termination of an infringement first to negotiate with the defendant, possibly by involving a public body which is a qualified entity in the defendant's Member State. Member States may further require that this qualified entity must be consulted. However, if these negotiations do not bring about an end of the infringement within two weeks, an injunction may be sought.

15. The UK has exercised both elements of this option. Section 214(1) requires that an enforcer (irrespective of which type) must first consult with the person against whom an enforcement order would be made. There also has to be consultation with the Office of Fair Trading. The OFT can dispense with the need for consultation where it thinks that an application for an enforcement order should be made without delay (s.214(3)). The requirement to consult finishes at the end of a 14-day period beginning with the day after the person against who the order is sought was first contacted.

16. This provision has therefore also been implemented in accordance with the Directive. It may be noted in passing that the consultation requirement applies irrespective of whether the complaint relates to a domestic or a Community infringement.

*Article 6*

17. This provision only imposes obligations on the Commission and does not require implementation by the UK.

*Article 7*

18. This permits Member States to grant qualified entities and other persons more extensive rights to take action at national level. It does not appear to have been used to a significant degree in the UK. Community enforcers can only take action with regard to Community enforcements, and only to the extent permitted in the Directive. Some of the provisions which ostensibly implement the Directive have been given a wider scope to apply to purely domestic situations. However, no Community enforcer

has been given the power to take action for domestic infringements, nor are there powers to request anything but an enforcement order.

*Articles 8, 9 and 10*

19. These deal with transposition issues and entry into force and do not require implementation by the UK.

*Annex – List of Directives*

20. The list of directives found in the Annex to the Injunctions Directive has been included in Schedule 13 to the Enterprise Act 2002. This Schedule has been amended to take into account changes made to the Annex by directives adopted after the Injunctions Directive entered into force.

Impact of Unfair Commercial Practices (UCPD- Directive 2005/29/EC)

21. We may note immediately that, unlike the other directives examined in this report, the Injunctions Directive is not going to be affected by the UCPD. Indeed, it is clear from Article 16 UCPD, which amends the Annex to the Injunctions Directive, that one of the mechanisms by which the UCPD's provisions can be enforced will be through the legislation implementing the Injunctions Directive. Both directives will therefore operate in a complementary manner, and it will not be necessary to undertake any revisions to the Injunctions Directive as a result of the adoption of the UCPD.

# Chapter 8

## Sale of Goods and Associated Guarantees[69]

Background

1. Directive 99/44/EC on the sale of consumer goods and associated guarantees was adopted by the European Commission and Parliament on 25th May 1999, but the need for EC legislation in this area had first been identified by a Council resolution in 1975. Indeed, an article on consumer guarantees was included in 1990 in the first draft of what became the unfair terms directive. However, those proposals were abandoned and the origins of the provisions in the 1999 directive can be traced to the Commission's Green Paper of 1993.

2. The directive was adopted as a Single Market measure under art 100a (now art 95). Broadly speaking it covers two main areas. Its main provisions establish the requirement that where goods are supplied by a business to a consumer the goods supplied must be in conformity with the contract, and provides a scheme of remedies for the consumer where the seller supplies goods not in conformity with the contract. In addition it provides that where goods are offered to the consumer with the benefit of a guarantee, that guarantee should be legally enforceable in accordance with its terms.

3. As with the unfair terms directive the conformity requirement, in particular, covers an area in which most member states already had (long established) legal provisions (a point recognised in the 1993 Green Paper). Most member states (but not the UK) are also parties to the United Nations' Vienna Convention on Contracts for the International Sale of Goods (CISG), and, although the CISG is concerned with commercial rather than consumer contracts the drafting of the directive's conformity requirement and, especially, the remedial scheme for its breach, draw heavily on the drafting of the CISG.

4. In recognition of the fact that most member states already had established legislation in the area it covers the directive is a minimum harmonisation measure, allowing

[69] For more detailed analysis see Bradgate and Twigg-Flesner, *Blackstone's Guide to Consumer Sales and Associated Guarantees,* OUP 2003

member states to introduce or maintain in the area covered by the directive measures providing consumers with a higher level of protection than that provided by the directive.

5. The UK, like most member states, already had legislation covering the area covered by the directive, primarily in the form of the Sale of Goods Act 1979 and Sale and Supply of Goods and Services Act 1982 (SGSA), as amended, and which in some important respects provided a higher level of protection for consumers than did the directive. However, unlike most other member states, the UK has not ratified the CISG.

6. The implied terms requiring goods supplied to conform to their description, be of satisfactory quality and reasonably fit for the buyer's purpose and, where sold by sample to correspond with the sample[70], broadly corresponded to the directive's conformity requirement, albeit with some small but significant differences. The remedies provided by domestic law for breach of the implied terms, despite some superficial similarities, differed quite radically from the remedial scheme of the directive. This is hardly surprising because the two systems are rooted in different philosophies of contract. The directive, like most civil law systems, and also like the CISG, favours preservation of the contract and therefore gives primacy to remedies which keep the contract alive. The principal remedies in the directive are therefore forms of specific performance, permitting the seller to cure a defective performance. Common law, in contrast, regards specific performance as economically inefficient and permits the buyer relatively easily to escape from the contract if the seller makes a defective tender. English law classifies the statutory implied terms as conditions and the buyer's primary remedy for breach of condition is to reject the goods and terminate the contract. Reconciling the two regimes was therefore relatively difficult,

7. A further difficulty was caused by the scope of the directive. Goods are supplied under a wide range of contractual arrangements, not all of which are classified as sales. The directive applies only to contracts of sale, although it adopts an extended definition of "sale" which treats as sales contracts which would not be classified as sales by domestic law. In contrast, domestic law implies terms broadly corresponding to the directive's conformity requirement into contracts of sale (ss 13 – 15 SGA 1979) and also into contracts of hire purchase (ss 9 – 11 Supply of Goods (Implied

[70] SGA 1979 ss 13 -15.

Terms) Act 1973 (SOGITA 1973), work and materials, barter, exchange and hire (ss 3 -5 and 8 – 10 Supply of Goods and Services Act 1982 (SGSA)). In all cases the implied terms are classified as conditions, in the event of whose breach the customer[71] is entitled to reject the goods and terminate the contract and/or claim damages. However, the right to terminate operates differently according to how the contract is classified. Under a contract of sale rejection of the goods entitles the buyer to a full refund of the price if paid, but the right to reject the goods will be lost if the buyer accepts or is deemed to have accepted the goods and, despite reforms to the law in 1994[72] the buyer may still be deemed to have accepted the goods before he is aware of the breach (most notably if he retains the goods beyond a reasonable time without rejecting them). The concept of acceptance has no application to contracts other than sales, under which the customer only loses the right to terminate on the grounds of breach if, with full knowledge of the breach, he affirms the contract. On the other hand the customer who does terminate under a contract other than sale is not necessarily entitled to a full refund of sums paid; termination generally operates prospectively, not retrospectively, so that the customer is only entitled to a full refund if he has received no part of the supplier's contracted-for performance, or if the performance received is of no legal value. The UK therefore faced a decision in implementing the directive whether to extend its provisions to supply contracts other than sale.

8. Following the criticism levelled at the manner of implementation of the unfair terms directive, the decision was taken to implement the guarantees directive principally by amending existing primary legislation. It was also decided as a matter of policy that implementation should not result in a reduction of existing levels of consumer protection so that where the existing legislation provided higher levels of protection than the directive that protection would be retained. Finally, in order to minimise the differences between different forms of supply contract, it was decided to extend some provisions of the directive to contracts other than sale. In considering the implementation of the directive it will therefore be necessary to consider not only the amendments to the SGA but also (i) the pre-existing provisions of sales law and (ii) the legislation governing other forms of supply contract, as amended, bearing in mind that insofar as the implementation goes further than required by the directive in general it does so as a result of deliberate policy decisions. As will be seen, in a

[71] The neutral word "customer" is used here in preference to "buyer" which is appropriate to contracts of sale but not to other forms of supply contract.
[72] Sale and Supply of Goods Act 1994

number of respects it may be that the implementing legislation does not fully meet the directive's requirements.

9. Strictly speaking the legislation implementing the directive is the Sale and Supply of Goods to Consumers Regulations, 2002, SI 2002/3045. However, as noted above, for the most part the regulations operate by amending existing legislation – so much so that the regulations have only one free-standing substantive provision. In some cases it was felt that no change to existing legislation was required in order to implement the directive, on the grounds that domestic law already went as far as, or further than, the directive. It is therefore not always easy to map the directive's provisions onto corresponding implementing legislation. It will therefore be simplest to consider each of the directive's provisions in turn against the corresponding provisions of English law.

Mapping the implementation

10. The purpose of the Directive, as stated in art 1.1, is "the approximation of the laws, regulations and administrative provisions of the Member States on certain aspects of the sale of consumer goods and associated guarantees in order to ensure a uniform minimum level of consumer protection in the context of the internal market".

*Scope and Definitions*

11. The directive applies where "consumer goods" are sold by a "seller" to a "consumer". Each of these terms is defined in art 1.2.

12. *Consumer* is defined as "any natural person who, in contracts covered by the directive, is acting for purposes which are not related to his trade, business or profession."

13. *Consumer goods* are defined as "any tangible moveable item with the exception of
    a) Goods sold by way of execution or otherwise by authority of law
    b) Water and gas where not put up for sale in a limited volume or set quantity
    c) Electricity".

14. *Seller* is defined as "any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession".

15. The definitions of both "consumer" and "seller" differ from the corresponding definitions in the unfair terms directive.

16. Arts 1.3 and 1.4 expand on the definition of "consumer goods". Art 1.3 permits Member States additionally to exclude from the definition of consumer goods second hand goods sold at public auction where the consumer has the chance to attend the sale in person. Art 1.4 provides that contracts for sale of goods to be manufactured or produced are to be deemed to be contracts of sale for the purposes of the directive.

17. The implementing legislation differs in several respects. Reg 2 of the SSGCR 2002 contains a definition of consumer which is a verbatim transcription of the definition in art 1.2 of the directive. However, it applies only for the purposes of reg 15, which gives effect to consumer guarantees and implements art 6 of the directive. For the most part the SSGCR apply in favour of a person who deals as a consumer, as defined in s12 of the Unfair Contract Terms Act 1977. The UCTA definition is imported into the SGA by SGA s 61(5A)[73] and was amended slightly to align it with the Directive. According to the amended definition a person deals as a consumer if

    a) he does not make the contract in the course of a business; and
    b) the seller does make the contract in the course of a business.

18. "Business" is defined as including a profession and the activities of any government department or local or public authority (SGA s61). For all practical purposes, therefore, (subject to the possibility that there may be a difference in effect between a person's contracting "in the course of *a* business" and contracting "in the course of *his* business") "business" is defined in the same way in the regulations and directive. The same cannot however be said of "consumer". Under the directive a consumer is defined as "any natural person who, in contracts covered by the directive, is acting for purposes which are not related to his trade, business or profession". Under domestic law the first characteristic of a consumer is that he is a person who is not contracting in the course of a business. The expression "in the course of a business" has been considered by the courts on several occasions, with different results. In *R & B Customs Brokers Ltd v UDT Finance Ltd*[74] the Court of Appeal held that for the purposes of the UCTA 1977 a person buys in the course of a business if the

[73] And into the SGSA by s 18 (4); SOG(IT)A s 11A(4)
[74] [1988] 1 All ER 847

transaction in question is integral to the business or there is sufficient regularity of similar transactions. On the other hand in *Stevenson v Rogers*[75] a differently constituted Court of Appeal held that any sale of a business asset is a *sale* in the course of a business for the purposes of the SGA. Most recently, in *Feldarol Foundry v Hermes Leasing (London) Ltd* [2004] EWCA Civ 747 the Court of Appeal held that *R&B Customs Brokers* remains good law. The result is that the meaning of "in the course of business" is not clear. In particular it is not clear whether the distinction between the cases is that *R & B* concerns a buyer and *Stevenson* a seller, or that *R&B* concerns the UCTA and *Stevenson* the SGA. Nor is it clear which approach should be adopted when the UCTA definition is imported into the SGA. However, on the basis that *R& B* remains good law we may conclude that the class of persons who may "deal as consumer" for the purposes of UCTA and therefore for the purposes of the implementation of the Directive, is wider in two respects than the class of persons classified as "consumers" by the directive. First, UCTA requires a closer connection between a contract and the buyer's business before the contract becomes a non-consumer contract ("in the course of business" as interpreted in *R&B*); and, second, the class of consumers under the UCTA, and therefore for the purposes of the implementation of the directive, is not limited to natural persons.

19. The Act previously required that for a person to be dealing as a consumer under a contract for the sale or supply of goods the goods must be of a type ordinarily supplied for private use or consumption. This requirement no longer applies where the buyer is a natural person but continues to apply in other cases. It is considered below.

20. We should note that if the Law Commission's proposals on exclusion clauses (see chapter 4) are implemented it will no longer be possible for a business to qualify as a consumer.

21. There is no definition of "consumer goods" in the implementing legislation. The definition in the directive comprises two elements – a base definition ("any tangible moveable item") and a short list of exceptions. The SGA defines "goods" as "personal chattels", broadly equivalent to "any tangible moveable item". The legislation has no list of exceptions corresponding to that in the directive. Some provisions of the SGA do not apply to goods sold by way of execution, but there is no

[75] [1999] 1 All ER 613

general exception of such goods. Case law suggests that electricity probably is not "goods", but the position of water and gas is less clear. The effect is that, by recognising a wider category of goods than the directive's class of consumer goods, English law may in theory offer wider protection than required by the directive, but the difference may be more theoretical than real.

22. Art 1.3 of the directive allows member states to exclude from the definition of consumer goods second hand goods sold at public auction. The UK implementation takes this option, but in a roundabout way. Since the implementation contains no definition of "consumer goods" it excludes auction sales of second hand goods by providing, in UCTA s 12 as amended, that a person is not to be regarded as "dealing as a consumer" where he is an individual and buys second hand goods at a public auction which consumers have the option of attending in person. Since the implementation confers the rights derived from the directive only on persons who deal as consumers this has the same effect as the exclusion permitted by the directive. The use of the word "individual" is slightly problematic. The directive limits the definition of "consumer" to "natural persons" and the limitation to "individuals" is presumably intended to exclude legal persons rather than to exclude joint purchasers from the definition of "consumer".

23. UCTA s12 also provides that a person is not to be regarded as "dealing as a consumer" where he is not an individual and buys goods at auction or by competitive tender. There is no corresponding provision in the directive but since the directive limits the definition of "consumer" to natural persons the exclusion is permitted if "individual" is interpreted as "natural person" as suggested above.

*Goods to be manufactured or produced*

24. Art 1.4 provides that a contract for goods to be manufactured or produced is to be deemed to be a contract of sale for the directive's purposes. This is a significant provision as the classification of such contracts in domestic law is uncertain and some may be classified as contracts for work and materials. Such contracts are governed by the SGSA 1982.

25. Art 1.4 was not transposed by the UK implementation. Instead amendments were made to the SGSA. In our view this is not sufficient to satisfy the directive. The SGSA implies into contracts for work and materials terms requiring the materials

used to correspond with description and sample and to be of satisfactory quality and reasonably fit for the buyer's purpose, and a further term requiring the work to be performed with reasonable skill and care[76]. There is however, no implied term relating to the quality etc of the finished item[77]. The directive requires the finished item to be in conformity with the contract. Moreover, breach of the implied term that the work be performed with reasonable skill and care is not classified as a lack of conformity so as to trigger the remedial scheme derived from the directive. Further in addition, the directive prohibits agreements which exclude or limit the consumer's right to receive goods which are in conformity with the contract. So far as domestic law is concerned, UCTA renders invalid terms and agreements which exclude (etc) the implied terms relating to the quality etc of the materials used under a contract fo work and materials but permits exclusion of the term requiring the work to be done with reasonable skill and care provided that the exclusion satisfies the test of reasonableness[78]. It therefore seems to us that the implementation of art 1.4 of the directive is unsatisfactory in several respects. The problem might be overcome by the courts classifying contracts to supply goods to be manufactured or produced as contracts for the sale of the finished item[79] but there is no guarantee that they will do so and reliance on the courts is therefore insufficient to satisfy the directive[80].

26. In a number of other respects the implementing legislation goes considerably further than the directive by extending the scope of its application. Subject to art 1.4 (and art 2.5 – see below) the directive applies only to sales *strictu sensu*. The tendency of domestic law in recent years has been to assimilate so far as possible the legal treatment of contracts for the sale of goods and other classes of contract for the supply of goods. To that end, as noted above, terms corresponding to those implied into contracts of sale by ss 13 – 15 SGA are implied into other supply contracts. A policy decision was taken to carry that policy through into the implementation of the directive. Thus insofar as the directive required amendments to the statutory implied terms, amendments were made not only to the terms implied into contracts of sale but also to those implied into other contracts of supply.

[76] SGSA 1982 s 13
[77] Such a term may be implied at common law
[78] UCTA s 2
[79] There is case law to support this view but there is no consistent line in the decided cases.
[80] In the following analysis we refer to the provisions of the SGA. We refer to the corresponding provisions of other legislation only where they raise different issues.

27. On the other hand this process of assimilation has not been carried through into the remedies available for breach of the implied terms, with the result, as noted above, that there are significant differences between the remedies available to the buyer under a contract of sale and those available for breach of other classes of supply contract. Again this policy was followed through into the implementation of the directive and the directive's remedial scheme was applied to contracts of sale and work and materials but not to contracts of hire or hire purchase. The extension of the remedial scheme to certain contracts for work and materials was necessary to satisfy art 2.5 of the directive (see below) (it is suggested that this is insufficient to satisfy art 1.4 for the reasons set out above). As a side effect the remedial scheme was also extended to certain other contracts for the supply of goods, most notably barter, but although not strictly required by the directive it is suggested that such contracts are, relatively speaking, commercially insignificant. On the other hand the remedial scheme was not extended to contracts of hire purchase which fall outside the scope of the directive.

*Article 2 – Conformity with the contract*

28. Arts 2 and 3 are the core of the directive, art 2 establishing the fundamental requirement that the seller supply the consumer with goods that are in conformity with the contract and art 3 setting out the consumer's remedies for breach of that requirement.

29. According to art 2.1 "the seller must deliver goods to the consumer which are in conformity with the contract of sale". This immediately gives rise to an ambiguity. The directive seems to require "conformity" to be assessed at the time of delivery, but does not define its concept of "delivery". English law recognises the concept of "constructive delivery" whereby goods can be delivered without any change of physical possession where the person in possession of goods acknowledges that he holds them on behalf of someone else. It is not clear whether this concept is recognised by the directive. This has a real practical significance, because failure to define "delivery" means that it is not clear who is intended to bear the risk of loss of or damage to the goods during transit to the consumer, as where goods are supplied by mail order or other distance contract. The principle of consumer protection would suggest that "delivery" should mean "physical delivery" so that the directive would require the goods to be in conformity with the contract when they actually reach the

consumer[81]. However, English law generally links the risk of loss of or damage to the goods with the transfer of property in them from seller to buyer, and property can pass without the transfer of possession, with the result that prior to the directive where goods were supplied at a distance, property and therefore risk of damage would pass to the buyer at the time the goods were dispatched to the consumer. Confusingly, recital 14 to the Directive states that "references to the time of delivery do not imply that Member States have to change their rules on the passing of the risk." The directive's intention is therefore not clear.

30. Arts 2.2 – 2.5 expand on the conformity requirement. Art 2.2 provides that goods are presumed to be in conformity with the contract if they

    a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
    b) are fit for any particular purpose for which the consumer requires them which the consumer has made known to the seller at the time of conclusion of the contract and which the seller has accepted;
    c) are fit for the purposes for which goods of the same type are normally used; and
    d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer of the goods[82] or his representative, "particularly in advertising or labelling".

31. It is worth pausing to note that art 2.2 does not in terms require goods to comply with any of its requirements. It creates a presumption that goods which satisfy the four requirements are in conformity with the contract. Although it is not clear, it would see that the presumption raised by art 2.2 is rebuttable, so that goods which satisfy the four requirements may nevertheless be held not to be in conformity with the contract whilst, equally goods may be in conformity despite their not satisfying one or more pf the requirements.

[81] The consumer's natural expectation would be that the goods would not be delivered until they actually reach him.
[82] "Producer" is given an extended definition to include the manufacturer of the goods, the person who imports them into the territory of the EC and any person who by placing his name, trade mark or other distinctive sign on the goods purports to be the producer. Compare the similar provision in the product liability directive.

32. Art 2.3 adds two further qualifications to art 2.2. It provides, first, "there shall be deemed not to be a lack of conformity … if at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity." Second, there is deemed not to be a lack of conformity if the lack of conformity has its origin in materials supplied by the consumer.

33. Under art 2.2 the seller is effectively held liable for the public claims and statements made about the goods by the producer of the goods. Art 2.4 allows him to avoid liability for such statements if he shows (i) that he was not and could not reasonably have been aware of the statement in question; (ii) that by the time of conclusion of the contract the statement in question had been corrected; or (iii) that the consumer's decision to buy the goods could not have been influenced by the statement.

34. Art 2.5 expands the ambit of the directive, providing that any lack of conformity resulting from "incorrect installation of the goods" shall be deemed to be equivalent to a lack of conformity in the goods if either (i) installation forms part of the contract and the goods are installed by the seller or "under his responsibility" or (ii) the "product" is intended to be installed by the consumer, is so installed and the incorrect installation is due to a shortcoming in the installation instructions. This is a difficult provision and its drafting far from clear. There is no definition of "installation"; presumably it includes such actions as (say) installing a shower; but it is not clear if it also includes (e.g.) assembly of self assembly furniture or the fitting of a new tyre to a car or fitting of a car radio. As will be seen, it is not clear to us that this provision has been properly implemented in the UK.

*Implementation*

35. There is no provision in the implementing legislation directly corresponding to the general requirement in the directive that the seller must deliver goods which are in conformity with the contract. Instead the view was taken that the aspects of conformity listed in art 2.2 are broadly equivalent, in functional terms, to the implied terms relating to the goods in ss. 13 – 15 SGA. One must therefore look to several provisions of domestic law for implementation of art 2.

36. The nearest analogue to the general requirement in art 2.1 is SGA s 27 which states that it is the duty of the seller to deliver the goods in accordance with the terms of the contract.

37. It is generally thought that in domestic law the compliance of the goods with the terms of the contract must be assessed at the time of delivery or at the time of transfer of risk from seller to buyer. Often these will be the same but risk generally passes with property and can pass independently of physical possession. The Directive seems to require that the goods be in conformity with the contract when *physically* delivered to the buyer (see the discussion above) and s 20 SGA was therefore amended to provide that where the buyer deals as a consumer the goods are at the seller's risk until delivered to the buyer[83]. A further amendment was made to s 32 SGA to provide that where the buyer deals as consumer, and contrary to the general rule, where the seller is authorised to send the goods to the buyer, delivery to the carrier is not to be treated as delivery to the buyer[84]. As noted above, the better view is that these amendments were required in order to satisfy the directive, but the directive is ambiguous on the point and, if art 2 is satisfied by constructive delivery, these provisions go further than required.

38. Note should also be taken of s 48A (1)(a) which makes the remedies derived from the directive available to the buyer where the seller delivers to the consumer goods which do not conform to the contract and which therefore inferentially imposes a duty to deliver goods which are in conformity with the contract.

*Art 2.2 – presumption of conformity*

39. Art 2.2 raises a presumption that the goods conform with the contract if they satisfy four criteria. The requirements of those four criteria are broadly equivalent to those of the implied terms relating to goods in ss 13 – 15 SGA. There are however important differences between the implied terms and the provisions of art 2.2. Moreover, as noted above, compliance with the requirements of art 2.2 raises a presumption that the goods conform with the contract. On its face compliance with art 2.2 is neither a necessary nor a sufficient condition of goods being in conformity with the contract. In contrast the SGA imposes an absolute requirement that the goods delivered under the contract comply with the implied terms in ss 13 -15. Insofar as under the directive

[83] s.20(4).
[84] S.32(4).

goods may be in conformity with the contract despite their not complying with the requirements of art 2.2, domestic law is more demanding. However we expect that in practice the courts will normally treat goods which do not satisfy art 2.2 as not conforming with the contract. Moreover there is considerable flexibility built into the implied terms in ss 13 – 15 SGA allowing the court to manipulate their application. In practice we would therefore expect this distinction between the two instruments to be more apparent than real.

40. On the other hand it seems clear that goods may satisfy art 2.2 and still be judged not to be in conformity with the contract. In domestic law terms this may happen where goods do not comply with an express or common law implied term of the contract. The key provisions here are ss 27 and 48F SGA. Section 27 has been referred to above. The seller must deliver goods "in accordance with the terms [express and implied] of the contract". Section 48 F defines conformity with the contract for the purposes of SGA Part 5A which implements the remedial provisions of the directive and provides that there is a lack of conformity for this purpose if there is a breach of an express term or of a term implied by ss 13 – 15 SGA. We would suggest that a lack of conformity may also result from breach of a common law implied term and that technically s 48F may not go far enough properly to implement the directive.

41. Paragraphs (a) to (d) of art 2(2) list conditions, compliance with which raises a presumption that the goods are in conformity with the contract. On the whole they correspond to the implied terms in SGA ss 13 – 15, but it is not necessarily possible to map the paragraphs of art 2.2 one to one onto individual implied terms.

*Art 2.2(a)*

42. According to art 2.2(a) in order for goods to be presumed to be in conformity with the contract they must comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model. This is broadly equivalent to the implied terms in ss 13 and 15 SGA requiring goods sold by description to correspond with that description and, where sold by sample to correspond to the sample.

43. There are nuanced differences between the domestic provisions and those of the directive. For instance, the concepts of "sale by description" and "sale by sample" do not cover all instances of the use by the seller of descriptive words and/or a sample;

to that extent the domestic provisions may on their face be narrower in application than those of the directive. On the other hand on a literal reading art 2.2(a) is limited to descriptions given by the seller; s 13 SGA is not and to that extent may appear to be wider in scope. In practice we anticipate that the two sets of provisions will have broadly equivalent effect.

*Art 2.2(b)*

44. According to art 2.2(b) in order for goods to be presumed to be in conformity with the contract they must be "fit for any particular purpose for which the consumer requires them and which he has made known to the seller at the time of conclusion of the contract and which the seller has accepted". This broadly corresponds to s 14 (3) SGA which requires goods to be reasonably fit for the buyer's purpose.

45. Again there are subtle differences between the two provisions. The consumer can rely on s 14(3) if (a) he makes his purpose known to the seller or his agent, or, in certain circumstances, a credit broker acting for the seller unless (b) the circumstances show that the consumer did not rely on the seller's skill or judgement or that it was unreasonable for him to do so. There is no requirement for the seller to "accept" the buyer's purpose, although if the seller does so it will clearly be reasonable for the buyer to rely on him, but insofar as the directive appears to require a positive act on the seller's part whereas s 14(3) appears to protect the consumer unless there is some circumstance, such as a disclaimer of expertise rendering reliance unreasonable, s 14 (3) could be said to be more protective. In practice, however, we would expect that in many cases the seller's acceptance for the purposes of art 2.2 (b) will generally be tacit or implied so that the real difference between the two provisions will be minimal.

46. On its face art 2.2(b) appears to require goods to be absolutely fit for the buyer's stated purpose, whereas s 14(3) requires only reasonable fitness. To that extent s 14 (3) would seem to be less favourable to the consumer. Again though we expect that in practice the two provisions will have similar effects.

*Art 2.2(c)*

47. According to art 2.2(c) in order for goods to be presumed to be in conformity with the contract they must be “fit for the purposes for which goods of the same type are normally used.”

48. Fitness for normal purpose is the core of the requirement under SGA s 14(2) that goods be of satisfactory quality. Section 14(2A) provides that goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory taking account of … all the relevant circumstances” . Section 14(2B) then lists a number of factors to be taken into account as “aspects of quality” in appropriate cases. The first of those factors is “fitness for all the purposes for which goods of the same description are commonly supplied”.

49. Again there is scope for argument that the two provisions are subtly different. There clearly is a possible difference between “description” and “type” and there is a further possible difference between “the purposes for which goods are normally used” and “the purposes for which goods are commonly supplied”. However the differences are subtle; it cannot be said that either formulation is necessarily more favourable to the consumer than the other and in practice we would expect that they will generally produce similar outcomes.

*Art 2.2(d)*

50. According to art 2.2(d) in order for goods to be presumed to be in conformity with the contract they must “show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling.”

51. Again this broadly corresponds to the requirement under SGA s 14(2) that goods be of satisfactory quality. As noted above, the general quality standard in s 14(2A) is essentially a reasonable expectation test. Although public statements about the goods would probably be a relevant circumstance to be considered under s 14(2C) a new s 14(2D) was added to the SGA specifically to make such statements one of the circumstances to be considered where the buyer deals as a consumer. Section 14(2D) adopts the key words of art 2.2(d) verbatim.

52. Art 2.2(d) effectively makes the seller liable for public statements of the producer of the goods. Art 2.4 allows the seller in certain circumstances to avoid liability for such statements. It is implemented by new s 14 (2E) SGA, with some changes in wording which are not significant.

53. There is no provision in the directive corresponding to the list of factors in s 14(2B) SGA to be considered as aspects of quality "in an appropriate case". Those factors include appearance and finish, freedom from minor defects, safety and durability. In addition under s 14(2A) description and price are to be taken into account in determining whether goods are of satisfactory quality. It could be argued that the express reference to the factors in s 14(2B) SGA imposes a higher quality standard than under the directive, but we think that these factors would be considered by a court assessing quality even if they were not specifically referred to[85] and that they will be relevant in assessing whether, for the purposes of the directive, goods show the quality and performance … which the consumer can reasonably expect."

*Art 2.3*

54. Art 2.3 qualifies the conformity requirement in art 2, providing that

"There shall be deemed not to be a lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or could not reasonably be unaware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer."

55. Art 2.3 covers two situations: (i) the consumer is aware of a lack of conformity and (ii) the lack of conformity has its origin in materials supplied by the consumer." There is no directly corresponding provision in the SGA. Section 14 (2C) provides a partial equivalent to the first part of art 2.3. It qualifies the satisfactory quality requirement in s 14(2) by providing that the quality term does not extend to any matter making the goods unsatisfactory (a) which is specifically drawn to the buyer's attention before the contract is made or (b), where the buyer examines the goods, which that examination ought to reveal or (c) on a sale by sample which would have been apparent on examination of the sample.

56. The first part of art 2.3 is wider than s 14 (2C) in a number of respects, and to that extent the SGA provides on its face a higher standard of consumer protection than

[85] As was the case in the UK before express reference to these factors was introduced in 1994.

does the directive. Most importantly, s 14(2C) only qualifies the quality requirement in s 14(2), whereas art 2.3 operates as a qualification to all aspects of the conformity requirement in art 2. However, again one must take account of the way in which the SGA implied terms have been applied by the courts. Reasonable reliance is a condition of the fitness for purpose term in s 14(3) (see above) and the courts have held that a sale is not one *by* description unless the buyer reasonably relies on the description[86]. Where the consumer is aware that a description is inaccurate, or that goods are not fit for his purpose, it will be unreasonable for him to rely on the description or to expect the goods to be fit for that purpose, as the case may be, and the sale will therefore not be one by the relevant description, or the relevant lack of fitness will not amount to a breach, as the case may be. The upshot is again that we think that although there is no direct statutory equivalent to art 2.3, English law largely produces the same effect.

57. There is no provision in the SGA, or in the SGSA, corresponding to the second part of art 2.3 which simply has not been implemented. The provision operates as a qualification to art 1.4 (contract for goods to be manufactured to be treated as sale) and reduces the seller's liability. As noted, art 1.4 has not been transposed. The failure to transpose the second part of art 2.3 arguably provides an increased level of consumer protection in those cases where the contract to make and supply goods is classified as a sale. It would be possible for a domestic court to reach the same result as the directive (seller not liable for lack of conformity originating in consumer's materials) by a roundabout route by classifying the transaction as one for work and materials, the supplier then being liable only for his own materials, but that would result in inadequate transposition of the effect of art 1.4, because the supplier would not be liable for lack of conformity in the finished product[87]. We would suggest that the transposition of arts 1.4 and 2.3 needs to be reconsidered.

58. The implementation of art. 2.5 is also problematic. As noted above, art. 2.5 applies where there is a lack of conformity resulting from incorrect installation of the goods and either (a) the goods were installed by the seller or under his responsibility under the contract of sale or (b) the goods were intended to be and were in fact installed by the consumer and incorrect installation results from a shortcoming in the installation instructions. The only provision implementing art. 2.5 is s 11S of the SGSA 1982, which provides that under a contract for the supply or transfer of goods, the goods do

[86] *Harlingdon & Leinster v Christopher Hull Fine Arts* [1991] 1 QB 564

[87] An alternative, treating the consumer as first selling the materials to the supplier, would not work since as a private seller the consumer would not be liable for the quality or fitness of the materials.

not conform to the contract if "installation of the goods forms part of the contract for the transfer of goods, and the goods were installed by the transferor, or under his responsibility, in breach of the term implied by section 13 below...". The effect is to make available the remedies of repair, replacement, price reduction and rescission, derived from the directive where there is a breach of the implied term in s 13 SGSA. This is inadequate to cover the first situation covered by art. 2.5. That requires a lack of conformity resulting from inadequate installation to be treated as a lack of conformity in the goods, for which the seller or supplier will be strictly liable. Under the implementing provision a lack of conformity is triggered by the supplier's breach of the term implied by SGSA s 13. That term requires the supplier to perform the service element of the contract (the installation of the goods) with reasonable skill and care, and therefore requires the consumer to prove negligence on the part of the supplier in order to establish a breach of contract. UK legislation therefore seems to provide a lower level of consumer protection than does the directive and so the implementation is inadequate.

59. There is no provision implementing the second part of art. 2.5, requiring any lack of conformity resulting from the consumer's own installation to be treated as a lack of conformity in the goods where the incorrect installation results from a shortcoming in the installation instructions, although arguably such a situation would be covered by the implied terms in SGA s 14, case law having recognized that inadequate instructions can render goods unsatisfactory.

*Art 3: Rights of the consumer*

60. Art 3 is headed "Rights of the consumer" and sets out what might in domestic law be described as the *remedies* available to the consumer where the seller is in breach of the conformity requirement. Art 3.1 confirms the reading of art 2.1 suggested above, stating that the seller is liable for any lack of conformity which exists at the time of delivery of the goods. Essentially the directive provides the consumer with four remedies – repair or replacement of the goods, reduction of the price and total "rescission" of the contract (art 3.2). However, the relationship between them is complex and the bulk of art 3 is given to explaining that relationship. Essentially it arranges the four remedies in a hierarchy and, reflecting the underlying philosophy referred to earlier, gives preference to the first two mentioned (repair and

replacement) which are effectively forms of specific enforcement. Art 3.3 therefore provides that "in the first place" the consumer may require the seller to repair or replace the goods, free of charge, unless this is "impossible or disproportionate". It continues that any repair or replacement must be completed within a reasonable time and without any significant inconvenience to the consumer, taking account of the nature of the goods and the purpose for which the consumer required them. Repair is defined in art 1.2 as "to bring consumer goods into conformity with the contract of sale". Art 3.4 explains that "free of charge" covers the "necessary costs incurred to bring the goods into conformity" and includes "postage, labour and materials".

61. The key word in art 3.3 is "disproportionate". The second paragraph of art 3.3 explains that a remedy shall be deemed disproportionate if it imposes costs on the seller which, in comparison with "the alternative remedy" are unreasonable, taking into account

    b) The value the goods would have if they were in conformity with the contract
    c) The significance of the lack of conformity
    d) Whether the alternative remedy could be completed without significant inconvenience to the consumer.

62. Art 3.3 is a difficult provision. It is clear that the assessment whether a remedy is disproportionate involves a comparison between two remedies but it is not clear whether comparison can only be made between repair and replacement or whether repair/replacement can also be compared with the other two remedies of price reduction and rescission. This is important. If comparison between all four remedies is permitted the effect will be to make repair and replacement much less common since repair and, in particular, replacement will generally impose greater costs on and be less convenient for the seller than, especially, price reduction. As will be apparent below this is an important question in view of the way art 3 has been implemented in the UK.

63. Arts 3.5 and 3.6 deal with the remaining two remedies, of price reduction and rescission. Art 3.5 provides that the consumer is entitled to have the price reduced or the contract rescinded in three circumstances:-

    e) if the consumer is entitled to neither repair nor replacement;

f) if the seller has not completed "the remedy[88]" within a reasonable time;

g) if the seller has not completed "the remedy" without significant inconvenience to the consumer.

64. There is nothing to suggest that the choice between rescission and price reduction involves any comparison between the two or consideration of whether either remedy is disproportionate. However, art 3.6 provides that the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

*Implementation*

65. Art 3 is implemented by insertion of a new Part 5a into the SGA, containing six new sections (ss 48A- 48F). Although the new sections do not follow the text of the directive verbatim they follow it closely and, insofar as they differ, the new provisions of the SGA are arguably less favourable to the consumer than are those of the directive. To that extent it may be questionable whether the directive has been properly implemented.

66. In one respect domestic law is considerably more favourable to the consumer than is the directive. As noted above, prior to implementation the consumer's remedies under domestic law were to reject the goods for a full refund and/or claim damages. The right to reject closely resembles the right under the directive to rescind the contract but, although it is available only for short time after delivery, it is in some ways more potent than the directive's right to rescind. Most importantly it is an absolute right and may be exercised if the seller is in breach of condition regardless of questions of reasonableness. A policy decision was taken on implementation not to reduce existing levels of consumer protection, and the rights to reject and/or claim damages were retained, relying on art 8 of the directive which permits the retention of provisions providing a higher level of protection than the directive and provides that it is without prejudice to national rules on contractual and non-contractual liability. Insofar as the right to reject is more favourable to consumers than the rights provided by the directive, domestic law therefore goes further than the directive requires, in accordance with a deliberate policy decision.

67. The policy of retaining existing provisions creates a number of other difficulties.

[88] The remedy referred to would seem to be whichever of repair and replacement the consumer requested.

68. The interaction of the new remedies derived from the directive and the pre-existing domestic remedies of rejection and damages needs to be worked out. An additional new provision, s 48D, restricts the consumer's right to reject where (s)he has asked for repair, but the problem of the effect on the right to reject of a request for replacement is not addressed in the legislation.

69. Similarly the relationship between a claim for damages and the remedies derived from the directive is not addressed in the legislation. One may infer from basic principles that no damages should be awarded in respect of losses which are effectively avoided by a remedy derived from the directive, but the absence of express provisions to address the issue is to be regretted in a consumer protection measure. On the other hand we should observe that the retention of the right to claim damages is permitted by the directive and, insofar as a remedy derived from the directive may not make good all of the consumer's losses, is entirely justified.

70. We turn now to the details of the implementation.

71. Art 3.1 provides that the seller shall be liable to the consumer for any lack of conformity which exists at the time the goods are delivered to the consumer. There is no directly corresponding implementing provision, but s 27 SGA provides that it is the duty of the seller to deliver the goods in accordance with the terms of the contract and new provision s 48A(1) sets out the conditions for application of the new remedial provisions in SGA Part 5a. Section 48A(1)(b) provides that Part 5a applies where the goods do not conform to the contract of sale at the time of delivery. Section 48F defines "lack of conformity" for this purpose and provides that there is a lack of conformity if there is in relation to the goods a breach of an express term or a breach of one of the terms implied by SGA ss 13 – 15 (see above).

72. Art 3.2 sets out the remedies available to the consumer in the event of a lack of conformity – repair or replacement of the goods, price reduction and rescission of the contract. It is implemented, albeit not verbatim, by s 48A(2). Reference should also be made to s 48E which gives the court power to order specific performance by the seller of the duty to repair or replace the goods. This section has no analogue in the directive but was deemed necessary because repair and replacement are effectively forms of specific performance, a discretionary remedy in English law which is rarely awarded and whose availability is restricted under the SGA. Unfortunately s 48E may not be adequate to give effect to the directive in the way intended. It gives the court a wide discretion to award an alternative remedy to that sought by the consumer and to

impose conditions on the remedy awarded, which does not appear to be justified by the directive.

73. Art 3.3 deals with the availability of the remedies of repair and replacement, the primary remedies in the directive's scheme. It is implemented by SGA s 48B. Section 61 (1) SGA transposes the directive's definition of "repair". The transposition is not verbatim but the differences are not significant.

74. The first sub-paragraph of art 3.3 provides that the consumer may require the seller to repair or replace the goods, without charge, unless this is impossible or disproportionate. Sub-paragraph 2 outlines the meaning of "disproportionate". Sub-paragraph 3 imposes a requirement that any repair or replacement be completed within a reasonable time without significant inconvenience to the consumer. Art 3.4 complements art 3.3 by explaining that "free of charge" refers to the necessary costs incurred to bring the goods into conformity with the contract, including postage, labour and materials.

75. Sub-paragraph 1 is implemented by a combination of SGA ss 48B(1) and 48B(3); s 48B(2) implements art 3.4 and explains the meaning of "free of charge". The implementation is not verbatim and we would suggest that it is questionable whether s 48B(3) properly implements the directive. The test of disproportionality in art 3.3 requires a comparison of the costs imposed on the seller by the remedy sought and "the alternative remedy". Appearing in the context of art 3.3 "the alternative" seems to us to refer "to the other of repair and replacement". Section 48B(3) on the other hand permit comparison to be made with any of the directive's four remedies so that the seller or a court would be entitled to refuse (say) repair on the grounds that it imposes costs which are unreasonable in comparison with those imposed by price reduction or rescission. As this will often be the case, repair and replacement will be available under s 48B(3) much less often than under our reading of art 3.3, and if we are correct the implementation is therefore less favourable to the consumer than is the directive and thus there is a failure of implementation. However, the directive is not clear on the point and it may be that the implementation is compliant. The opportunity should be taken to clarify the directive.

76. Sub-paragraph 2, dealing with the meaning of "disproportionate", is implemented by SGA s 48B(4). The implementation is not verbatim but there is no significant difference in effect.

77. There is no provision directly equivalent to art 3.3 sub-paragraph 3, requiring repair or replacement to be completed within a reasonable time but s 48B(2) achieves the same effect by imposing on the seller a duty to complete the remedy within a reasonable time and without significant inconvenience to the consumer, whilst s 48B(4) includes consideration of whether the remedy can be completed in accordance with these criteria in its assessment of disproportionality. This seems to achieve the same effect as art 3.3(3). These provisions must be read alongside s 48B(5) which explains that the determination of what is a reasonable time or significant inconvenience is to be made by reference to the nature of the goods and the purpose for which the consumer required them. Taken together these provisions implement art 3.3(3).

78. Art 3.5 deals with the availability of the remedies of rescission and price reduction. It provides for them to be available if the consumer is entitled to neither repair nor replacement or if the seller has failed to implement "the remedy" – presumably repair or replacement – within a reasonable time or without significant inconvenience to the consumer. This is augmented by art 3.6 which provides that the consumer is not entitled to have the contract rescinded if the lack of conformity is minor.

79. These provisions are implemented, in the main, by SGA s 48C. Again the implementing provisions do not follow the directive verbatim. Arguably the implementing provision is inadequate to satisfy the directive. Section 48C(1) provides that if the seller delivers goods which do not conform to the contract and either the buyer is not entitled to require repair or replacement or the seller has failed to effect repair or replacement within a reasonable time or without significant inconvenience the consumer, the consumer is entitled to reduce the price "of the goods in question or to rescind the contract "with regard to those goods"[89]. Section 48 therefore anticipates that where only part of the contract goods are not in conformity with the contract the consumer may be entitled to a form of partial rescission, limited to the non-conforming goods. Such a right is not normally recognised in English law, and it is not clear that it is consistent with the directive. There is no corresponding restriction in art 3.5 which speaks simply of the contract being rescinded, but art 3.2 could be read as providing for partial rescission restricted to the non-conforming goods. Again there is a need for clarification of the directive.

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[89] A similar restriction appears in s 48A.

80. Section 48C(3) provides for a further restriction on the right of rescission, providing that on rescission the amount reimbursed to the consumer may be reduced to take account of the use he has had of the goods. This is reinforced by s 48E(5) which, dealing with the powers of the court, gives the court power when ordering rescission to reduce any refund due to the consumer to take account of the use he has had of the goods. There is no corresponding provision in art 3 and, indeed, there is no analogous restriction in the directive. Section 48C(3) appears to be based on recital 15 to the directive.

81. On the other hand there is no provision implementing art 3.6, which provides that the consumer is not entitled to have the contract rescinded where the lack of conformity is minor. On the face of it this is more favourable to the consumer than is the directive, but s 48E(3) gives the court wide general discretion where the consumer seeks to rescind the contract to award an alternative remedy if it considers that alternative more appropriate. This would enable the court to refuse rescission in the case of a minor lack of conformity. Section 48E(3) is supplemented by s 48E(6) which gives the court a further wide discretion to make any order it may make on such terms and conditions as it thinks just. Neither provision has any basis in the directive and together these provisions impose a significant restriction on the consumer's right to rescind. Again therefore the consumer's rights under domestic law appear to be more restricted than under the directive.

*Right of redress*

82. Under both the directive and domestic law the consumer's remedy for lack of conformity lies against his contractual supplier, who may not be actually responsible for the lack of conformity. Art 4 is intended to provide the seller with a right of redress against the person responsible. However, its drafting is far from clear. It provides that "the seller *shall be entitled* to pursue remedies against the person or persons liable in the contractual chain" but continues that the person or persons against whom the seller may pursue remedies and the "relevant actions and conditions of exercise *shall be determined by national law*". It is thus not clear whether it is mandatory for member states to provide a right of redress in all cases. Again this is an issue for the implementation.

83. There is no provision implementing art 4. The effect of the contractual nature of the seller's liability is that the final seller will often be liable because of some act of a

previous party in the supply chain. Where that happens English law permits the seller to pursue a claim for a contractual indemnity against his supplier, who will in turn have a claim against his supplier, and so on back up the supply chain. However, the seller's claim will not be a perfect mirror image of the consumer's claim against him. In addition English law permits exclusion of liability against a buyer who does not deal as a consumer[90], so that the seller may find his indemnity claim barred by an appropriate exclusion or limitation clause. This appears to be permitted by the directive which allows national law to determine "the relevant actions and conditions of exercise", but the point is not clear and art 4 could also be read as requiring member states to ensure that the final seller is entitled to some redress. This is therefore another point on which clarification of the directive would be welcome.

*Art 5 Time limits*

84. Art 5 is headed "Time Limits" and lays down three separate time limits. First it provides that the seller is to be liable for any lack of conformity which becomes apparent within two years from delivery of the goods. Any limitation period under national law must be not less than two years (art 5.1). The period provided for in art 5.1 is not strictly a limitation period[91] but would be more properly termed a "defect period". Second, it permits member states to require consumers to inform the seller of any lack of conformity within two months of its discovery (art 5.2). Third, it provides that any lack of conformity which becomes apparent within six months of delivery shall be presumed to have existed at the time of delivery unless such presumption is incompatible with the nature of the goods or the lack of conformity (art 5.3). The seller is only liable in respect of a lack of conformity which exists at the date of delivery. Ordinarily the consumer who claims in respect of a lack of conformity which only manifests some time after delivery would have to prove that the lack of conformity existed at the date of delivery. Art 5.3 reverses that burden of proof in respect of any lack of conformity which becomes apparent within six months from delivery.

*Implementation*

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[90] UCTA S 6. The exclusion must satisfy aa tet of reasonableness.
[91] Although art 5.1 does state that any limitation period provided for by domestic law must not be less than two years.

85. There is no provision corresponding to art 5.1 in the UK implementation where the only relevant time limit is the general limitation period of six years for contractual claims. This was already the limitation period for damages claims and it was felt that to have two different time limits applied to similar claims would be undesirably confusing, whilst as previously noted the overriding policy was that there should be no reduction in existing levels of consumer protection. The result is that English law is more favourable to the consumer than the directive requires since, provided the claim is brought within the limitation period, it allows the consumer to obtain redress for a lack of conformity which becomes apparent at any time within six years from delivery.

86. It is difficult to see how a notification period such as that permitted by art 5.2 could be policed and the UK decided not to take up the option to adopt a notification period. It is not clear whether a consumer who unreasonably delays pursuing a remedy after detecting a lack of conformity could be barred from making a claim, perhaps on the basis of estoppel but subject to that possibility as a result of non-implementation of art 5.2 here again English law would appear to be more favourable to the consumer than the directive requires.

87. Art 5.3, providing that any lack of conformity which becomes apparent within six months from delivery shall be presumed to have existed at the time of delivery unless such presumption is incompatible with the nature of either the goods or the lack of conformity, is implemented, albeit by different wording, by SGA s 48A(3).

*Art 6 Guarantees*

88. Art 6 is the sole provision concerned with “guarantees”. “Guarantee” is defined widely for this purpose as “any undertaking by a seller or producer … given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising.” It thus includes not merely formal guarantees but also advertising claims such as “Your money back if …” Its main effect is to require guarantees to be legally binding in accordance with their terms. There is no requirement as to the content of a guarantee undertaking; that is a matter for the guarantor to decide. However, art 6.2 requires that a guarantee must include a statement that the consumer has legal rights under national law which are not affected by the guarantee, and set out in plain intelligible language the terms of the guarantee

and the conditions to be satisfied to make a claim under the guarantee. Art 6.3 reinforces art 6.2 by requiring that on request the consumer be supplied with guarantee in writing or some other "durable medium". "Durable medium" is not defined in the directive. "The phrase appears in other directives dealing with consumer and contractual issues but is not consistently defined. It is therefore necessary to look to other instruments and to court decisions for guidance as to its meaning. There is no indication whether "plain intelligible language is to be judged according to an objective or subjective standard, but an objective standard would seem more appropriate. The consumer information function of the guarantee is supported by art 6.4 which permits member states to impose a requirement that any guarantee supplied with goods marketed in their territory be made available in one or more of the official languages of the Community. No sanction is prescribed for non-compliance with the requirements of art 6 but art 6.5 provides that non-compliance is not to affect the validity of the guarantee or its enforceability by the consumer.

*Implementation*

89. The definition of "guarantee" is transposed by SSGCR reg 2. The transposition is not verbatim. SSGCR reg 12 defines "guarantee" as "any undertaking to a consumer given by a person acting in the course of his business …" It is not clear whether this should be interpreted as meaning that the giving of the guarantee must be in the course of the guarantor's business, and if so, how "in the course of business" should be interpreted in this context, but it is clear that the category of potential guarantors under the regulations is wider than that under the directive, potentially including agents, intermediaries and advertisers. On the other hand, given the width of the definition of "producer" in the directive the difference between the two definitions is unlikely to make any significant difference in practice.

90. The directive's definition of "producer" is not used for the purposes off defining "guarantee" but is transposed verbatim by s 61(1) SGA for other purposes.

91. Prior to implementation of the directive there was some doubt about the enforceability of such undertakings at common law. Art 6 is implemented by regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002, the only free standing substantive provision of the 2002 Regulations, but reliance is also placed on the pre-existing Consumer Transactions on Statements Order, 1976.

92. Art 6.1 contains the fundamental principle that a guarantee undertaking as defined shall be legally binding on the guarantor. It is implemented by reg 15(1) SSGCR 2002.The language differs but the practical effect of the two provisions is the same. . The most significant difference is that the implementing provision makes explicit that the guarantee takes effect as a contractual obligation.

93. On the whole the contents of the guarantee are left to be determined by market forces. Art 6.2 contains some minimal prescription of the content of the guarantee, requiring that it contain a statement that the consumer has rights under national law which are not affected by the guarantee, and that it set out in plain intelligible language the contents of the guarantor's undertaking and the conditions for making a claim under it. The UK already had legislation covering the first of these requirements in the form of the CT(RS)O 1976. Those regulations remain in force and art 6.2 is partly implemented by regs 4 and 5. The second requirement of art 6.2 is implemented by reg 15(2) of the SSGCR 2002.Again there are linguistic differences but they have little practical significance.

94. Art 6.3 provides that the consumer is entitled, on request, to have the guarantee made available to him in writing or in another "durable medium" available and accessible to him. Art 6.3 is implemented by SSGCR reg 15(3) and 15(4), but with some small differences. Noattempt iss made to expand the definition of "durable medium".

95. Reg 15(3) provides that the guarantee must be made available to the consumer "within a reasonable time". There is no corresponding qualification in the directive. It may be that this qualification is implicit in the directive, but on the face of it the directive appears to require the guarantee to be made available immediately ("on request"). If this is the correct reading of the directive the SSGCR impose an impermissible qualification on the consumer's rights.

96. Reg 15(4) provides that the obligation to supply a copy of the guarantee is imposed on both the guarantor and the seller of the goods. Again there is no corresponding provision in the directive which does not make clear who is required to respond to the consumer's request. It may be that an obligation on the seller to supply the guarantee is implicit in the directive; if not the SSGCR are more favourable to the consumer than is the directive, but it is submitted that this is appropriate in the interests of giving efficacy to the provision.

97. The UK took up the option permitted by Art 6.4 to require that any guarantee given of goods marketed in its territory shall be drafted in one or more of the official languages of the EC and reg 15(5) requires that any guarantee of goods marketed in the UK must be provided in English.

98. Art 6.5 provides that where a guarantee infringes the requirements of art 6.2, 6.3 or 6.4 the validity of the guarantee is not affected. It is implemented by SSGCR reg15(6).

99. We should add one observation. Although the directive requires the imposition of duties on guarantors it prescribes neither a remedy for breach of those duties nor the legal nature of those duties. As we have noted, SSGCR reg 15 makes clear that the guarantee undertaking itself is enforceable as a contractual undertaking. The nature of the other obligations imposed by reg 15 is not made clear. In accordance with general principles they should be enforceable by the consumer by way of action for breach of statutory duty. However, it would be preferable if this were made clear in the legislation.

*Art 7 Binding nature*

100. Art 7 prohibits exclusion or limitation of the consumer's rights derived from the directive. It contains two main provisions. Art 7.1 provides that contract terms or agreements which (directly or indirectly) waive or restrict the consumer's rights resulting from the directive are not binding on the consumer if concluded before a lack of conformity is brought to the seller's attention. Thus contractual exclusion and limitation clauses are ineffective but agreements to settle disputes are permitted. By way of partial derogation from this prohibition it permits member states to allow contracting parties on a sale of second hand goods to agree a liability period of not less than one year, rather than the two years provided for by art 5.

101. Art 7.2 seeks to prevent consumers being deprived of the directive's protection by choice of law and requires member states to take "the necessary measures" to ensure that consumers are not deprived of the directive's protection as a result of "opting for" the law of a non-member state as the applicable law where the contract has a "close connection with the territory of the Member States". This is a common form of anti-avoidance provision in EU consumer protection legislation.

*Implementation*

102. No new provision was deemed necessary to implement art 7.1. Sections 6 and 7 of UCTA 1977 already rendered wholly ineffective any attempt to exclude or restrict the SGA implied terms in the case where the buyer deals as a consumer. UCTA S 13 extends the reach of the Act to a wide range of terms which have the effect of excluding or restricting liability or its enforcement. Some amendment was required to the definition of "deals as a consumer" in order to align the 1977 Act with the directive. Originally UCTA required that for a person to "deal as a consumer" three requirements had to be satisfied. (1) The seller had to contract in the course of a business; (2) the buyer had to be contracting not in the course of a business; and (3) the goods supplied under the contract had to be of a type ordinarily supplied for private use or consumption. In order to align UCTA with the directive this third requirement has been deleted where the buyer is a natural person. However, as noted above, it has been held that a limited company can deal as a consumer for the purposes of UCTA although not for the purposes of the directive. The third requirement relating to the type of goods supplied has therefore been retained in cases where the buyer is a limited company. As noted above, the rights derived from the directive are given under the implementing legislation to buyers who deal as consumers, adopting the UCTA definition of "deals as a consumer". It is therefore possible for a corporate buyer to deal as a "consumer" and benefit from the rights granted by the directive. In such a case however it will be possible for the seller validly to exclude his liability where the goods supplied are not of a type ordinarily supplied for private use or consumption. Insofar as the UCTA protects corporate buyers it applies more widely than the directive requires, but since this extension is wholly outwith the scope of the directive it does not depend on the "minimal2 clause.

103. UCTA ss 6 and 7 also provide wider protection than the directive in another respect, since they prohibit exclusion or restriction not only of the rights and remedies derived from the directive but also those arising under domestic law. As noted above the rights to reject non-conforming goods for breach of condition and/or claim damages for breach of contract are retained following the implementation. The claim for damages falls outside the scope of the directive (art 8.1); the retention of the right of rejection is permitted by the minimum harmonisation clause in the directive (art 8.2). Insofar as UCTA ss 6 and 7 prohibit restriction or exclusion of these remedies they go further than required by the directive, but their retention is consistent with the

commitment not to reduce existing levels of protection. In addition, insofar as the rights to reject and claim damages are retained, any differentiation between them and the rights derived from the directive for purposes of exclusion would only make the law unnecessarily complex.

104. The UK chose not to adopt the derogation permitted by Art 7.1 to permit the parties to agree a shorter liability period of not less than one year on a sale of second hand goods. The implementation therefore provides a higher level of protection than required by the directive.

105. In other respects however ss6 and 7 UCTA do not go far enough to satisfy the directive. We have noted already that the directive requires contracts to manufacture and supply goods to be treated as contracts for sale of the finished goods, and that under a contract to supply and install goods a lack of conformity resulting from incorrect installation of the goods be treated as a lack of conformity in the goods, but that neither of these requirements has been properly implemented. That failure of implementation creates further difficulties under art 7.1.

106. As we have noted a contract to manufacture and supply goods under English law may be classified as one for work and materials under which there are implied terms corresponding to those in SGA s 13 -15 relating to the goods supplied and a further implied term requiring the work to be done with reasonable skill and care. We have already observed that as a result there is a failure properly to implement arts 2 and 3 of the directive and that a defect resulting from negligent workmanship will not amount to a lack of conformity for the purposes of the implementing legislation. A further difficult arises under art 7. Exclusion of the implied skill and care term in s 13 SGSA is permitted insofar as the exclusion satisfies the test of reasonableness. It is therefore (theoretically) possible for the supplier under a manufacture-and-supply contract to exclude or restrict the consumer's rights in respect of a lack of conformity resulting from negligent workmanship. This is inconsistent with art 7.

107. A similar problem arises in relation to supply-and-install contracts where again the supplier's liability in respect of installation arises under SGSA s13. Again this has the consequence that liability etc can potentially be excluded or restricted subject to a test of reasonableness. This is inconsistent with art 7.

108. Art 7.2 requiring member states to "take the necessary measures" to prevent consumers being deprived of the directive's protection by the choice of the law of a non-member state as the applicable law of the contract where the contract has a strong connection with the territory of the member states has not been transposed in the implementation. Reliance seems to have been placed on UCTA s 27 which provides that where one party to the contract deals as a consumer the Act (UCTA) applies notwithstanding a choice of the law of some jurisdiction outside the UK. This is clearly inadequate to satisfy art 7.2 for a number of reasons.

- Section 27 only applies where the consumer is habitually resident in the UK..
- Most important, s 27 only prohibits evasion of the UCTA controls on contracting out of liability. At best therefore it prohibits evasion of the protection afforded by art 7.1. What art 7.2 requires is as a prohibition on evasion of the protection afforded by the rights and remedies derived from the directive in its entirety.

109. Nor can reliance be placed on the Rome convention, given effect in the UK by the Contracts (Applicable Law) Act 1990. That provides that a choice of law shall not deprive the consumer of the protection of the mandatory rules of law of the place where he has his habitual residence. However, it only applies in restricted circumstances, such as when the customer's order was solicited by the supplier or where it was received by the supplier in the state where the customer has his habitual residence.

110. We may therefore conclude that art 7.2 has not been adequately implemented.

91. Finally in this connection we would point out another failure of implementation. UCTA s26 provides that the Act's restrictions on exclusions of liability do not apply to "international supply contracts" as defined. Essentially the effect of s 26 is to disapply UCTA's controls to certain types of cross-border sale contract. There is no saving for consumer transactions. This is incompatible with the directive[92].

*Minimum harmonisation*

[92] The Law Commission has recognised this failure and recommended reform.

111. Art 8 is the minimum harmonisation provision. Art 8.2 permits member states to adopt or maintain provisions offering consumers a higher level of protection than that provided for by the directive. Art 8.1 compliments this by defining the scope of the directive. It provides that the rights arising from the directive may be exercised without prejudice to other contractual or non-contractual rights the consumer may have under national law.

112. No implementation of this provision was required.

*Information*

113. Art 9 requires member states to take appropriate measures to inform consumers of the national legislation transposing the directive and to encourage "appropriate professional organisations" to inform consumers of their rights.

114. No implementation of this provision was required. The information duty has been satisfied in various ways.

*Other provisions*

115. The remaining provisions deal with procedural and administrative matters. Art 10 adds a reference to the directive to the annex to directive 98/27/EC. Art 12 requires the Commission to present a report on the application of the Directive not later than7 July 2006[93]. Arts 11, 13 and 14 deal with the procedures for implementation of the Directive and its coming into force.

116. These provisions require no implementation.

## Impact of the UCPD

117. We have noted a number of respects in which domestic law, as amended to implement Directive 99/44, goes further than the directive requires, either by providing broader protection (e.g. by extending the directive's remedial scheme to contracts other than sale or by allowing businesses to qualify as consumers for some

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[93] Amongst the issues to be addressed by such review will be the question whether consumers should be given rights corresponding to those arising from the directive against producers of goods.

purposes) or by providing consumers with a higher level of protection than is required by the directive (e.g. by retaining the absolute right to reject for breach of condition under a contract of sale; providing longer time limits to liability than the two years provided for by the directive).

118. We have also noted a number of respects in which the UK has failed properly to implement the directive, most notably in relation to make-and-supply and supply-and-install contracts.

119. Insofar as domestic law provides a higher level of protection, in general it does so as a result of a deliberate policy decision, either that there should be no reduction in existing levels of consumer protection or that cognate transactions should be treated alike.

120. Insofar as measures providing for a higher level of protection than the directive are based on the minimum harmonisation clause and fall within the scope of the UCPD, they must be capable of being justified under art 3.5 UCPD as being essential to ensure that consumers are adequately protected.

121. The extension of consumer rights to businesses arguably falls outside the scope of the directive 99/44 (and the UCPD) and thus does not need to be justified in this way. We note however that if the Law Commission's recommendations are implemented it will no longer be possible for businesses to deal as consumers in this way.

122. Similarly it is arguable that the extension of the directive's remedial scheme to supply contracts other than sale falls wholly outside the scope of directive 99/44 and that it therefore does not need to be justified under the UCPD.

123. Retention of the right to reject would be more difficult to justify but it too falls outside the scope of the UCPD and therefore does not need to be justified in this way.

124. In fact most of the provisions of directive 99/44 fall outside the area covered by the UCPD. There is therefore little scope for replacing provisions of directive 99/44 by the provisions of the UCPD. However one of the unfair commercial practices prohibited by the UCPD is the provision of misleading information, and under art 6.1 this includes information about

- the nature of the product (art 6.1(a))

- the main characteristics of the product (art 6.1(b))

- its fitness for purpose (art 6.1(b))
- the consumer's rights, including the right to repair or replacement under directive 99/44.

125. Misleading statements about the qualities, fitness and nature of the product will often give rise to a claim that the product does not conform to the contract as required by directive 99/44 and implementing legislation. To that extent there would appear to be an overlap between the two instruments. However, they have different functions. The conformity requirement in directive 99/44 as implemented gives rise to private law rights and acts as a trigger for the rights provided by art 3. The UCPD provisions on the other hand give rise to administrative remedies. We therefore see no scope for the replacement of the provisions of directive 99/44 by those of the UCPD.

126. We must add one qualification. As we have noted, art 6 of directive 99/44, implemented by reg 15 SSGCR 2002 and the CT(RS)O 1976 requires a guarantee offered to a consumer to set out the contents of the guarantee, notify the consumer that his rights under general law derived from directive 99/44 are not affected, and be made available to the consumer on request. There clearly is an overlap between the provisions of art 6 of directive 99/44 and the prohibition on misleading practices in the UCPD.

## Implementation table

### Door-Step Selling

| Directive | National Transposition |
|---|---|
| ***Article 1 para 1, 1st sentence*** | Regulation 3(1) |
| ***Article 1 para 1, 1st sentence, 1st indent*** | Reg 3(1)(d) |
| ***Article 1 para 1, 1st sentence, 2nd indent, No i*** | Reg 3(1)(a)(i) |
| ***Article 1 para 1, 1st sentence, 2nd indent No ii*** | Reg 3(1)(a)(ii) |
| ***Article 1 para 1, 1st sentence, 2nd indent*** | Reg 3(1)(b) |
| ***Article 1 para 2*** | Reg 3(1)(b) |
| ***Article 1 para 3*** | Reg 3(1)(c) |
| ***Article 1 para 4*** | Reg 3(1)(c) |
| ***Article 2***<br>Definition of "consumer" | Reg 2(1) |
| ***Article 2***<br>Definition of "trader" | Reg 2(1) |
| ***Article 3 para 1*** | Regs 3(2)(f) and (g) |
| ***Article 3 para 2 lit. a*** | Reg 3(2) (a) |
| ***Article 3 para 2 lit. b*** | Reg 3(2)(b) |
| ***Article 3 para 2 lit. c*** | Reg 3(2)(c) |
| ***Article 3 para 2 lit. d*** | Reg 3(2)(d) |
| ***Article 3 para 2 lit. e*** | Reg 3(2)(e) and Reg 4 |
| ***Article 3 para 3*** | |
| ***Article 4, 1st and 2nd sentence*** | Regs 4 (1) and (3). |
| ***Article 4, 3rd sentence, lit. a-c*** | Reg (4) |
| ***Article 4, 4th sentence*** | Reg 4A – 4H |

| ***Article 5 para 1, 1st sentence*** | Reg 4(5) |
|---|---|
| ***Article 5 para 1, 2nd sentence*** | Reg 4(7) |
| ***Article 5 para 2*** | Reg 4(6) |
| ***Article 6*** | Reg 10 |
| ***Article 7*** | Regs 5-8 |

**Package Travel**

| Directive | National Transposition |
|---|---|
| ***Article 1*** | Regulation 3(1) |
| ***Article 2, para 1 1st sentence*** | Reg 2(1) |
| ***Article 2, para 1 2nd sentence*** | Reg 2(1) indent (i) |
| ***Article 2, para 2*** | Reg 2(1) |
| ***Article 2, para 3*** | Reg 2(1) |
| ***Article 2, para 4*** | Reg 2(1) |
| ***Article 2, para 4*** | Reg 2(1) |
| ***Article 3, para 1*** | Reg 4 |
| ***Article 3, para 2, 1st sentence*** | Reg 5(1) and Schedule 1 |
| ***Article 3, para 2, 2nd sentence*** | Reg 6(1) |
| ***Article 4, para 1 lit. a*** | Reg 7(1) and (2) |
| ***Article 4, para 1 lit. b, No i-vi*** | Reg 8 |
| ***Article 4, para 2 lit a ; Annex*** | Reg 9(1)(a) and Schedule 2 |
| ***Article 4, para 2 lit b*** | Reg 9(1)(b) and (c) |
| ***Article 4, para 2 lit c*** | Reg 9(2) |
| ***Article 4, para 3*** | Reg 10 |
| ***Article 4, para 4 lit. a*** | Reg 11 (1)-(2) |
| ***Article 4, para 4 lit. b*** | Reg 11 (3) |
| ***Article 4, para 5, 1st sentence*** | Reg 12 (a) |
| ***Article 4, para 5, 2nd sentence*** | Reg 12 (b) |
| ***Article 4, para 6 lit. a and lit. b*** | Reg 13 (1) and (2) |
| ***Article 4, para 6 lit. b No i*** | Reg 13 (3) (a) |

| | |
|---|---|
| ***Article 4, para 6 lit. b No ii*** | Reg 13(3) (b) |
| ***Article 4, para 7, 1st sentence*** | Reg 14 (1) and (2) |
| ***Article 4, para 7, 2nd sentence*** | Reg 14 (3) |
| ***Article 5, para 1*** | Reg 15 (1) |
| ***Article 5, para 2, 1st sentence, 1st part*** | Reg 15 (2) first part |
| ***Article 5, para 2, 1st sentence, 2nd part*** | Reg 15 (2) remaining parts |
| ***Article 5, para 2, 2nd sentence*** | Reg 15(7) |
| ***Article 5, para 2, 3rd sentence*** | Reg 15 (3) |
| ***Article 5, para 2, 4th sentence*** | Reg 15(4) |
| ***Article 5, para 3*** | Reg 15(5) |
| ***Article 5, para 4*** | Reg 15(9) |
| ***Article 6*** | Reg 15 (8) |
| ***Article 7*** | Regs 16 - 26 |

**Unfair Contract Terms**

| Directive | National Transposition |
|---|---|
| ***Article 1, para 1*** | Reg 4 (1) |
| ***Article 1, para 2*** | Reg 4(2) |
| ***Article 2 lit. b*** | Reg 3(1) |
| ***Article 2 lit. c*** | Reg 3(1) |
| ***Article 3 para 1, Article 2 lit. a*** | Reg 5(1) |
| ***Article 3 para 2, 1st sentence*** | Reg 5(2) |
| ***Article 3 para 2, 2nd sentence*** | Reg 5(3) |
| ***Article 3 para 2, 3rd sentence*** | Reg 5(4) |
| ***Article 3 para 3*** | Reg 5(5) |
| ***Article 4 para 1*** | Reg 6 (1) |
| ***Article 4 para 2*** | Reg 6(2) |
| ***Article 5, 1st sentence*** | Reg 7(1) |
| ***Article 5, 2nd sentence*** | Reg 7(2) |

| ***Article 6 para 1*** | Reg 8(1) and (2) |
|---|---|
| ***Article 6 para 2*** | Reg 9 |
| ***Article 7 para 1*** | Regs 10-16 |
| ***Article 7 para 2 and para 3*** | Reg 11 |
| ***Article 10 para 2*** | |
| ***ANNEX No 1a*** | Schedule 2, Para 1a |
| ***ANNEX No 1b*** | Schedule 2, Para 1b |
| ***ANNEX No 1c*** | Schedule 2, Para 1c |
| ***ANNEX No 1d*** | Schedule 2, Para 1d |
| ***ANNEX No 1e*** | Schedule 2, Para 1e |
| ***ANNEX No 1f*** | Schedule 2, Para 1f |
| ***ANNEX No 1g*** | Schedule 2, Para 1g |
| ***ANNEX No 1h*** | Schedule 2, Para 1h |
| ***ANNEX No 1i*** | Schedule 2, Para 1i |
| ***ANNEX No 1j*** | Schedule 2, Para 1j |
| ***ANNEX No 1k*** | Schedule 2, Para 1k |
| ***ANNEX No 1l*** | Schedule 2, Para 1l |
| ***ANNEX No 1m*** | Schedule 2, Para 1m |
| ***ANNEX No 1n*** | Schedule 2, Para 1n |
| ***ANNEX No 1o*** | Schedule 2, Para 1o |
| ***ANNEX No 1p*** | Schedule 2, Para 1p |
| ***ANNEX No 1q*** | Schedule 2, Para 1q |
| ***ANNEX Nr. 2a*** | Schedule 2, Para 2a |
| ***ANNEX Nr. 2b 1st sentence*** | Schedule 2, Para 2b 1st sentence |

| | |
|---|---|
| ***ANNEX Nr. 2b, 2nd sentence*** | Schedule 2, Para 2 2nd sentence |
| ***ANNEX Nr. 2c*** | Schedule 2, Para 2c |
| ***ANNEX Nr. 2d*** | Schedule 2, Para 2d |

**Timeshare**

| Directive | National Transposition |
|---|---|
| ***Article 1, 1st sentence*** | Not transposed. |
| ***Article 1, 2nd sentence*** | Not transposed |
| ***Article 2, 1st indent*** | Not directly transposed, but see s.1(1); (2); (3A) and (4). |
| ***Article 2, 2nd indent*** | Not directly transposed but see s.2(a) for the definition of "accommodation". |
| ***Article 2, 3rd indent*** | Not transposed separately but certain provisions (implementing rules from the Directive) apply only where the offeror is in the course of a business. |
| ***Article 2, 4th indent*** | Not transposed separately but certain provisions apply only where the person is an individual not acting in the course of a business |
| ***Article 3 para 1, Annex*** | S.1A(1) and (2), together with Schedule 1 |
| ***Article 3 para 2, 1st sentence*** | s.1A(3) & (4) |
| ***Article 3 para 2, 2nd, 3rd and 4th sentence*** | s.1A (4) & (5) |
| ***Article 3 para 3*** | s.1B |
| ***Article 4, 1st indent, Annex*** | s.1C and Schedule 1 |
| ***Article 4, 2nd indent*** | s.1D |
| ***Article 4, 3rd indent*** | s.1E |

| ***Article 5 para 1, 1st indent, 1st sentence*** | s.5(1) together with s.2(2)(a) Where information about cancellation rights **is** included in the agreement<br><br>OR<br>s.5(2), (3) and (3A) Where the information is **not** included |
|---|---|
| ***Article 5 para 1, 1st indent, 2nd sentence*** | s.5 (3B) and s.5A (3) |
| ***Article 5 para 1, 2nd indent, 1st sentence, Annex*** | s.5A(1) |
| ***Article 5 para 1, 2nd indent, 2nd sentence,*** | s.5A(2) |
| ***Article 5 para 1, 3rd indent*** | s.5A(1) |
| ***Article 5 para 2, 1st sentence*** | s.5(4) & (5) |
| ***Article 5 para 2, 2nd sentence*** | s.12(3) |
| ***Article 5 para 3*** | s.5(8) |
| ***Article 5 para 4*** | s.5(8) |
| ***Article 6*** | s.5B |
| ***Article 7*** | s.6A |
| ***Article 8*** | s.12(4) |
| ***Article 9*** | s.7 and 7A |
| ***Article 10*** | s.10A |
| ***Article 12 para 1, 3rd sentence*** | Not transposed. |

**Distance Selling**

| Directive | National Transposition |
|---|---|
| ***Article 1 (Object)*** | Reg 4 |
| ***Article 2 (Definitions), para 1*** | Reg 3(1) |
| ***Article 2 (Definitions), para 2*** | Reg 3(1) |
| ***Article 2 (Definitions), para 3*** | Reg 3(1) |
| ***Article 2 (Definitions), para 4, Annex I*** | Reg 3(1) and Schedule 1 |
| ***Article 2 (Definitions), para 5*** | Reg 3(1) |
| ***Article 3 (Exemptions), para 1, 1st indent*** | Reg 3(1) |
| ***Article 3 (Exemptions), para 1, 1st indent*** | Reg 5(1)(d) |
| ***Article 3 (Exemptions), para 1, 2nd indent*** | Reg 5(1)(e) |
| ***Article 3 (Exemptions), para 1, 3rd indent*** | Reg 5(1)(a) |
| ***Article 3 (Exemptions), para 1, 4th indent*** | Reg 5(1)(f) |
| ***Article 3 (Exemptions), para 2, 1st indent*** | Reg 6(2)(a) |
| ***Article 3 (Exemptions), para 2 2nd indent*** | Reg 6(2)(b) |
| ***Article 4 (Prior information) para 1*** | Reg 7 (1) |
| ***Article 4 (Prior information) para 2*** | Reg 7(2) and (3) |
| ***Article 4 (Prior information) para 3*** | Reg 7(4) |
| ***Article 5 (Written confirmation of information) para 1, 1st sentence*** | Reg 8 (1) |
| ***Article 5 (Written confirmation of information) para 1, 2nd sentence, 1st to 4th indent*** | Reg 8(2) |
| ***Article 5 (Written confirmation of information) para 2*** | Reg 9 |
| ***Article 6 (Right of withdrawal), para 1, 1st sentence*** | Reg 10; Reg 11(2) and Reg 12(2). |

| | |
|---|---|
| ***Article 6 (Right of withdrawal), para 1, 2nd sentence*** | Regulation 17(8) |
| ***Article 6 (Right of withdrawal), para 1, 3rd sentence, 1st indent*** | Regulation 11(1) |
| ***Article 6 (Right of withdrawal), para 1, 3rd sentence, 2nd indent*** | Regulation 12(1) |
| ***Article 6 (Right of withdrawal), para 1, 4th sentence*** | Regulation 11(4) and Regulation 12(4) |
| ***Article 6 (Right of withdrawal), para 1, 5th sentence*** | Regs 11(3) and 12(3) |
| ***Article 6 (Right of withdrawal), para 2*** | Reg 14 |
| ***Article 6 (Right of withdrawal), para 3, 1st indent*** | Reg 13(1)(a) |
| ***Article 6 (Right of withdrawal), para 3, 2nd indent*** | Reg 13(1)(b) |
| ***Article 6 (Right of withdrawal), para 3, 3rd indent*** | Reg 13(1)(c) |
| ***Article 6 (Right of withdrawal), para 3, 4th indent*** | Reg 13(1)(d) |
| ***Article 6 (Right of withdrawal), para 3, 5th indent*** | Reg 13(1)(e) |
| ***Article 6 (Right of withdrawal), para 3, 6th indent*** | Reg 13(1)(f) |
| ***Article 6 (Right of withdrawal), para 4*** | Regs 15 and 16. |
| ***Article 7 (Performance) para 1*** | Reg 19 (1) |
| ***Article 7 (Performance) para 2*** Obligation of supplier to inform and to refund in case of unavailability of the goods or services ordered | Reg 19 (2) |
| ***Article 7 (Performance) para 3*** | Reg 19(7) – Reg 7(1)(b) and (c) |
| ***Article 8 (Payment by card)*** | Reg 21 |
| ***Article 9 (Inertia selling), 1st indent*** | Reg 24 |

| | |
|---|---|
| ***Article 9 (Inertia selling), 2nd indent*** | Reg 24 (2) and (3) |
| ***Article 10 (Restrictions on the use of certain means of distance communication), para 1, 1st indent*** | Regulation 19 of SI 2003/2426 |
| ***Article 10 (Restrictions on the use of certain means of distance communication), para 1, 2nd indent*** | Regulation 20 of SI 2003/2426 |
| ***Article 10 (Restrictions on the use of certain means of distance communication), para 2.*** | Regulation 21 of SI 2003/2426 |
| ***Article 11 (Judicial or administrative redress), para 1*** | Regulation 26 |
| ***Article 11 (Judicial or administrative redress), para 2*** | Regulations 27 and 28 |
| ***Article 11 (Judicial or administrative redress), para 3 lit. a*** | |
| ***Article 11 (Judicial or administrative redress), para 3 lit. b*** | Regulation 27 |
| ***Article 11 (Judicial or administrative redress), para 4*** | |
| ***Article 12 (Binding nature), para 1*** | Regulation 25 (1)-(4) |
| ***Article 12 (Binding nature), para 2*** | Regulation 25 (5) |
| ***Article 13 (Community rules) para 1*** | Regulation 6 |
| ***Article 13 (Community rules) para 2*** | Regulation 6 |
| ***Article 14 (Minimal clause), 2nd sentence*** | |
| ***Article 15 (Implementation), para 2*** | |

**Unit Prices**

| Directive | National Transposition |
|---|---|
| ***Article 1*** | Not transposed |
| ***Article 2, lit. a*** | Regulation 1(2) |
| ***Article 2, lit. b; corresponding Commission Declaration*** | Reg 1(2) |
| ***Article 2, lit. c*** | Reg 1(2) |
| ***Article 2, lit. d*** | Reg 1(2) |
| ***Article 2, lit. e*** | Reg 1(2) |
| ***Article 3, para 1*** | Reg 4(1); Reg 5(1) |
| ***Article 3, para 2, 1st ident*** | Reg 3(1)(a) |
| ***Article 3, para 2, 2nd ident*** | Reg 3(1)(b) |
| ***Article 3, para 3*** . | Reg 4(2) |
| ***Article 3, para 4*** | Reg 5(4) |
| ***Article 4, para 1, 1st sentence*** | Reg 7(1)(a); Regulation 9 (on sales) |
| ***Article 4, para 1, 2nd sentence*** | |
| ***Article 4, para 2*** | Reg 1(2)<br>Reg 8<br>Schedule 1 |
| ***Article 5, paras 1 and 2*** | Reg 5(3)(a)<br>Schedule 2 |
| ***Article 6*** | Regulation 5(3)(c) and (d). |
| ***Article 8*** | Prices Act 1974, section 7<br>Prices Act 1974, Schedule, paragraphs 5-10 and 13/14 |
| ***Article 11*** | Not transposed (but in explanatory notes) |

**Injunctions**

| Directive | National Transposition |
|---|---|
| ***Article 1 (Scope) para 1, Annex*** | Enterprise Act 2002, s.212(1) |
| ***Article 1 (Scope) para 2, Annex*** | EA 2002, s.212(1) |
| ***Article 2 (Actions for an injunction), para 1, lit. a*** | EA 2002, s.215(5) and s.217(5) |
| ***Article 2 (Actions for an injunction), para 1, lit. b*** | EA 2002, s.215(5) and s.217(8) |
| ***Article 2 (Actions for an injunction), para 1, lit. c*** | EA s.220 |
| ***Article 2 (Actions for an injunction), para 2*** | (No obvious transposition) |
| ***Article 3 (Entities qualified to bring an action) 1st part*** | s.213(1) EA and s.213(5) EA<br>s.215(2) and (4) EA |
| ***Article 3 (Entities qualified to bring an action) 2nd part, lit. a*** | s.213(2) EA and s.215(5) EA |
| ***Article 3 (Entities qualified to bring an action) 2nd part, lit. b*** | s.213(3) EA and s.215(5) EA |
| ***Article 4 (Intra-Community infringements), para 1*** | s.212(1) EA and s.215(1) and (4) EA |
| ***Article 4 (Intra-Community infringements), para 2 and para 3*** | |
| ***Article 5 (Prior consultation), para 1, 1st sentence*** | s.214 (1) EA |
| ***Article 5 (Prior consultation), para 1, 2nd sentence*** | s.214 (1) EA |
| ***Article 5 (Prior consultation), para 1, 3rd sentence*** | s.214(4) EA |
| ***Article 8 (Implementation) para 1, 3rd sentence*** | s.235 EA |
| ***ANNEX***<br>*LIST OF DIRECTIVES* | Schedule 13 EA |

**Sales**

| Directive | National Transposition |
|---|---|
| ***Article 1 (Scope and definitions) para 1*** | Not transposed. |
| ***Article 1 (Scope and definitions) para 2, lit. a*** | Regulation 2 SSGCR<br><br>S.12 Unfair Contract Terms Act 1977 (s.25 for Scotland) |
| ***Article 1 (Scope and definitions) para 2 lit b, 1st part*** | s.61(1) Sale of Goods Act 1979 |
| ***Article 1 (Scope and definitions) para 2 lit. b, 2nd part*** | Not transposed separately but most are excluded from the definition of goods. |
| ***Article 1 (Scope and definitions) para 2 lit. c*** | s.61(1) Sale of Goods Act 1979 |
| ***Article 1 (Scope and definitions) para 2 lit. d*** | s.61(1) Sale of Goods Act 1979<br>s.18 of the Supply of Goods and Services Act 1982<br>s.15 Supply of Goods (Implied Terms) Act 1973 |
| ***Article 1 (Scope and definitions) para 2 lit. e*** | Reg 2 Sale and Supply of Goods to Consumers Regulations 2002 |
| ***Article 1 (Scope and definitions) para 2, lit. f*** | s.61(1) Sale of Goods Act 1979<br>s.18 of the Supply of Goods and Services Act 1982 |
| ***Article 1 (Scope and definitions) para 3*** | s.12 UCTA |

| | |
|---|---|
| ***Article 1 (Scope and definitions) para 4*** | Not transposed; instead, legislation on supply of goods&services contracs amended |
| ***Article 2 (Conformity with the contract) para 1*** | No general requirement; specific definition of "conformity" for new remedies in s.48F SoGA and s.11S SGSA 1982 |
| ***Article 2 (Conformity with the contract) para 2 lit. a*** | s.13 and s.15 SoGA<br><br>s.3 and s.5 SGSA (11C and 11E for Scotland)<br>s.8 and 10 SGSA (11I and 11K for Scotland)<br><br>s.9 and 11 SoG(IT)A |
| ***Article 2 (Conformity with the contract) para 2 lit. b*** | s.14(3) SoGA<br><br>s.3(4) SGSA(s.11D(5) for Scotland)<br>s.9(4) SGSA (s.11J(5) for Scotland)<br><br>s.10(3) SoG(IT)A |

| | |
|---|---|
| ***Article 2 (Conformity with the contract) para 2 lit. c*** | s.14(2-2B)) SoGA<br><br>s.3(2) SGSA (s.11D(2) for Scotland) and s.18(3)<br>s.9(2) SGSA (s.11J(2) for Scotland) and s.18(3)<br><br>s.10(2-2B) SoG(IT)A |
| ***Article 2 (Conformity with the contract) para 2 lit. d*** | s.14(2) & (2D) SoGA<br><br>s.4(2) & (2B) SGSA (s11D (2) & (3A) for Scotland)<br>s.9(2) & (2B) SGSA (s11J (2) & (3A) for Scotland)<br><br>s.19(2) & (2D) SoG(IT)A |
| ***Article 2 (Conformity with the contract) para 3*** | s.14(2C) SoGA<br><br>s.4(3) SGSA (11D(4) for Scotland)<br>s.9(3) SGSA (11J(4) for Scotland)<br>s.10(2C) SoG(IT)A |
| ***Article 2 (Conformity with the contract) para 4*** | s.14(2E) SoGA<br><br>s.4(2C) SGSA (s11D (3B) for Scotland)<br>s.9(2C) SGSA (s11J (3B) for Scotland)<br><br>s.19(2E) SoG(IT)A |
| ***Article 2 (Conformity with the contract) para 5 1st sentence*** | s.13 and s.11S(1)(b) SGSA |

| | |
|---|---|
| ***Article 2 (Conformity with the contract) para 5, 2nd sentence*** | |
| ***Article 3 (Rights of the consumer) para 1*** | s.27 SoGA |
| ***Article 3 (Rights of the consumer) para 2*** | s.48A (2) SoGA<br>s.11M(2) SGSA |
| ***Article 3 (Rights of the consumer) para 3, 1st sentence*** | s.48B(1) SoGA<br>s.11M(2) SGSA |
| ***Article 3 (Rights of the consumer) para 3, 2nd sentence*** | s.48B(3)/(4) SoGA<br>s.11M(3)/(4) SGSA |
| ***Article 3 (Rights of the consumer) para 3, 3rd sentence*** | s.48B(2) SoGA<br>s.11M(2) SGSA |

| | |
|---|---|
| ***Article 3 (Rights of the consumer) para 4*** | s.48B(2)(b) SoGA<br>s.11M(2)(b) SGSA |
| ***Article 3 (Rights of the consumer) para 5*** | s.48C SoGA<br>s.11P SGSA |
| ***Article 3 (Rights of the consumer) para 6*** | Not transposed. |
| ***Article 4 – Right of Redress*** | Not transposed. |
| ***Article 5 (Time limits) para 1*** | Not transposed. |
| ***Article 5 (Time limits) para 2*** | Not transposed. |
| ***Article 5 (Time limits) para 3*** | s.48A(3) SoGA<br>s.11M(3) SGSA |
| ***Article 6 (Guarantees) para 1*** | Regulation 15(1) SSGCR |
| ***Article 6 (Guarantees) para 2***<br>- | Regulation 15(2) SSGCR and<br><br>Consumer Transactions (Restrictions on Statements) Order 1976 Regs 4 and 5 |
| ***Article 6 (Guarantees) para 3*** | Regulation 15(3) and (4) SSGCR |
| ***Article 6 (Guarantees) para 4*** | Regulation 15(5) SSGCR |
| ***Article 6 (Guarantees) para 5*** | Regulation 15(6) SSGCR |
| ***Article 7 (Binding nature) para 1, 1st sentence*** | s.6 and 7 Unfair Contract Terms Act 1977 |
| ***Article 7 (Binding nature) para 1, 2nd sentence*** | Not used. |
| ***Article 7 (Binding nature) para 2*** | ss. 26 and 27 Unfair Contract Terms Act 1977 |
| ***Article 8 (National Law) para 1*** | Not transposed |
| ***Article 10*** | Enterprise Act 2002, Schedule 13 |
| ***Article 11 (Transposition) para 1 3rd sentence*** | Not transposed. |

# Part II

# Comparative analysis and cross-cutting themes

**Definitions**

1. Each of the eight directives under consideration contains a definitions clause, or article, which defines a number of key terms. However, the definitions in each directive apply only for the purposes of that directive. As a result there are a number of terminological differences between the directives. Broadly speaking three types of problem can be identified:-
   (a) the use of different terms to refer to the same concept;
   (b) different definitions of the same term;
   (c) failure to define key concepts.

2. In this section we examine the definitions of key terms in the eight directives, identify the differences which exist and consider whether such differences create any substantive difficulties or obstacles within the market and if harmonisation of terminology would improve the *acquis*.

**Consumer and Seller /Supplier/ Trader**

3. The eight directives are concerned with consumer protection. All therefore give a definition of "consumer", with the exception of the Injunctions directive, which stands conceptually somewhat apart from the other seven directives, and the Timeshare directive which refers instead to "purchaser", which is defined in terms similar to those used to define "consumer".

4. In general a consumer must be a natural person[94] who is not acting for business purposes. In addition a consumer is generally only protected if (s)he contracts with a business or professional. English law adopts a similar approach but whereas English law incorporates the requirement that the "consumer" deal with a professional into the definition of "consumer" (see the approach of the Unfair Contract Terms Act 1977), the consumer *acquis* directives tend to separate the two requirements, so that "consumer" is defined without reference to the status of the other contracting party but the consumer is only protected when dealing with a professional. To put it another way, the directives only impose obligations/liabilities on a business/professional.

5. However, although each of the directives adopts a broadly similar approach there are small but significant terminological differences between them.

6. There are even more significant differences between the definitions of the party dealing with the consumer, where there is no consistent use of terminology and definitions differ. Thus the party who deals with the consumer is variously referred to as "seller", "seller or supplier", "trader", "retailer" and "vendor". (For that reason in the following text we use the neutral term "professional" to refer in the abstract to the party who deals with the consumer.) In essence the definitions of these terms are broadly similar but they differ in points of detail. In particular the language used to describe the connection required between the professional and his business in order

[94] A limited company therefore cannot be a "consumer" for these purposes: *Cape Snc v Idealservice Srl* [2002] All ER (EC) 657.

for the directive to apply differs from one directive to the next, sometimes even where the same word is used to refer to the professional.

***Consumer***

7. The Doorstep Selling Directive defines the term "consumer" in its Article 2 as "a natural person who … is acting for purposes which can be regarded as outside his trade or profession". The similar phrase "may be regarded" is also used in the Timeshare Directive. The difference between the two definitions is probably due to the drafting and translation process; there is no indication that a substantive difference was intended.

8. Other directives however, such as the Distance Selling and Unfair Contract Terms directives, include the term "business" and require that the consumer is acting for purposes which "*are*" outside his trade, business or profession. It is not clear that the addition of the word "business" adds anything, although the point is arguable. The use of the word "are" instead of "may be regarded" or "can be regarded" suggests a more subjective approach. A transaction "may be regarded" as being outside a person's business even though in fact it is not. The difference in wording cannot be explained simply as a change of approach over time: there was a gap of nine years between the Doorstep and Timeshare directives during which time the Package Holidays and Unfair Terms directives were completed using the more "objective" wording, to which the draftsman reverted after the Timeshare Directive. Thus it is not clear whether the difference in wording is intended to have substantive significance or if it is simply an arbitrary matter of personal preference. Neither wording is inherently more predictable than the other in its application, both leaving scope for discretion in their application to facts. It will be necessary to await the *Comparative Analysis* to be prepared by the Research Team working for the European Commission to see whether the difference in wording has had any practical effect.

9. Similar wording is used in the Brussels Convention on Jurisdiction. Article 13 of the Convention refers to a consumer contract as "a contract concluded by a person for a purpose which can be regarded as being outside his trade or profession". In C-464/01 *Gruber v Bay Wa* AG,[95] the ECJ confirmed its earlier view in *Benincasa*[96] that "only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the Convention to protect the consumer as the party deemed to be the weaker party".[97] *Gruber* itself was concerned with a so-called "dual purpose" transaction, i.e., a contract whereby an individual was acting partly for private and partly for professional purposes. The ECJ confirmed that such mixed transactions are not consumer contracts for the purposes of Article 13 of the Brussels Convention, unless the professional purpose is "so limited as to be negligible", even where the private element is predominant.[98] It is perhaps noteworthy that the ECJ did not seem to make anything in particular of the words "can be regarded", focusing instead on the more crucial words "outside his trade or profession".

10. The Unit Pricing directive follows the same approach as the Distance Selling and Unfair Terms Directives but uses a slightly different wording, defining a consumer as "any natural person who buys a product for purposes that do not fall within the sphere

[95] [2005] ECR I-n.y.r. (judgment of 20 January 2005).
[96] Case C-269/95 *Benincasa* [1997] ECR I-3767.
[97] *Gruber*, paragraph 36.
[98] *Gruber*, paragraph 54.

of his commercial or professional activity". It is probably true that the difference in wording will not result in significant substantive differences, because the term "commercial activity" would probably interpreted to include "business and trade"; however, the fact that different wording was employed here does not promote a consistent approach to EC legislation in this field.

11. Similarly, the Directive on Sales and Guarantees uses slightly different wording with "purposes which are not related to his trade, business or profession". This phrasing potentially allows a wider interpretation than "are outside" and could exclude a number of contracts from the scope of application of the Directive. A transaction may be outside a person's trade etc but still be related to it. It is conceivable that, in this instance, there may have been a slip-up in the drafting of this provision. The wording of this definition in the different official language –versions varies slightly, and may in some instances also reflect particular national concepts, and the problems flowing from this variation should not be overstated. There is no indication in other materials or in the recitals to the different directives, that the different terminology was intended to convey different meanings or interpretations.

12. The Package Travel directive however, uses the term "consumer" but defines it in a way which does suggest substantive differences. "Consumer" is defined in Article 2 (4) as "the person who takes or agrees to take the package, or….". There is no limitation to a person acting for purposes outside/ not related to his trade, business or profession. It seems to be the underlying assumption that package travel is a product that is mainly used by private individuals and for private purposes, but the definition here is considerably wider and does include business travel as well if it is arranged as a package. The definition would also seem capable of applying to a business buying a package for employees, customers, etc – eg: as a perquisite for staff or as part of a hospitality package for customers.

13. In parallel to the formal definitions of consumer, the ECJ has developed the concept of the average consumer in its case law [99]. Although there are some variations in the way the ECJ defines the "average consumer" and her expectations, the case law of the ECJ does not distinguish between different definitions of "consumer" in different directives but establishes and follows a common approach. There is, of course, a fundamental difference between the formal definition of "consumer" as found in the various directives, and the more general notion of consumer, as considered, for example, in the context of the derogations from the prohibition of quantitative restrictions on the free movement of goods under Article 28 EC. The ECJ has developed this concept in order to provide guidance to national courts when they need to consider e.g., whether a particular description may be misleading to consumers, requiring the courts to apply the "average consumer" yardstick.[100] Nevertheless, if the average consumer possesses the same characteristics regardless of the statutory context or the particular definition of "consumer" used in that context, it suggests that the essential concept of " consumer" is the same regardless of variations in the definition.

***Seller/supplier/trader***

14. A wider variety of terminology is used to describe the party who contracts with the consumer, who is described as "trader" in the Doorstep Selling and Unit Pricing

[99] For a detailed analysis see Twigg-Flesner, C., Howells, G., Parry, D., Nordhausen, A., "An Analysis of the Application and Scope of the Unfair Commercial Practices Directive" (Report for the DTI)
[100] See e.g., C-210/96 *Gut Springenheide v Oberkreisdirektor des Kreises Steinfurt* [1998] ECR I-4657.

directives, "supplier" in the Distance Selling directive, "seller" in the Sales directive, "seller or supplier" in the Unfair Contract Terms directive, "vendor" in the Timeshare directive, and "retailer" in the Package Travel directive. The definitions of these different terms share a large degree of similarity. In every case – and in contrast to the "consumer", who must always be a natural person – the professional may be a natural or legal person. Where the definitions differ is in the degree of connection required between the professional's business and the contract in question. Thus for the purposes of the Doorstep Selling directive a "trader" is a person who "acts in his commercial or professional capacity". A "seller or supplier" for the purposes of the Distance Selling directive is similarly a person who "is acting in his commercial or professional capacity", and "vendor" is defined in similar terms for the purposes of the Timeshare directive. For the purposes of the Unit Pricing directive a "trader" is a person who "sells or offers for sale products which fall within his commercial or professional activity."

15. Slightly different wording is used in the Unfair Terms and Sales directives. For the purposes of the Unfair Terms directive, a "seller or supplier" is a person who is "acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned", whilst the Sales directive defines "seller" as a person "who, under a contract, sells consumer goods in the course of his trade, business or profession". It is possible to argue that this difference in wording creates, or is intended to create, a genuine substantive difference, "in the course of" suggesting a closer connection between the business and the particular contract than "for purposes relating to"[101]. However, it cannot be said with any confidence that the difference in wording was intended to or does produce any substantive difference in interpretation, and there are strong arguments for applying similar interpretations to the Unfair Terms and Sales directives.

16. On the other hand there clearly is a substantively different approach in the Package Travel directive, which applies to the "organiser" and "retailer" of a package, where the "retailer" is "the person who sells or offers [the package] for sale". As this does not require professional activity and "organiser" includes all persons organising package travel "other than occasionally", private individuals and non-professional organisers and sellers are here (deliberately) included.

17. Apart from the slightly different scope of application in the Package Travel Directive, there is a broad degree of similarity in the definitions and interpretation of the terms "consumer" and "supplier/trader/seller/vendor" in this group of directives. The use of different terminology and differences in definitions do not seem to have resulted in significant differences of substance. Nor have they generated a significant body of case law. On the other hand, the use of different terms to refer to the same concept threatens the coherence and rationality of the law.

18. We would not read a great deal into the absence of reported case law; consumer disputes being of relatively low value rarely result in litigation, even less reported decisions of the higher courts. Consumer law needs to be accessible to those affected by it – businesses and consumers. Accessibility requires comprehensibility. Terminological differences also undermine harmonisation. Thus, notwithstanding our comments above we would suggest that in the interests of clarity and the development of a coherent consumer *acquis* as well as to avoid differences between different language versions of the legislation and national implementing measures, the

[101] Compare the approach of the English courts to the phrase "in the course of a business" in the Unfair Contract Terms Act 1977: see *R&B Customs Brokers v UDT Finance Ltd;* see p 117 above.

consistent use of terminology with common definitions and terminology would improve the *acquis*.

**Other terms**

19. A typical UK statute will contain a substantial definitions section defining many of the terms used in the statute. In comparison the definition sections in the directives we are here concerned with tend to be fairly thin, defining only the most essential terms. Some key terms are not defined at all. Others are defined in some directives and not in others. It would be impracticable to seek to list all the terms which are not defined in the various directives to. We would note just three.

***Goods***

20. The term "goods" is not defined in any of the directives here under consideration. Even the Consumer Sales directive which is concerned with contracts for the sale and supply of goods contains only a partial definition, of "consumer goods", which are defined as "any tangible moveable item" subject to certain listed exceptions. Amongst other things this leaves open the important question of the status of computer software, an issue which has troubled the domestic courts of England and Scotland under domestic legislation, producing no satisfactory answer. Given the commercial and economic significance of computer software and related products in the modern economy it seems to us that it is desirable that this issue be dealt with directly in the legislation.[102]

***Contract***

21. There is no definition in any of the directives of "contract", the concept presumably being left to be determined by domestic law. However, this leaves open the possibility of different interpretations being given in different member states where, although the essential concept of a contract may be more or less similar, there are differences in the treatment of certain types of transaction. This is clearly a fundamental matter and one we would expect to see addressed in the development of any sort of common frame of reference for European contract law.

***Durable medium***

22. We note in our discussion of information duties, below, that a feature of more recent directives in this area is that they require the consumer to be provided with information, and that where earlier directives required information to be provided to "in writing" the more recent ones require the provision of information in a "durable medium". However, although the expression "durable medium" is used in both the Distance Selling and Consumer Sales directives, it is defined in neither. The term is also used in the directives on Distance Selling of Financial Services[103] and Insurance Mediation[104]. In both it is defined as "any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference

[102] We may note that in New Zealand, the Consumer Guarantees Act 1993 was amended recently by expanding the definition of “goods” to encompass computer software; something which has been criticised because the remedies of repair/replacement, in particular, may be difficult to operate in relation to computer software. Contrast the approach in Scots law which treats a contract for the supply of computer software as *sui generis*: see *Beta Computers (Europe) Ltd v Adobe Systems Ltd.* [1996] SLT 604.

[103] 2002/65/EC

[104] 2002/92/EC

for a period of time adequate for the purposes of information, and which allows the unchanged reproduction of the information stored", but it is not clear whether this definition applies where the expression "durable medium" appears in other directives. Advocate-General Tizzano once suggested that it should be possible to take a definition of a key term from another Directive,[105] although no clear authority from the ECJ on this point exists. However, such an approach would be consistent with General Principle 6 of the *Joint Practical Guide of the European Parliament, Council and Commission for persons involved in drafting of legislation within the Community institutions*.[106] This requires that legislation must be “formally consistent”, which means “that the same terms are to be used to express the same concepts and that identical terms must not be used to express different concepts”. The aim is to leave no ambiguities, contradictions or doubts as to the meaning of a term. Any given term is therefore to be used in a uniform manner to refer to the same thing and another term must be chosen to express a different concept.” (para 6.2). Although only a guideline, it makes a fundamental point about the need for coherence in the *acquis communautaire*, but this is something which is lacking with regard to the concept of “durable medium”.

[105] C-168/00 *Leitner v Tui Deutschland* [2002] ECR I-2631.
[106] Available at http://europa.eu.int/eur-lex/en/about/techleg/guide/index_en.htm

## Table 2: Definitions of key terms

| Term | 85/577/EEC | 90/314/EEC | 93/13/EEC | 94/47/EC | 97/7/EC | 98/6/EC | 98/27/EC | 99/44/EC |
|---|---|---|---|---|---|---|---|---|
| 'consumer' | a natural person who, in transactions covered by this Directive, is acting for purposes which **can be regarded as outside** his trade or profession | the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee'); | any natural person who, in contracts covered by this Directive, is acting for purposes which **are outside** his trade, business or profession | | any natural person who, in contracts covered by this Directive, is acting for purposes which **are outside** his trade, business or profession | any natural person who buys a product for purposes **that do not fall within the sphere of** his commercial or professional activity. | | any natural person who, in contracts covered by the directive, is acting for purposes which **are not related to** his trade, business or profession. |
| 'purchaser` | | | | any natural person who, acting in transactions covered by this Directive, for purposes which may be regarded as being outwith his professional capacity, has the right which is the subject of the contract transferred to him or for whom the right which is the subject of the contract is established | | | | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 'trader' | 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. | | | | | any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity | | |
| Seller or supplier | | | any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned. | | any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity | | | any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession. |
| 'retailer' | | the person who sells or offers for sale the package put together by the organizer; | | | | | | |
| 'organizer' | | the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer; | | | | | | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| vendor | | | | any natural or legal person who, acting in transactions covered by this Directive and in his professional capacity, establishes, transfers or undertakes to transfer the right which is the subject of the contract | | | | |
| 'contract' | the agreement linking the consumer to the organizer and/or the retailer | | | | | | | |
| ‘distance contract’ | | | | | any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded; | | | |

| *Consumer goods* | | | | | | | | "any tangible moveable item with the exception of<br>(a) Goods sold by way of execution or otherwise by authority of law<br>(b) Water and gas where not put up for sale in a limited volume or set quantity<br>© Electricity. |
|---|---|---|---|---|---|---|---|---|

## Information Duties in the Eight Consumer Law Directives

23. One of the features of many of the EC's consumer law directives is the use of extensive information duties. These are usually imposed on the trader and require him to furnish the consumer with information about particular aspects of the transaction he may wish to conclude. However, it needs to be emphasised immediately that these directives do not impose a general duty to provide information, nor is it the case that such a general duty could be derived from the various instances where legislation provides for this.

### *When are information duties imposed?*

24. A review of the various directives indicates that specific information duties tend to be imposed in circumstances where one or more of the following factors seem to make this necessary: (i) the personal circumstances of the consumer, (ii) the circumstances in which the contract is concluded; and (iii) the type of contract to be concluded.[107] An examination of the 8 directive reveals that information obligations tend to be imposed where one or more of these factors are present.

*Door-Step Selling (85/577/EEC)*

25. This was one of the first directives in the field of consumer law, and its approach to information obligations is still comparatively restricted. Instead, it is better known for the introduction of a right of withdrawal in circumstances where a consumer has concluded a contract on the doorstep after an unsolicited visit by a trader. The only information requirement is linked to this aspect: Art.4(1) states that a consumer must be given information in writing about his right to withdraw from the contract within 7 days of conclusion. This obligation arises primarily because of the circumstances in which the contract is concluded, i.e., the surprise element of an unsolicited visit by a trader to the consumer's home.

*Package Travel (90/314/EEC)*

26. The Package Travel Directive considerably wider on the various information requirements. There are three circumstances where specified items of information need to be given: (a) when the consumer makes an initial enquiry and/or is given a brochure; (b) when the consumer is in the process of concluding a contract; and (c) in the contract document itself. Without going into the detail of the various items of information that need to be provided (see the comparative table below), it generally relates to various aspects of the holiday to be booked, the costs of the holiday, and contact details for the holiday organiser. In this instance, it is primarily the specific nature of the contract that has given rise to the imposition of information obligations.

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[107] See e.g., M.Ebers, "Informations- und Beratungspflichten bei Finanzdienstleistungen: Allgemeine und besondere Rechtsgrundsätze" in R.Schulze, M.Ebers and H.C.Grigoleit (eds.), *Informationspflichten und Vertragsschluss in Acquis communautaire* (Tübingen: Mohr Siebeck, 2003).

*Unfair Terms (93/13/EEC)*

27. The Unfair Contract Terms Directive does not contain any express information obligations. However, note the notion of "good faith", which is used in Art.3(1) as one element in determining whether a term is unfair. It seems that "good faith" embodies a procedural requirement which demands openness[108] in the way a trader deals with a consumer. Furthermore, term (i) of the indicative list in the Annex to the Directive, suggests that a term which binds a consumer to all the terms in the contract without having had an opportunity to become acquainted with them before the conclusion of the contract may be unfair. Although this is perhaps not an obvious information obligation, it does seem that the Directive demands some transparency in the way contracts are concluded.

*Timeshare (94/47/EC)*

28. The Timeshare Directive contains information obligations in circumstances which are not dissimilar to those found in the Package Travel Directive. Thus, a consumer interested in acquiring a timeshare has to be given a range of information specified in the directive, and should the consumer decide to conclude a contract, the contract itself also has to contain particular items of information. A lot of detail is required on the nature of the property covered by the timeshare. These information obligations are primarily justified on the basis of the nature of the transaction – a consumer is usually not able to inspect the property in advance and needs to have all the relevant information to make an informed decision.

*Distance Selling (97/7/EC)*

29. Distance selling is, perhaps, the paradigm transaction for the imposition of information obligation. This is a situation where the circumstances of the transaction (dealing with a trader by a means of distance communication, generally the internet) require that the consumer is given essential information about the goods or services he may wish to purchase. Information on some matters has to be provided in good time before the conclusion of a contract, and then again during its performance. Unlike the Package Travel and the Timeshare directives, the information obligations are phrased in much more general terms, although there are a number of different items of information that need to be provided (main characteristics, costs, etc.).

*Price Indications (98/6/EC)*

30. This Directive only contains a rather limited obligation to provide information, i.e., the need to display both the selling and the unit price. This is intended to provide greater price transparency.

*Directive(99/44/EC)*

[108] See, in particular, the speech by Lord Bingham in *Director-General of Fair Trading v First National Bank* [2001] UKHL 52.

31. The Consumer Sales Directive does not contain any concrete information obligations. However, it may be possible to interpret the requirement that goods must be in conformity with the contract (Art.2(2)) combined with the exclusion from the requirement of matters which would mean that goods are not in conformity but of which the consumer was aware. A seller who knows of a specific defect is encouraged to disclose this information, because not doing so might result in the seller having to provide a remedy in accordance with Art.3. Commentators disagree as to whether this is a clear obligation to disclose information,[109] an "indirect information requirement",[110] or a simple "encouragement to disclose information".[111]

32. Furthermore, Art.6 of the Directive contains a number of requirements regarding the presentation of guarantees, as well as the kind of information to be included therein. Such requirements seem to have been included because of the type of contract: guarantees have often been seen as a mechanism to restrict consumers' rights under the law on the sale and supply of goods, and may still have the effect of deflecting consumers' attention from these rights towards the often more limited rights under such a guarantee. By disclosing what is covered, and that consumers' legal rights remain unaffected by the guarantee, such difficulties should be avoided.

33. Having considered the various directives from the perspective of the circumstances in which they impose an information requirement, we can see that there is, as yet, no all-encompassing requirement to disclose. Instead, information obligations tend to arise where the circumstances in which a contract is concluded put the consumer at a significant informational disadvantage, or where the transaction in question is of a kind where it is necessary that the consumer is provided with certain items of key information. One possible exception to this is the obligation that might be derived from Art.3(1) of the Unfair Contract Terms Directive, which suggests that a consumer should be clear about the terms of any contract which he is concluding.

***What information must be provided?***

34. In addition to the circumstances in which they impose an information obligation, it is possible to analyse these directives in terms of the categories of information which they require. It is possible to identify 7 such categories, requiring information about (i) the main characteristics of the goods or services supplied; (ii) the costs of supply, including price, taxes and other charges; (iii) the supplier, including affiliation and contact details; (iv) the terms of the contract; (v) the rights and obligations of the contracting parties;

[109] See e.g., K.Riesenhuber, "Party Autonomy and Information in the Sales Directive", in S.Grundmann, W.Kerber and S.Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market* (Berlin: De Gruyter, 2001).
[110] See T.Wilhelmsson, "Private Law Remedies against Breach of Information Requirements of EC Law", in R.Schulze, M.Ebers and H.C.Grigoleit (eds.), *Informationspflichten und Vertragsschluss in Acquis communautaire* (Tübingen: Mohr Siebeck, 2003).
[111] C.Twigg-Flesner, "Information Disclosure about the Quality of Goods – Duty or Encouragement?" in G.Howells, A.Janssen and R.Schulze (eds.), *Information Rights and Obligations* (Aldershot: Ashgate, 2005)

(vi) any available redress procedures; and (vii) other information obligations. The information requirements in the various directives can be classified in accordance with these categories. This will be of particular relevance to the second stage of this research, because these categories resemble the information requirements in the UCPD.

*Doorstep-Selling (85/577/EEC)*

35. The only information obligation in this Directive falls into category (v), as it relates to the consumer's cancellation rights under the Directive.

*Package Travel (90/314/EEC)*

36. It is possible to put the various information requirements into several of the categories identified above. The bulk of the information requirements relates to miscellaneous aspects of the package holiday to be booked and therefore falls into the first category. There are also several provisions dealing with matters of costs (category (ii)). Some information has to be provided about the organiser, retailer or their local representative (category (iii)), and about the complaints procedure (category (vi)). Finally, there is a general obligation not to provide misleading information, and the need to inform the consumer about passport, visa and health formalities (category (vii)).

*Unfair Terms (93/13/EEC)*

37. As indicated previously, the Directive does not contain any obvious information requirements. However, the notion of good faith in its procedural sense could be categorised as relating to the terms of the contract (category (iv)), and the point in paragraph (i) of the Annex relates to information about the parties' rights and obligations (category (v)).

*Timeshare (94/47/EC)*

38. This Directive contains information requirements in most categories. Thus, a considerable amount of detail needs to be provided about the accommodation in which the timeshare right is to be acquired (category (i)), costs (category (ii)), and the trader (category (iii)). Moreover, the consumer needs to be given the terms of the contract (category (iv)), and information about cancellation rights and the possibility to sell a particular timeshare right (category (v)).

*Distance Selling (97/7/EC)*

39. This Directive contains information obligations which fall into all seven categories identified above.

*Price Indications (98/6/EC)*

40. Due to the specific nature of this Directive, the only information obligations fall within category (ii) and relate to the display of the unit and selling price.

*Injunctions (98/27/EC)*

41. As this Directive does not contain any information duties, none of the categories applies.

*Consumer Sales (99/44/EC)*

42. In respect of goods supplied under the contract, there is a requirement that goods must be in conformity, although the seller can escape this responsibility if he draws particular defects to the consumer's attention. If this is interpreted as an information requirement, then this falls into category (i), relating to the main characteristics of the goods and services. In relation to guarantees, the information obligations fall into a number of categories: contents of the guarantee (category (i)); person providing the guarantee (category (iii)); need to draw legal rights to consumer's attention (category (v)); and procedure for making a claim (category (vi)).

***When, and in what form, should the relevant information be provided?***

43. A final issue to consider is the question of when and in what form the required information should be provided. It will be important that the consumer receives the relevant information in such a way that he can make appropriate use of it. It will usually be of limited assistance to a consumer if a long list of items of information is provided in verbal form; a written document is likely to be of more use. Moreover, information should be provided at a time when it will still be of use to a consumer; it would make little sense to give notice of cancellation rights after the period for cancelling a contract has already expired. Most of the directives under examination contain rules on both the form and timing of information.

*Doorstep-Selling (85/577/EEC)*

44. This Directive is rather basic in respect of the requirements of form and timing, which is not surprising in view of the fact that this was the first directive to introduce such rules. All that is said about form is that the notice about the consumer's cancellation rights must be provided in writing. This information must be provided at the time the contract is concluded.

*Package Travel (90/314/EEC)*

45. This Directive also requires that the relevant information is provided in writing, but it adds to this that it may be provided "in another appropriate form". The relevant information needs to be given before the contract is concluded.

*Unfair Terms (93/13/EEC)*

46. This Directive does not require that consumers are given information about contract terms at any particular point in time. However, if there are written

terms to be given to a consumer, then such terms must be presented in plain and intelligible language.

*Timeshare (94/47/EC)*

47. Once again, information has to be provided in writing; in addition, there is a language requirement in this Directive. Information about a property has to be made available to a consumer on request.

*Distance Selling (97/7/EC)*

48. There are two different sets of information requirements in this Directive. Thus, some information about the goods or services at issue needs to be provided in good time before the conclusion of the contract, and in a way appropriate to the means of distance communication – which does not mean that this has to be done in writing. However, once a contract has been concluded, written confirmation of specified information needs to be provided during the performance of the contract, and by the time of delivery of goods. If information is not provided in writing, then it has to be provided in another durable medium, but this is not further defined in the Directive.

*Price Indications (98/6/EC)*

49. This Directive does not specifically deal with circumstances leading up to the conclusion of a contract, so there is no specific time requirement here. However, pricing information has to be unambiguous and be clearly legible.

*Injunctions (98/27/EC)*

50. As this Directive does not contain any information duties, there is also no requirement about form and timing.

*Consumer Sales (99/44/EC)*

51. Information about guarantees has to be made available in writing, or another durable medium (again, not defined), on request by the consumer. Also, on the assumption that the "conformity with the contract" requirement is a form of information duty, any information about the goods conformity (or lack thereof) has to be provided before the goods are delivered to the consumer. There is no requirement as to form in this regard.

| Table 3: Information duties | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | **85/577/EEC** | **90/314/EEC** | **93/13/EEC** | **94/47/EC** | **97/7/EC** | **98/6/EC** | **98/27/EC** | **99/44/EC** |
| **Main Characteristics of Goods/Services** | | Art.3(2) [destination; means of transport used; type of accommodation and classification; meal plan; itinerary; minimum number of bookings]<br><br>Art.4(1)(b)[times of intermediate stops; travel accommodation]<br><br>Art.4(2)(a) + Annex (a), (b) , (c), (d), (e), (f), (j) [destination, transport, accommodation, minimum number, itinerary; visits and excursions; consumer's special requirements] | | Art.3(1) and Annex paras (c), (d), (e) (f), (g), (h).<br>[person requesting information to be given information about various aspects of the property to be acquired on timeshare basis]<br><br>Art.4(1) ditto [contract document] | Art.4(1)(b)<br>Art.5(1)[availability of after-sales service] | | | Art.2(2) and Art.2(3) [goods to be in conformity except where consumer told about shortcoming]<br><br>Art.6(2) [contents of the guarantee] |
| **Costs (including price, taxes, other charges)** | | Art.3(2) [price, including deposit to be paid]<br><br>Art.4(4) [price variation clause – information about calculation]<br><br>Art.4(2)(a) + Annex (h) and (i) [price, price revision, payment schedule and method] | | Art.3(1) and Annex para (i)<br><br>Art.4(1) ditto [contract document] | Art.4(1)(c) [price incl. taxes]<br><br>Art.4(1)(g) [cost of means of distance communication] | Art.3 [obligation to display unit and selling price] | | |

| Table 3: Information duties | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | **85/577/EEC** | **90/314/EEC** | **93/13/EEC** | **94/47/EC** | **97/7/EC** | **98/6/EC** | **98/27/EC** | **99/44/EC** |
| **Trader and related information** | | Art.4(1)(b) [details of organiser and local representatives; contact details if minors are travelling] | | Art.3(1) and Annex para (a)<br><br>Art.4(1) ditto [contract document] | Art.4(1)(a) [identity and address] | | | Art.6(2) [information about person providing a guarantee] |
| **Terms of the contract** | | | Art.3(1) – [notion of "good faith" in the unfairness test, which seems to have procedural element of transparency] | Art.3(1) and Annex paras (b), [person requesting information to be given information about exact nature of right;<br><br>Art.4(1) ditto [contract document] | Art.4(1)(i) [minimum duration where permanent or recurrent supply]<br><br>Art.5(1) [conditions for cancelling contract of unspecified duration] | | | |
| **Rights and obligations of contracting parties** | Art.4(1) [cancellation rights] | | Note point (i) in the Annex (list of indicative terms) [irrevocably binding consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract] | Art.3(1) and Annex para (l) [person requesting information to be given information about cancellation rights]<br><br>Art.4(1) ditto [contract document] plus Annex paras (j) and (k) [costs, charges and obligations as per document; existence of scheme for selling right] | Art.4(1)(f) [existence of right of withdrawal]<br><br>Art.5(1) [info about exercising withdrawal] | | | Art.6(2) [guarantee to inform consumers about rights under legislation on sale of goods] |
| **Redress procedures** | | Art.4(2)(a) + Annex (k) [periods during which to make complaint] | | | Art.5(1) [address for complaints; guarantees] | | | Art.6(2) [particulars for making a claim under a guarantee] |

| Table 3: Information duties | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | **85/577/EEC** | **90/314/EEC** | **93/13/EEC** | **94/47/EC** | **97/7/EC** | **98/6/EC** | **98/27/EC** | **99/44/EC** |
| **Other information requirements** | | Art.3(1) [descriptive matter must not contain misleading information]<br><br>Art.3(2) [information on passport and visa requirements; health formalities]<br><br>Art.4(1)(a) [passport and visa requirements]<br><br>Art.4(1)(b)(iv) [optional travel insurance] | | | Art.4(1)(h) [period during which offer valid] | | | |
| **Form in which information to be provided** | Art.4 [written notice] | Art.4(2)(a) and (b) [in writing or other appropriate form] | Art.5 [written terms to be in plain, intelligible language] | Art.4 [in writing; language requirements] | Art.4(2) [in a way appropriate to the means of distance communication]<br><br>Art.5(1) [in writing or durable medium] | Art.4 [selling price unambiguous, easily identifiable and clearly legible. | | Art.6 [in writing or another durable medium] |
| **Time at which information to be provided** | Art.4 [on concluding contract] | Art.4(2)(a) and (b) [before the contract is concluded] | | Art.3 [information about property available on request] | Art.4(2) [in good time before conclusion of contract]<br><br>Art.5(1) [written confirmation in writing during performance and by the time of delivery] | | | Art.2(1) [implicit that goods must conform on delivery so any information about shortcomings to be stated before delivery]<br><br>Art.6(3) [on request] |
| **Sanctions for failing to provide information** | | | | Art.5 [start of withdrawal period can be extended by up to 3 months] | Art. 6 [start of withdrawal period can be extended by up to 3 months] | | | Art.3 [goods to be brought into conformity, or price reduction/rescission) |

**Rights of cancellation in the eight consumer directives.**

52. A common technique for protecting consumers in relation to the contractual activities is to provide them with rights to cancel, withdraw from or terminate the contract on various grounds. This technique is used in several of the directives considered in this report. Thus the consumer is given a right to cancel, or withdraw from, the contract under the Doorstep Sales, Package Travel, Timeshare, Distance Selling and Sale of Goods directives. However, the rights are given for different purposes in different directives and vary in their detail, including as to the grounds on which the right may be exercised, the time for which it is available and the manner in which it may be exercised. In addition, similar rights are provided under other EC consumer protection legislation, including the e-commerce directive and the distant selling of financial services directive. Further in addition, similar rights are afforded to consumers by domestic law. Thus consumers are entitled to rights to withdraw from and to cancel regulated consumer credit agreements under the Consumer Credit Act 1974[112]. The common law also grants contractors rights to terminate a contract on grounds of breach and to rescind the contract on various grounds for defects in formation, including misrepresentation, duress and undue influence. All these common law rights may overlap and/or coincide with the statutory rights of cancellation and withdrawal provided for by legislation. In addition, the right to withdraw from an anticipated contract before its conclusion may overlap with statutory rights of withdrawal and cancellation

53. Hellwege[113] has written of how EC legislation causes friction and creates complexity in the law by adding new statutory rights alongside and in parallel with existing domestic national law. The problems he identifies are exacerbated when there are inconsistencies between the two sets of rules. The problem of friction is all the greater in the present context because there are inconsistencies between apparently similar rights arising under the different pieces of legislation. In some cases the differences may be merely terminological; in others differences may be genuine differences of substance. Both types of difference hinder understanding and add complexity to the law.

54. Broadly speaking a right to cancel, or withdraw from or terminate a contract may be granted to the consumer for the following purposes: - as a sanction for breach of contract by the supplier; to protect the consumer against ill considered purchase decisions, surprise or high pressure sales tactics; or to protect the consumer and provide him or her with a right of cancellation in the event of variation of the contract. We find cancellation rights being provided for all three purposes under the legislation here under consideration. Thus, under the sales directive and the distance selling directive the consumer is awarded rights to terminate the contract in the event of the seller's failure to perform. The doorstep selling and timeshare directives give right of cancellation to protect the consumer against ill-considered decisions, surprise or high-pressure sales tactics. The distance selling directive may also be seen as giving a right of cancellation to protect again surprise, but this time surprise of a different form, the rationale for the cancellation right being that the consumer has not had the opportunity to see the goods prior to their being delivered under the contract. The package holiday directive gives a right of cancellation to protect the consumer in the event of variation of the contract by the supplier. Rights of cancellation or termination are not relevant under the unit prices and injunctions directives, which by their nature are not concerned with the consumer’s contractual rights. The unfair terms directive does not in terms grant the consumer any right of cancellation on

[112] Section 67.
[113] [2004] 63 CLJ 71

termination, but the availability to the consumer of a right of cancellation or variation may be relevant in assessing the fairness of various types of term which might otherwise be considered unfair. This is apparent from examination of the indicative list of potentially unfair terms included in the annex to the directive. Thus the availability of a right for the consumer to terminate the contract may be relevant to the fairness of the terms in paragraphs 1 (c), 1(f), 1(i) and 1(o). Strictly speaking these are not rights of termination, being rights given by the contract rather than by law, but they do demonstrate the underlying rationale that a right to terminate may be provided for in the interests of fairness and to protect the consumer against failure of his or her legitimate expectations.

55. Rights to cancel, withdraw from or terminate a contract may be triggered by different events. Broadly speaking the trigger will depend upon the purpose for which the right is given. In the case of the rights under the sales directive and the distance selling directive, the right to terminate the contract is triggered by the seller's breach. In the case of the package travel directive, the right of withdrawal is triggered by the supplier's variation of the contract. Under the doorstep selling, timeshare and distance selling directives the right arises automatically without any trigger other than the making of the contract. This is consistent with the rationale of the rights in these cases, which is to provide the consumer with protection against ill-considered decisions and/or high-pressure sales tactics.

56. There are also differences in the periods for which rights of cancellation, withdrawal or termination are available and the rules on the manner in which the right may be exercised at. In this case the reason for the differences in treatment of the different rights is not always apparent. In some cases, for instance doorstep sales, timeshare and distance selling, the cancellation period may be extended as a sanction for failure by the seller to satisfy the relevant information requirement under the directive. These provisions may be complex and detailed, and are often unlikely to be readily comprehensible to the average consumer, or indeed the average business, without the assistance of professional advice.

*Door-Step Selling* (85/577/EEC)

57. As one of the earliest consumer protection directives, this was the first to provide for rights of cancellation. The rationale for the right is clear: a consumer in receipt of an unsolicited sales visit may enter into a contractual commitment without proper consideration, or as a result of high-pressure sales tactics, for instance in order to "get rid of" the salesman. That this is the rationale for the right is confirmed by the exclusion of the right of cancellation in the case of certain types of contract, including catalogue sales and contracts resulting from a visit requested by the consumer. The directive therefore requires the seller to provide the consumer with a written notice of his right to cancel the contract, at the time it is concluded. The consumer then has an absolute right to cancel the contract at any time within seven days from the date of receipt of the notice. The result, therefore, is that although the directive does not expressly so provide, failure to give the required notice of cancellation rights effectively extends the periods during which the consumer may cancel the contract, without limit: if the seller never sends the notice the consumer remains entitled to cancel the contract at any time, and the ECJ has held that it is contrary to the directive for a Member State to impose a time limit on the consumer's right to cancel[114]. The directive provides that the notice of cancellation is effective on posting; otherwise the

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[114] *C-48 1/99 Bayerische Hypothekenbank v Heinenger*

effects of cancellation are a matter for domestic law and the UK implementing regulations contain detailed provisions as to the effect of cancellation.

*Package Travel* (90/314/EEC)

58. A package travel contract may be said to possess some of the characteristics of a distance sales contract, in that the consumer makes the contract in reliance upon information supplied by the supplier all his representative through brochures and so on. However, since Package Travel contracts are normally initiated by the consumer they do not raise the same issues of surprise as are raised by doorstep selling contracts.

59. The Package Travel directive gives the consumer a right to withdraw from the contract in the event that the supplier seeks to alter significantly any of the essential terms of the contract. In the event of cancellation in such circumstances, the consumer is entitled to a full refund of all monies paid.

60. As noted elsewhere in this report, the implementing regulations seem to go further than the directive in that they make the provision of the information required to be provided by the supplier a condition of the contract with the result that the supplier's failure to provide the required information will be breach of contract entitling the consumer to terminate and withdraw from the contract at common law.

*Unfair Terms* (93/13/EEC)

61. The unfair terms directive does not provide for any right of cancellation or withdrawal. However, it does indirectly encourage the supplier who deals with a consumer to grant the consumer an express right of withdrawal/cancellation in certain circumstances, including where the supplier seeks to include in the contract a right to vary its terms or the nature of his performance.

*Timeshare* (94/47/EC):

62. As we have noted, a timeshare contract may share some of the characteristics of a doorstep selling contract, in that the consumer may be exposed to high-pressure sales techniques. However, unlike a doorstep contract to negotiation is normally initiated by the consumer. In addition, a timeshare contract may share some of the characteristics of a Package Travel or distance selling contract, in that the consumer may decide to buy on the basis of brochures and the like without actually seeing the timeshare property. The timeshare directive therefore provides consumers with a high level of protection, including a generous cancellation right. Essentially the consumer is entitled to cancel at any time within 10 days after conclusion of the timeshare contract. However, if the contract omits certain of the prescribed information required by the directive to be included, the cancellation period is extended, and will not begin to run until the required information is provided, or, if information is not provided within three months from the date of the contract, until expiry of a three-month period. There is no requirement that the notice of cancellation be given in writing; instead the directive requires the notice to be given by any means which can be proved in accordance with national law. As under the doorstep selling directive, it is not necessary that the notice of cancellation reach the supplier; all that is required is that the notice be dispatched. Cancellation releases the consumer from all obligations under the contract and the directive provides that if the price of the timeshare is covered by credit agreement, that agreement should also be cancelled.

63. The reason for granting a longer cancellation period - 10, rather than seven, days - in the case of timeshare contracts as compared with the other cases in which such a right is provided for is not readily apparent.

*Distance Selling* (97/7/EC)

64. As we have already noted, distance sales contracts are the paradigm example of a situation where information requirements may be imposed to protect the consumer. For similar reasons they also provide a paradigm example of a situation where a right of cancellation or withdrawal may be necessary in the interests of consumer protection, and unsurprisingly, the directive provides for the consumer under a distance sales contract to have a right of cancellation. The right is available for a minimum of seven days from the date of delivery of the goods, where the contract is for the sale supply of goods, or from the date of the conclusion of the contract in the case of a contract for services. However, as in the case of a timeshare contract, the period may be extended by the seller's failure to supply information required by the directive. In that case the cancellation period begins to run from the date when the required information is supplied, with a maximum period of three months from the date of receipt of the goods or conclusion of the contract, as appropriate.

65. The rules governing the period during which a distance sales contract may be cancelled therefore differ from those applicable both to doorstep sales and to timeshare contracts. In relation to the latter, the basic cancellation period is 10 days under a timeshare contract, but only seven days under a distance sales contract; failure to provide the required information extends the cancellation period in both cases whereas in the case of a timeshare contract the a maximum cancellation period is three months plus 10 days, in the case of a distance sales contract the maximum period is three months.

66. There are other significant differences. On cancellation of a distance sales contract the consumer is entitled to a full refund, but may be required to bear the costs of returning goods to the supplier except where, relying on a term to that effect in the contract, the supplier supplies goods of a different specification from that provided for in the contract, in which case the supply must bear the costs of returning the goods. As under a timeshare contract, if the contract is financed by credit agreement cancellation of the distance sales contract also releases the consumer from obligations under the credit agreement. The detailed rules as to cancellation of the credit agreement are a matter for member states.

67. The directive also contains a second right for the consumer to withdraw from the contract. Article 7 of the directive provides that unless otherwise agreed the supplier must perform his part of the contract within 30 days, and that if he fails to do so on the grounds that the goods or services are available, the consumer must be informed of that fact hand be entitled to a refund of any monies paid within 30 days.

*Consumer Sales* (99/44/EC).

68. The consumer sales directive does not give the consumer a right of cancellation or withdrawal of the type provided for by the doorstep, timeshare and distance sales directives. However, one of the remedies available to the consumer for breach by the seller of the conformity requirement under the directive is the right to rescind the contract. This is a remedy of last resort under the directive, available only where repair and replacement are unavailable or have not been provided within a reasonable time. However, it must be borne in mind that under the UK implementing legislation

the consumer also enjoys an absolute right to reject the goods for breach of condition for the relatively short time after delivery[115].

69. Both the rights of rescission derived from the directive and rejection derived from domestic law are remedies for breach of contract. There is therefore no direct comparison between them and the rights of cancellation provided for by the distance sales, timeshare and doorstep directives. It must be borne in mind however that a doorstep or distance sales contract is also a contract for the sale of goods and is therefore subject to the general law of sale. Where a consumer contracts to buy goods under a distance sales contract he may therefore enjoy a right to cancel the contract in accordance with the distance sales directive, a right to rescind the contract in certain circumstances in accordance with the sales directive, a right to reject the goods in accordance with domestic sales law and, in appropriate circumstances, a right to rescind the contract, for instance for misrepresentation, in accordance with domestic contract law.

*Conclusion*

70. The picture which emerges is one of considerable complexity. Rights of cancellation, withdrawal and termination may be given under different types of contract for different purposes or reasons. As we have demonstrated, the detailed rules applicable to rights under the different directives here under consideration differ to a considerable degree. As a result it may be difficult for consumers or businesses to understand the relevant rights, at least without professional advice which may not always be justified in the types of transaction here under consideration. Differences in points of detail, and even in points of substance, may well be justified where rights are given for different reasons, and different considerations may have to be balanced under different types of contract. However, in some cases it is difficult to discern the rationale underlying differences of approach between different directives.

71. In fact the position is more complicated than we have here described. The analysis above is restricted to the relevant provisions of the eight consumer protection directives considered in this report. As we have noted, there are also rights of cancellation and/or withdrawal under other legislation, both domestic and European, and the detailed provisions of that legislation may differ from those of the directives described above. Where for instance a consumer contracts to buy goods over the internet, the contract may be subject to the legislation governing distance sales contracts, e-commerce, and the general law of sale, all of which may provide for rights of withdrawal and/or cancellation or termination in one form or another.

[115] See p 131.

**Table 4: Cancellation rights**

| | 85/577/EEC | 90/314/EEC | 93/13/EEC | 94/47/EC | 97/7/EC | 98/6/EC | 98/27/EC | 99/44/EC |
|---|---|---|---|---|---|---|---|---|
| **Nature of right**[116] | **Cancellation** | **Cancellation** | **No right to cancel etc as such; supplier encouraged to provide contractual rights of cancellation in interests of fairness/balance** | **Cancellation** | **(1)Cancellation; (2) termination** | **N/A** | **N/A** | **Termination ("rescission")** |
| **Rationale/purpose** | **Protection against surprise/high pressure sales techniques; provides time for reconsideration** | **(1) Protection against variation; (2) remedy for failure to satisfy information requirements; (3) decision to buy may be taken without seeing property** | | **Protection against surprise/high pressure sales techniques; provides time for reconsideration; decision to buy may be taken without seeing property.** | **(1) Decision to buy may be taken without seeing goods etc (2) Seller's breach** | | | **Seller's breach** |
| **Trigger/when available** | **In all cases where contract made away from supplier's business premises as defined, subject to exceptions as provided for.** | **(1) Variation of essential terms of contract; (2) failure to provide required information** | | **In all cases** | **(1) In all cases, subject to listed exclusions; (2) failure to perform within 30 days** | | | **Delivery of goods not in conformity with the contract** |

[116] In this table the terms "withdrawal", "cancellation" and "termination" are used, respectively, to indicate (1) a right to withdraw from a prospective contract before its conclusion; (2) a right to cancel a concluded contract without any breach; (3) a right to terminate/withdraw from a concluded contract on grounds of a discharging breach.

| Table 4: Cancellation rights | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | **85/577/EEC** | **90/314/EEC** | **93/13/EEC** | **94/47/EC** | **97/7/EC** | **98/6/EC** | **98/27/EC** | **99/44/EC** |
| **Time during which available** | **7 days from receipt of notice of cancellation rights.** | **(1) No time limit; consumer to notify supplier "as soon as possible" (2) No time limit but right of termination for breach must normally be exercised promptly or may be deemed waived/barred** | | **10 days from conclusion of contract, or from provision of required information, up to maximum 3 months + 10 days** | **(1) 7 working days from receipt of goods/contract for services, or until supplier fulfils information requirements; maximum 3 months; (2) no time limit prescribed** | | | **Only if repair/replacement unavailable/unsuccessful** |
| **How exercised** | **Notice in writing to the seller or representative; notice effective on posting.** | **No provision in directive** | | **Any means provable in domestic law; notice effective on dispatch** | **No provision in directive** | | | **No form prescribed** |
| **Effects** | **Consumer released from all obligations** | **Consumer entitled to full refund** | | **Consumer released from all obligations; credit agreement also released** | **(1) Consumer entitled to full refund (minus costs of returning goods); (2) consumer entitled to full refund** | | | **Refund may be reduced to take account of consumer's use of goods** |

**Remedies, penalties and sanctions**

72. It is widely recognised that the effectiveness of consumer protection depends on the provision of effective and adequate remedies. Seven of the eight directives here under consideration impose obligations on a person who deals with a consumer by way of consumer protection[117]. On the whole, however, whilst the directives create a reasonably harmonised scheme of consumer "rights", they are surprisingly and remarkably vague on the remedies for breach of those rights. Indeed, in many areas, the matter of providing remedies for breach of the various consumer rights and supplier obligations created by the directives is left as a matter for the member states.

73. In broad terms remedies might take one of several forms. When private law rights are given to individual consumers, the most appropriate form of remedy will often be a private law claim, typically, for damages to compensate the consumer for any loss caused by the infringement. As an alternative, the consumer may be given a right to rescind or terminate[118] and thus escape from the contract, or a right to an injunction to compel compliance with some mandatory or prohibitive provision. Where an infringement may affect the interests of consumers as a group it may be more appropriate to impose criminal or administrative sanctions, or both. Typically, administrative sanctions involve giving power to some administrative authority to take enforcement action to prohibit continuation of the infringing behaviour. Administrative enforcement may make use of criminal law or civil law sanctions.

74. A private law action for damages may seem appropriate only in cases where a consumer has suffered loss or damage on an individual basis. To date, European law has not developed any significant concept of a right to to damages, and damages or compensation are rarely provided for in EC consumer protection legislation. Conversely, in the absence of any centralised enforcement authority or harmonised criminal law, prescription of criminal or administrative sanctions might be regarded as ultra vires and, at the same time, be largely ineffective. When we look at the eight directives here under consideration we therefore find a range of remedial provisions but it would not be unfair to say that the remedies provided are often weak.

75. Where the directive operates at the level of the individual contract, as in the case of the sales directive, private law remedies will be appropriate, and the sales directive provides a sophisticated regime of private law remedies. As we have noted elsewhere, the remedies of repair and replacement may be regarded as forms of specific performance. In addition, the consumer is entitled in appropriate circumstances to have the contract rescinded or the contract price reduced. Leaving aside the question whether "rescission" is used here in its technical English law sense[119], we may regard both these remedies as forms of rescission, price reduction effectively allowing the court to re-write the contract or partly rescind it. The directive is expressly stated to be without prejudice to any other remedies, including the claim for damages, which may be available under domestic law. Similarly, the unfair terms directive, which also

[117] It makes more sense to speak of the imposition of obligations on the supplier than to speak o giving rights to the consumer since in several cases the obligation is not enforceable by any individual consumer. In such a case it is more sensible to speak of the sanction for non-compliance rather than the consumer's remedy.
[118] Technically rescission and termination are different in English law. Rescission operates retrospectively to return the parties to their pre-contract position and is typically a remedy for some wrong doing in the formation of the contract, such as duress by one party; termination operates prospectively to discharge the parties from any unperformed obligations as from the moment of termination, and is typically the remedy for a (serious) breach of contract. The terms are not, however, used consistently and for the most part we are not concerned with the distinction between them.
[119] See note 2, above.

operates at the level of the individual contract, prescribes the remedy for inclusion in the contract of an unfair term: the unfair term is not binding on the consumer, but no further remedy is provided. We may regard this statutory invalidity as a form of partial rescission. Another variant on a right of rescission – more properly a right of termination for breach – appears in the Distance Selling directive which permits the consumer to claim a refund if the seller fails to deliver the goods within 30 days. In similar vein the Package Travel directive permits the consumer to withdraw from the contract and obtain a refund if certain key components of the package are varied.

76. As we have noted, several of the directives require the supplier dealing with a consumer to provide the consumer with stipulated information either before entering into the contract or in the contract itself, or both. In many cases this is coupled with a right for the consumer to cancel or withdraw from the contract within a stated period after its conclusion. On the whole no sanction is prescribed for breach of the information requirements. Where a sanction is prescribed the effect of failure to satisfy the information requirements is normally to extend the cancellation period, effectively making the contract voidable at the consumers' option for a fixed limited period. The remedy here may also therefore be said to be a species of rescission.

77. However, this approach is by no means always or consistently the case. A requirement to provide information is imposed under the Doorstep Selling, Package Travel, Timeshare, Distance Selling, and Unit Prices directives. In addition, the Consumer Sales directive imposes a requirement to make the text of any guarantee offered with goods available to the consumer and requires a guarantee to be expressed in plain, intelligible language, and the Unfair Terms directive requires contracts generally to be expressed in plain, intelligible language. Under the Distance Selling and Timeshare directives failure to provide information as required has the effect in certain circumstances of extending the period during which the consumer may cancel the contract. In contrast, no express sanction is provided for failure to comply with the information requirements under the Doorstep Selling, or Package Travel directives, for breach of the "plain intelligible language" requirement in the Unfair Terms directive, for failure to supply the text of, or express a guarantee in plain intelligible language under the Sales Directive, nor for the requirement to supply certain information before conclusion of a contract under the Timeshare directive. However, although the Doorstep-selling Directive is silent on what should happen to the cancellation period where the seller fails to provide information about the cancellation rights, the European Court of Justice has declared that a domestic rule imposing a one-year time limit would be incompatible with EC Law,[120] suggesting that there may not be a limit at all in this particular case. Concerns about legal certainty were rejected by the court, as a seller could avoid this situation by complying with the information requirement.[121]

78. In several cases the relevant directives states that it is the obligation of member states to ensure the provision of effective remedies. This is expressly the case under the Distance Selling, Unit Pricing, Package Travel, Unfair Terms and Timeshare directives. However, even where there is no express requirement to provide an effective remedy, member states will be subject to such an obligation as a matter of European law.

*Compensation*

[120] See C-481/99 *Heiniger v Bayerische Hypotheken- und Wechselbank* [2001] ECR I-9945.
[121] See paragraphs 47-48 of the judgment.

79. Although on the whole EC directives do not provide a remedy by way of damages for a consumer injured by a trader's failure to comply with some obligation imposed by the directive, there is no reason why they should not do so and the Package Holidays directive seems to create such a remedy almost by implication. Art 5 provides that

> 1. Member States shall take the necessary steps to ensure that the organizer and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract …
>
> 2. With regard to the damage resulting for the consumer from the failure to perform or the improper performance of the contract, Member States shall take the necessary steps to ensure that the organizer and/or retailer is/are liable …
>
> In the matter of damages arising from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited in accordance with the international conventions governing such services.
>
> In the matter of damage other than personal injury resulting from the non-performance or improper performance of the services involved in the package, the Member States may allow compensation to be limited under the contract. Such limitation shall not be unreasonable

80. These provisions clearly contemplate the existence of a compensatory remedy. It is, however, not clear how damages are to be calculated, whether on a contractual or tortious basis. The more likely intention would be that they should be assessed on a contractual basis to compensate for the supplier's failure to provide the contract performance expected of him. In C-168/00 *Leitner v TUI Deutschland*,[122] the European Court of Justice did note that the concept of compensation includes non-material damage which has been caused by the non-performance of the contract.[123]

81. It might be possible to argue that the doctrine of *effet utile* requires that consumers always be provided with a compensatory remedy for all breaches by a trader of obligations imposed by EC law, in order to satisfy the requirement that they be provided with an effective remedy. It has been argued that there are early indications in the jurisprudence of the ECJ of the development of what might be termed a right to damages for breach of EC statutory duty where a person suffers loss or damage as a result of another's breach of an EC legal requirement imposed for the protection of the injured

[122] [2002] ECR I-2631.
[123] The case involved a claim for compensation *inter alia* for loss of enjoyment after a holiday was spoilt following an outbreak of salmonella. Austrian law did not recognise a claim for non-material damage. The case illustrates the lack of a common European concept of damages.

party[124]. However to date such rights have only been recognised where the claimant has been injured by a breach of a provision of the Treaty or other directly applicable provision. It is more difficult to see how such a right could be given for breach of a requirement imposed by a measure which is not directly applicable and is not addressed to the trader but to the Member States.

*Administrative sanction*

82. Another mechanism adopted in these directives is provision for administrative enforcement. The most familiar example of this approach is in the Unfair Terms directive which requires Member States to ensure that organisations with a legitimate interest in domestic law in protecting consumers have the right to take action against those using unfair terms. However, as a result of the Injunctions directive, regulatory enforcement measures are now available for breach of any EC consumer protection directive.

[124] See C-253/00 *Munoz* [2002] ECR I-7289; C-453/99 *Courage v Crehan* [2001] ECR I-6297, recognising a right for a party injured by a breach of art.81/82 to claim damages. See Betlem "Torts, a European Ius Commune and the Private Enforcement of Community Law" (2005) 64 CLJ 126,

| Table 5: Remedies and sanctions | | | | | | | |
|---|---|---|---|---|---|---|---|
| | **85/577/EEC** | **90/314/EEC** | **93/13/EEC** | **94/47/EC** | **97/7/EC** | **98/6/EC** | **99/44/EC** |
| **Performance of contract** | | | | | | | Repair or replacement of non-conforming goods |
| **Rescission of contract** | | Right to withdraw if certain terms changed (art 4.5) | | | Right to refund if seller fails to deliver within 30 days (art 7) | | Rescission of contract if seller delivers non-conforming goods AND repair/replacement unavailable; NOT if lack of conformity minor (art 3) |
| **Price reduction** | | | | | | | if seller delivers non-conforming goods AND repair/replacement unavailable (art 3) |
| **Compensation** | | If package cancelled due to alteration (art 4.6) Member states to ensure that retailer/organiser is liable for proper performance of contract (art 5.1) | | | | | |
| **Extension of withdrawal/cancellation period** | | | | Failure to include prescribed information in contract (art 5.1) | Failure to provide prescribed information (art 6) | | |
| **Invalidity of contract term** | Waiver of rights ineffective (art 6) | | Inclusion in contract of unfair term (art 6.1) | | | | Term excluding consumer's rights (art 7) |
| **Member states to provide effective remedy** | Duty to give consumer notice of right to withdraw (art 4) | Member States to ensure information included in contract (art 4.2) | | Member states to prohibit the taking of advance payments (art 6) | 1) Art 11.1. Member states to provide adequate remedies<br>2) Member states to prohibit inertia selling (art 9) | Member states to lay down penalties for non-compliance Directive, and to take all necessary measures to ensure that these are enforced. Penalties must be effective, proportionate and dissuasive (art 8) | |
| **No remedy provided for** | | 1) Duty not to provide misleading information (art 3.1)<br>2) Information to be legible and accurate<br>3) Terms of brochure to be binding (art 3.2)<br>4) Duty to provide evidence of security for refunds/repatriation (art 5.7) | Contract terms to be in plain intelligible language (art 5) | Duty to provide information before contract | Duty to provide information before contract (art 4) | | Text of guarantee to be available and in plain intelligible language (art 6) |

| Table 5: Remedies and sanctions | | | | | | | |
|---|---|---|---|---|---|---|---|
| | **85/577/EEC** | **90/314/EEC** | **93/13/EEC** | **94/47/EC** | **97/7/EC** | **98/6/EC** | **99/44/EC** |
| **Injunction** | Available under injunctions directive | Available under injunctions directive | Available under injunctions directive | Available under injunctions directive | Available under injunctions directive | Available under injunctions directive | Available under injunctions directive |
| **Administrative action** | | | Inclusion in contract of unfair term (art 7) | | | | |

# Part III

# Summary and conclusions

1. In the first part of this report we undertook an analysis of eight directives comprising part of the "consumer *acquis*" and their implementation in the UK. We would emphasise that these eight directives are not the whole of the *acquis* and that a number of consumer directives, including the Product Liability directive, the Distance Selling of Financial Services directive and the E-commerce directive, are outside the scope of this study.

2. Our study is further constrained by being limited to consideration of the implementation of the eight directives in the UK. We have not considered any issues arising from the implementation of these directives in other member states, and nor were we asked to do so, but it is clear from other published material that there are such difficulties, which would have to be taken into account in any general revision of the *acquis.* We should also point out that there is, of course, a wider review of the consumer *acquis* being undertaken at the European level. Our report has taken no account of that review, which is still ongoing.

3. Our analysis in the first part of this study covered two issues:

   1. an analysis of each of the eight directives we were asked to examine and their implementation in the UK, identifying those areas in which, relying on the so-called "minimum harmonisation clause" in the directive the implementing legislation provides a higher level of consumer protection than is provided by the underlying directive;

   2. consideration of the impact on such directives and their implementation of the Unfair Commercial Practices Directive (UCPD), taking into account the extent to which the UCPD covers the ground occupied by the relevant directive and, where the UK has made use of the minimal clause in the underlying directive, whether or not such use can be justified for the purposes of the UCPD.

2. In the second part of this report we undertook a comparison of the eight directives under consideration to identify common themes, areas of overlap and inconsistencies between them. The areas covered included the definitions of common terms, the information duties imposed on parties dealing with consumers, cancellation rights, and the remedies made available to consumers for breaches of the various duties.

3. In the first part we concluded that in general the UCPD has had, or rather will have, relatively little impact on these directives. In the second we identified a number of inconsistencies between the various directives. In some cases these were merely terminological differences; in others genuine differences of substance. For instance we noted inconsistencies in the definitions of key terms, such as "consumer" and "seller", failure in some cases to define key terms, such as "durable medium"; and differences in substantive provisions such as those requiring consumers to be provided with information, or granting consumers rights to cancel, or withdraw from or terminate a contract.

4. In this part of our report our aim, drawing on the conclusions in the first two parts of the report, is to seek to identify areas in which the existing *acquis* might be simplified or rationalised, so as to remove inconsistencies. We then consider areas in which the

existing legislation might be improved or updated, taking into account the European Commission's proposals to move from a system of minimal to one of maximal harmonisation. We should preface our remarks by repeating that we have not examined the whole of the consumer *aquis*. Our brief was restricted to eight directives which feature a minimum harmonisation clause. Two of them, the Injunctions directive and the Unit Pricing directive, stand somewhat apart from the other six since they do not impact directly on the relationship between individual consumers and their suppliers or give the individual consumer personal rights against the supplier.

Areas for rationalisation/simplification

5. Our comparative study of overarching “themes” running through the eight directives identified a number of areas in which there are inconsistencies between the directives.

*1. Definitions of key terms*

6. We have demonstrated that there is a remarkable lack of consistency in defining key concepts even within the small group of directives with which we are concerned. In some cases different terms are used for the same or similar concepts. Thus, for instance, (leaving aside the Injunctions directive, which is conceptually somewhat different from the other directives here considered) all but one of the directives protects, and defines, "consumers". The timeshare directive, however, protects the category of "purchasers", but defines them in terms which share several key features with the definitions of "consumer" in the other six directives. Whilst it may, arguably, be more natural to refer to the "purchaser" of a timeshare property, the reasons for not using the term "consumer" are not obviously compelling. The person who deals with the "consumer" is variously defined as the "seller or supplier", "trader", "retailer" and "vendor", generally with even less obvious justification for the variation.

7. A further problem is that the same term is defined differently in different contexts. In particular, the key concept of a "consumer" is defined differently in several different directives. Thus a "consumer" is a "natural person" who is acting "for purposes which *can be regarded as outside* his trade or profession" (Doorstep Selling directive); a natural person who is acting "for purposes which *are outside his trade, business or profession*" (Unfair Terms and Distance Selling directives); a natural person who is acting for purposes "which *do not fall within the sphere of his commercial or professional activities*" (Unit Prices directive); a natural person who is acting for purposes which "are *not related to* his trade, business or profession" (Consumer Sales directive); and a natural person acting for purposes "*outwith his professional capacity*" (Timeshare directive). In some cases there may be no substantive difference between these terms: for instance "outwith" is merely a somewhat archaic alternative for "outside". But in other cases it is not clear whether the differences in wording are intended to convey substantively different meanings. For instance, it is arguable that a purpose which is outside an individual’s trade, business or profession, may still be related to that trade, business or profession so that the individual in question would be a consumer for the purposes of the Unfair Terms or Distance Selling directives, but not for the purposes of the Consumer Sales directive. We suggested above that the differences in terminology were probably due to no more than idiosyncracies of translation and not intended to produce substantive differences, but we cannot say with any certainty that that is the case and whilst we think that a court would be likely to interpret the different expressions in broadly the same way, the terminological differences create uncertainty which is in the interests neither of consumers nor of business. At the very least these differences in terminology are an "irritant" and a

hindrance to comprehension; at the worst, where the stakes are high enough, they may result in litigation.

8. There is a similar lack of consistency in the definition of the party who deals with the consumer. We have already noted, above, they have different terms are used in different directives. However, even where the same term is used, it is not defined consistently. Thus a "seller or supplier" is defined as a natural or legal person who is acting for "purposes relating to his trade, business or profession, whether publicly or privately owned" (Unfair Terms directive); a natural or legal person who is acting in his "commercial or professional capacity" (Distance Selling directive); a natural or legal person who is acting "in the course of his trade, business or profession" (Consumer Sales directive). This inconsistency is all the more striking if one bears in mind that a single transaction may be subject to all three directives.

9. Other key terms are simply not defined at all. Thus there is no definition in any of these directives, nor any agreed European concept, of a "contract". Similarly there is no definition of "goods", although there is a definition of "consumer goods" in the Sales directive. Most notably of all, although a number of more recent directives require information to be supplied to the consumer in "a durable medium" there is no definition of "durable medium" in these directives. There is a strong argument that, given their related fields of application, the same definition should be applied in both the Distant Selling and Distance Selling of Financial Services directives but as things stand although the term is defined in both the Distant Selling of Financial Services and Insurance Mediation directives, it is not clear if the definition applies universally.

10. One obvious area for rationalisation, which would greatly simplify the task of advising consumers and businesses upon their rights, would therefore be to rationalise, or harmonise, these definitions, using common definitions of recurring terms, such as "consumer", "supplier", "producer", and so on, unless a different meaning is required by the particular context. These and other similar terms could be defined in a framework instrument which would then apply to all consumer protection directives unless the context required a different approach.

*2. Information duties*

11. A common thread running through the six directives is the requirement to provide the consumer with information. The directives differ as to the information to be supplied, the time when and the form in which it should be supplied. It is, however, possible to discern some general principles running through the seven substantive directives (ie excluding the Injunctions directive). Broadly speaking the information to be supplied falls into five categories, concerned with (i) the nature and characteristics of the goods and/or services to be supplied; (ii) the price and other costs associated with the transaction; (iii) the identity and characteristics of the trader; (iv) the terms of the contract; and (v) rights of redress available to the consumer, including details of any right to cancel and the way in which it may be exercised. Even where a directive does not appear directly to impose any duty to supply information, as in the case of the main substantive provisions of the Consumer Sales directive, it may be possible to recast some of the duties as, in effect, duties to supply information. Thus for instance, it is possible to see in the conformity requirement of the sales directive a duty to supply information, at least in those circumstances where the supplier can escape liability by supplying accurate information - e.g. as to the purposes for which the goods are suitable - and articles 2(2)(d) and 2(4) can be seen as imposing liability for supplying inaccurate information.

12. The directives vary as to the form in which the information to be supplied should be made available, but broadly speaking the tendency is to require information to be supplied in a manner appropriate to the nature of the information and of the transaction. In particular, in distance transactions, or where the information relates to the consumer's contractual rights, the tendency is to require information to be supplied in a form in which it can be retained by the consumer. In the early directives this was reflected in a requirement that the information be supplied in writing; more recently directives have required information to be supplied in some "durable medium", although, as noted above, this term has not always been adequately defined.

13. Similarly, the directives differ as to the time when information should be supplied, but again, broadly speaking, it is possible to discern some general trends. Where information is concerned with enabling the consumer to make an informed transactional decision, it is normally required to be supplied before entry into the contract. Information concerned with the consumer's substantive rights, such as that concerned with rights of cancellation, terms of guarantees and the supplier's identity and contact details may be required to be supplied at a later stage and in the form of writing or another durable medium.

14. Having identified these broad, general principles running through the *acquis* directives, one possible way in which the legislation might be simplified would be to adopt a general principle requiring the supplier to make available to the consumer such information about the nature of the goods, the identity of the parties and the terms of the contract and the consumer's rights under it as is reasonably necessary to enable the consumer to make an informed transactional decision whether to enter into the contract, proceed with it or enforce any rights available to him under the contract or under the general law, such information to be accurate and to be supplied in good time to enable the consumer to make an informed decision, and to be supplied in a form appropriate to the nature of information and the nature of the transaction. The Unfair Commercial Practices directive effectively imposes a duty of this type on suppliers, but does not create any substantive rights for individual consumers. In its present form it would therefore provide no adequate substitute for the specific information duties in the individual directives. Nevertheless, it provides a model for the development of such a general duty and introduction offer a general duty owed to the individual consumer would therefore align the supplier's public and private law obligations. Alternatively, if EC law were to develop a general remedy of damages for anyone injured by a breach of EC law (see below), it might be possible to rely on the general information duty in the UCPD.

15. In fact, however, we have come to the conclusion that the UCPD would be an inadequate replacement for the individual duties for another reason. The obvious weakness of such a general duty is that it would tend to be so vague as to be almost useless. Replacing the existing specific duties with a general duty would inevitably result in uncertainty, lowering the level of consumer protection and creating difficulties for businesses, especially small businesses, which would be uncertain about the nature of the information duties under specific contracts. Such an approach would be likely to be particularly unwelcome to the UK business and legal communities. English law tends to be suspicious of and to set its face against broad and general duties, favouring more specific and detailed rules on the grounds that they are more productive of certainty, which it regards as being at a premium in commercial matters.

16. Nevertheless, we think there might be something to be said for adoption of a general principle requiring supplier to furnish the consumer with appropriate transactional

and other information. First it may be that the case for certainty in commercial matters is sometimes overstated. Domestic contract law abounds with open textured rules and general principles, the application of which involve some discretion on the part of the court and therefore, some inherent uncertainty. As an example we might cite the requirement in the Sale of Goods Act, section 14, that the goods supplied be of "satisfactory quality". Academic commentators have observed that this requirement is open textured and therefore capable of manipulation to fit the facts of individual cases, and that is almost impossible to formulate a quality requirement capable of general application which avoids such inherent uncertainty.

17. A possible solution which would reduce the uncertainty created by adoption of a general principle would be to adopt a general principle requiring the supply of appropriate information as outlined above, and then "flesh it out" by adopting more detailed specific requirements for individual types of contract. It is to be hoped that such individual requirements would be phrased in a mutually consistent manner, so as to minimise, if not wholly avoid, any inconsistencies. The value of the general background principle would be that it would provide a guide-line for interpretation and application of the more specific duties, operate as a "gap-filling" mechanism in areas not covered by the specific duties, and guide the development of new specific requirements in new areas as they emerge.

*3. Cancellation rights*

18. Another common feature of these directives is the availability to the consumer of a right to cancel the contract. Such rights are made available under the doorstep selling, timeshare, package holidays and distance selling directives.

19. Clearly the reasons for giving the right to vary from directive to directive: for instance the right to cancel a doorstep contract (to protect the consumer against ill-considered decisions and high-pressure sales tactics) has a different rationale from the right to cancel a distance sales contract (where the concern may be that the consumer has not seen the goods prior to contract). Nevertheless, there are some common features and there is scope for rationalisation. It is not immediately apparent why the periods during which the right of cancellation may be exercised varies from directive to directive, and a statement of general principles would contain general rules governing the exercise of the right and its consequences.

20. Cancellation rights are often coupled with information requirements. The sanction for failure to provide the required information is often extension of the cancellation period. Again, we can see no good reason for the length of such extension varying from directive to directive and it seems to us that there is a good case for harmonising the rules governing such extensions as part of the rationalisation of the consumer *acquis.*

21. However, although we think there is scope for rationalisation and alignment of the various cancellation rights, we have come to the conclusion that it would not be possible to replace the individual instances in which contracts are cancellable with a general principle. Although in general it is true that contracts are cancellable if made off the seller’s premises or by distance communication, the underlying rationale for allowing cancellation in the two cases differs. Moreover, whilst in general a contract made *inter praesentes* on the supplier’s premises is not cancellable – and we assume that no-one would argue that a straightforward retail sale should be cancellable – certain types of face to face contract are cancellable – such as a contract to buy a timeshare property. A general principle allowing cancellation in all cases where the

contract is made other than face to face on the seller's premises would therefore have to be subject to numerous qualifications to cover such situations.

*4. Remedies*

22. As we have demonstrated, consumers have an array of different remedies available to them under the different directives with which we are concerned. The remedies favoured by the directives may not always seem the most appropriate to the eyes of a common lawyer: for instance, a common lawyer may feel uncomfortable with the Consumer Sales directive's prioritisation of performance-based remedies in the form of rights to demand repair or replacement of non-conforming goods. The common law rarely gives specific performance of a contract for the sale of goods. On this particular point however we would note that, first, the consumer does not have an absolute right to demand repair or replacement, which are effectively rights available at the supplier's discretion; and second that repair or replacement will often be attractive options for the supplier, allowing him to avoid being left with second hand goods on his hands, and effectively locking the consumer into the transaction. Indeed, if we were to criticise the emphasis on repair and replacement in the sales directive it be on the grounds that they are more appropriate to commercial than to consumer transactions and tip the balance of power too far in favour of the supplier.

23. This, however, is a side issue. It is difficult to argue for a general rationalisation of remedies. Different remedies may be appropriate in different cases. For instance, a right to demand repair might make sense in the context of a contract for the sale of goods, but makes little sense in the context of a package tour contract. The law would, however, be improved by more consistent and clearer use of terminology. Some of the problems in this context arise from defective translation. For instance, it is not clear whether the right of "rescission" referred to in the sales directive is true "rescission *ab initio*", operating retrospectively, or what an English lawyer might more properly refer to as "termination", operating prospectively to release parties from unperformed obligations under the contract, but not retrospectively nullifying it. Whilst this may seem a somewhat obscure point, the nature of the right has serious consequences for the additional rights available to the parties. If "rescission" operates retrospectively, its effect is to put the parties in the same position as if the contract had never been made. If, however, it operates only prospectively, whilst the parties are discharged from their unperformed obligations, they were bound by a contract until the moment of discharge. The consequence is that a buyer who terminates the contract for breach is entitled to maintain against the seller an action for damages for breach of contract, but no such action is available to the buyer following rescission *ab initio.*

24. The real issue here is the interaction between remedies derived from the directive and those available under domestic law. A recurring problem is the question of the availability or non-availability of damages for infringement of rights arising from a directive (and the problem is not confined to consumer contracts: see, for instance the case law under the Commercial Agents directive). The issue is partly addressed in the sales directive, which expressly states that it is intended to be without prejudice to rights to claim damages available under domestic law, and yet, as we have seen, the interaction of the remedies derived from the directive with the action for damages is not clear in all instances.

25. More generally the striking gap in the array of remedies available under the directives forming the consumer *acquis* is the absence of a general right to claim damages for breach of a community obligation. It has been argued that the doctrine of *effet utile*, or effectiveness principle, in Community law requires that consumers always have a

right to claim damages where they suffer loss or injury as a result of breach of a community obligation, and that EC law might develop such a right in the form of what amounts to a (tortious) claim for breach of EC statutory duty. However, that would require development of the law by the ECJ and, as we have noted, it is difficult to see how such a right could be provided for breach of a non-directly applicable instrument such as a directive.

*26.* If greater use is to be made of the action for damages in European consumer law, it will be necessary to work out the principles governing the award of such damages. As the case law demonstrates those principles are not common across all member states and it will be necessary to work out such issues as the availability of damages for non pecuniary loss and so on. This may more properly be a matter for the ECJ or for consideration in the Common Frame of Reference rather than for revision of the consumer *acquis.*

27. Another striking gap which may be identified in the consumer *acquis* is the absence of a general principle that the supplier should be liable to the consumer if he fails to perform his contractual obligation. Such a principle is reflected in the package holidays directive, which requires the operator/retailer to compensate the consumer if he fails to provide the holiday contracted for, and in the distance selling directive, which gives the consumer a right to a refund if the supplier fails to deliver the goods within 30 days from the date of the contract. This however does not give the consumer a right to damages to cover any additional loss caused by the supplier's breach, such as the extra cost of having to purchase the goods elsewhere, and even this limited form of redress is not available under the other directives. Thus, surprisingly, the consumer sales directive imposes an obligation on the seller to deliver goods in conformity with the contract, but gives the consumer no remedy if the seller simply fails to deliver at all. If we are compiling general principles of consumer contract law, one of the most basic must be that the supplier will supply the goods or services contracted for and will compensate the consumer for any loss caused if he fails to do so.

<u>Other areas for improvement</u>

28. Our recommendations so far have focused on the rationalisation of the *acquis* by aligning the various component directives, removing inconsistencies and limited gap filling. It is possible to envisage more radical reform. At the level of individual directives we would identify two particular areas where reform might be considered.

*Unfair terms*

29. The unfair terms directive protects the consumer against an unfair term if the term is a standard, pre-drafted, term. It has no application to negotiated terms. In some of the decided cases this has led to extensive analysis of the question whether a particular term was or was not a "pre-drafted" term. This seems in many ways to be a sterile exercise. In a case where there is significant imbalance of bargaining power between the parties a "negotiated" term is as much open to abuse as a non-negotiated one. Indeed in such cases the concept of "negotiation" may be artificial. Of course, where one contracting party exploits his superior bargaining power to force a contract term on to the other party a court may well decide that the term was not negotiated in any real sense. However, it seems to us that there is a strong argument for removing the need to engage in such judicial acrobatics and for extending the reach of the unfair terms directive to all unfair terms, whether negotiated or pre-drafted. This, after all, is the position in relation to consumer contracts in domestic law as the law stands and it would remain the position if the recommendations of the Law Commission were to be

accepted. We understand that as originally drafted the unfair terms directive itself would have applied to negotiated terms, and we would suggest that this is an issue which might usefully be pursued when the directive is next revised.

*Consumer sales*

30. The consumer sales directive, in line with the laws of the individual member states, adopts a traditional system of vendor liability for goods. Liability for the quality, etc, of goods sold is imposed on the retail seller via the contractual nexus. In the modern commercial environment however there are convincing arguments for replacing, or, preferably, augmenting the system of seller liability with a system of producer or manufacturer liability. The arguments have been set out at length elsewhere[125] and there is no space in this report to develop them in detail. In a modern commercial setting, however, it must be recognised that it is the manufacturer or producer who is generally responsible for any defects in the goods as sold, and it is the manufacturer or producer who, through advertising, is primarily responsible for shaping consumers' expectations of the goods. Most goods are sold pre-packaged, reaching the retailer in sealed packaging and being resold to the ultimate consumer without being opened and with little or no chance of intermediate examination. In such a situation the retailer is little more than a channel or conduit by which the goods are transmitted from manufacturer to consumer.

31. The best argument in favour of retailer liability is that it often provides the consumer with a readily identifiable and accessible target from whom to seek a remedy if the goods prove defective or unsatisfactory. The retailer is left to pursue remedies against his contractual supplier, who will in turn pursue remedies against his supplier, and so on back up the chain of supply until liability is passed back to the party ultimately responsible for the goods, the manufacturer or producer. However, this chain of liability system is efficient. Moreover it may break down - for instance if one of the parties in the chain of liabilities insolvent, or if action at any point in the chain is barred by an effective exclusion of liability - in which case liability will never be passed back to the manufacturer or producer. The injustice of the system of retailer liability is brought into sharp relief if one bears in mind that the retailer may also be liable to the consumer for damages to compensate for any losses caused by the goods proving defective.

32. Under article 12 of the consumer sales directive the commission is, in July 2006, to review the operation of the directive and to consider, in particular the case for introducing a system of producer's direct liability. We would suggest that there is a strong case for introducing such a system. However, the system of retailer liability is familiar and well-established. Moreover it does provide the consumer with a convenient and accessible source of redress. We would therefore recommend that any system of producer liability should be introduced alongside and in parallel with the established system of retailer liability, allowing the consumer to choose whether to pursue an action or seek a remedy against the retailer or against the manufacturer or producer. At the same time the commission should consider extending the retailer's right to redress where he is held liable to the ultimate consumer because the goods have proved defective or unsatisfactory. As we have noted, the chain of liability is inefficient and unreliable. If the retailer's liability is justified as a means of providing the consumer with an effective means of redress, there is a strong case for giving the retailer a direct right of action to seek an indemnity against his liability from the manufacturer or producer.

[125] SeeBradgate and Twigg-Flesner, 25, Journal of Consumer Policy, 345

*Consolidation*

33. A yet more ambitious reform would be to seek to consolidate some or all of the directives under consideration in to a single instrument. It is possible to envisage several different combinations. We have already suggested a one possibility would be to combine instances of rights of cancellation in a single cancellable contracts directive. We have already given no reasons for thinking that this would be an impracticable course of action. Another alternative would be to combine the doorstep and distance selling directives in a single "contracts made away from business premises" directive. Consideration would then have to be given to the possible inclusion of the distance selling of financial services directive, but that might be better placed with other legislation concerned with financial services.

34. An even more ambitious consolidation would pull together all legislation concerned with consumer sales. It would therefore include the doorstep and distance selling directives, as well as the directive on consumer sales. That would produce the makings of a European consumer sales law, and if we were prepared to go that far it might be appropriate to consider filling in the gaps to produce a genuine consumer sales law. As a minimum such a law would include provisions covering the seller's duty to deliver the goods and the seller's right to sell the goods. It might also include provisions governing the passing of risk from seller to buyer (which as we have noted proved problematic in relation to the implementation of the consumer sales directive in the UK). An instrument covering these areas would occupy much the same ground as the UN Convention on Contracts for the International Sale of Goods. To produce a complete sales code the instrument would have to cover the rules governing the passing of property from seller to buyer, but that has proved a sensitive area for European action the past and it might not be possible to go that far. Nevertheless an instrument governing all of the contractual aspects of a sale contract would be workable and would not go significantly further than the existing law does.

35. However, one must ask whether it would be appropriate in modern commercial circumstances to produce an instrument limited to contracts for the sale of goods. Contracts for services are of increasing economic significance and the distant selling and doorstep sales directives extend beyond contracts for the sale of goods to contracts for the supply of services. Genuine consolidation would therefore require production of what would amount to a European consumer code. We can see much merit in the production of such an instrument, but it may be that it would be politically difficult, as well as time-consuming, to produce such an instrument at the present time. It may also be outside the terms of this report, but if it were possible we would suggest that production of such a code, consolidating existing legislation and filling in gaps we have identified, would be a project worthy of serious consideration.

36. If this is considered too ambitious a proposition, another more limited alternative would be to consolidate together the various controls on unfair terms and exclusion clauses. In addition to be unfair terms directive several of the directives here considered render particular types of contract term ineffective. Thus, for instance, terms seeking to exclude the seller's liability for the conformity of the goods under the sales directive are wholly ineffective. Similarly, under the directives giving rights of cancellation a contract term restricting or excluding the right is generally rendered ineffective. It can be argued that, in the interests of consistency and coherence, the various provisions which restrict the effectiveness of particular types of contract term should be brought together in a single piece of legislation. There are however arguments against such a course and in more general terms there are several different ways in which the various pieces of legislation we are here considering could be

packaged together. Once one has discounted the possibility of a complete consumer code no one configuration is self-evidently better than any other.

**Impact of CFR project**

37. We need to raise one final issue in respect of the suggestions we have made above. All of these are based on a particular national perspective on the 8 directives under consideration. However, there are now 25 Member States in the European Union, and each has its own experience of the implementation of these directives into domestic law. The purpose of the Commission's *Consumer Compendium* project is to bring together this experience and draw on it in making any reform proposals. The proposals we have offered here cannot take into account the results of this research, which has yet to be published by the Commission. Once a full picture emerges, it may become clearer which of our proposals are realistic, and which would meet with significant objections from other Member States.

38. Moreover, the Commission has made it clear that a reform of these 8 directives will not be an exercise carried out in isolation, based only on the results of the *Compendium*. At present, work is underway to prepare a *Common Frame of Reference on European Contract Law* (CFR), and the Commission intends to test the CFR by considering how the various principles from the CFR would improve the consumer *acquis*. Until the CFR has been finalised and approved (which is unlikely to occur much before 2009), broader reforms of these directives may not be on the agenda.

39. However, this should not affect the need for more immediate improvements to the consumer *acquis*. Streamlining definitions is a task which could be carried out before the CFR is finalised, as could reforms to the text of the Directives to clarify their substance. Problems which will have been indentified by the *Compendium* project should also be addressed before the CFR is available. It may be that the Commission will be reluctant to undertake such a two-step approach to improving the consumer *acquis*, but if there is one further recommendation we could make, it is this: there is a need to rationalise and streamline the existing directives to deal with the current problems – and this cannot wait for another 5 years.

End