

Review of the eight EU consumer *acquis* Minimum Harmonisation Directives and their implementation in the UK and analysis of the scope for simplification

Executive summary

Introduction

1. Since 1985 the EC has adopted a number of directives on particular aspects of consumer protection law.
2. In October 2001 the European Commission published a Green Paper on European consumer protection seeking views on a proposed reform of consumer protection law which would move from a process of harmonisation based on sectoral directives to harmonisation around a more flexible framework based on a "general duty to trade fairly".
3. In June 2002 the Commission indicated its intention to proceed with this proposal, and in May 2005 the Unfair Commercial Practices Directive ("UCPD")¹ was adopted. Its objective is 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.
4. Almost all EC consumer protection directives include 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. Whilst the minimum harmonisation clause permits individual member states to maintain higher levels of consumer protection, it may be said to have undermined the effectiveness of directives as harmonisation measures.
5. Unlike earlier consumer protection directives the UCPD is a maximum harmonisation measure, which prohibits member states maintaining measures more protective of consumers in the area it occupies, subject to a temporary saving allowing member

¹ Directive 2005/29/EC concerning unfair business – consumer practices in the internal market

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 objective². National provisions retained on the basis of this derogation must be notified to the European Commission³.

6. In parallel with these developments the Commission initiated a review of a European contract law and in July 2001 published a consultative "Communication on European Contract Law"⁴, 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.
7. In 2003, in light of responses to this document, the Commission published an *Action Plan on a Coherent European Contract Law*⁵. 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*.
8. 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.
9. The UCPD has already been the subject of two reports prepared for the DTI. The first⁶ had as its objective an analysis of the likely impact of the UCPD on English contract law. The second⁷ aimed to analyse the key concepts in the UCPD and the provisions of English law which might fall within its scope, including a detailed analysis of five specimen measures to illustrate how they might be affected by the UCPD.

² Art 3.5

³ Art 3.6.

⁴ COM 2001 398 final

⁵ COM 2003 68 final

⁶ "Operation of general rules and the notion of fairness in English law" (Brownsword, Bradgate and Twigg-Flesner, 2003).

⁷ "An analysis of the application and scope of the unfair commercial practices directive" (Twigg-Flesner, Howells, Nordhausen and Parry, 2005)

This report

10. The present report has been compiled for the Department of Trade and Industry by Professor Robert Bradgate and Annette Nordhausen of the Institute for Commercial Law Studies at the University of Sheffield and Dr Christian Twigg-Flesner of the Law School, the University of Hull. It has three objectives. In the first part it examines the 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,
 - consider the impact on such measures of the UCPD, and
 - consider the scope, if any, for simplification of the law offered by the UCPD.
11. The first part of the report comprises eight chapters, one devoted to each of the existing *acquis* directives and its implementation, examining where the implementation provides a higher level of protection than the underlying directive and the impact on the directive and its implementation of the UCPD, including consideration of the scope for rationalisation provided by the UCPD.
12. 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*.
13. The third part contains recommendations for simplification and improvement of the *acquis* based on the analysis undertaken in the first two parts.

Part I

14. In this part of the report we examine each of the existing eight minimum harmonisation directives and its implementation in the UK. In each case the background to the relevant legislation is first 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. Where there are, or may be, deficiencies in the implementation, we identify those deficiencies. Finally each chapter contains a section outlining the effect on the measures considered of the UCPD.
15. A more detailed summary of our examination of each directive and its implementation is included in the Annexe to this summary.
16. Overall we conclude that although there are instances of the implementation going further than required by the relevant directive, the UK has made relatively little use of the minimum harmonisation clause.
17. The most significant instances of domestic law going beyond the relevant directive are in the cases of unfair terms and consumer sales, where pre-existing provisions providing higher levels of consumer protection than the relevant directive have been maintained.
18. In most cases where use has been made of the minimum harmonisation clause the relevant provision falls outside the scope of the UCPD or benefits from the saving for provisions of contract law.
19. We therefore conclude that few provisions will need to be notified to the Commission in accordance with UCPD art 3.6.
20. Most of the directives considered in Part I give rights to individual consumers. The UCPD prohibition on unfair commercial practices is enforced by administrative sanction and gives no private law rights or remedies to the individual consumer. Thus although there are instances of overlap between the individual directives and the UCPD we conclude that there is little scope for replacement of the specific provisions of individual directives by the general provisions of the UCPD⁸.

⁸ An exception is the requirement in art 6 of the consumer sales directive that a guarantee offered to a consumer must 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, for which no sanction is provided in the directive or in the UCPD. Arguably failure to provide a complying guarantee would be a misleading act or omission for the purposes of the UCPD.

Part II

21. The second part of this report consists of a comparative analysis of four “cross-cutting” themes common to the eight directives examined in Part I. They are: definitions of key, recurring terms; information duties; cancellation rights; and remedies, penalties and sanctions.

Definitions

22. There are a number of unnecessary terminological differences between the eight directives. They include: - the use a different language refer to the same concept, the use of different definitions for the same term, and a failure to define key terms.
23. The eight directives apply in favour of a "consumer" who deals with a professional trader. A consumer is always defined as a natural person, but subject to that constant requirement, the definition of "consumer" differs from directive to directive. It may be that the differences in terminology are not intended to be significant and that the different terms would be interpreted by a court in the same way, but the differences are at least confusing and create doubt about the intended meaning.
24. The non-consumer contracting party is variously defined as a "trader", "seller", "seller or supplier", "vendor" and "retailer". The main thrust of the definitions of these various terms is similar, but again there are linguistic differences, particularly in relation to the degree of connection required between a contract and the professional's business activities to bring the relevant directive into play, again creating doubt about whether linguistic differences are intended to reflect substantive differences in meaning.
25. A number of key terms and concepts are not defined. Thus there is no definition in any of these directives of "contract" or "goods", despite the fact that these are matters upon which there are differences between the laws of different member states. In addition there is no definition in these directives of the expression "durable medium" which appears in both the distance selling and consumer sales directives and is increasingly prescribed as an alternative to writing as the means of communication of prescribed information.

Information duties

26. Six of the eight directives examined here impose a duty on the professional to provide the consumer with information. In addition, the unfair terms directive, through its

requirement that the professional deal with the consumer in good faith, arguably imposes an implicit duty to supply information.

27. There is, however, no consistency as between the information requirements imposed by different directives, which differ as to the circumstances in which information must be supplied, the nature of the information to be supplied, and the time at and manner in which it is to be supplied.
28. Earlier directives, such as the doorstep selling directives, required information to be supplied "in writing". More recent directives, such as distance selling or consumer sales, are more flexible and expressly permit the use of modern technology, requiring information to be supplied a "in writing or other durable medium". Whilst this term is not defined in the directives covered in this report,⁹ it does seem to permit the use of information technology, such as e-mail. The failure to include such provision in earlier directives is understandable, and arguably the requirement of writing would be interpreted as permitting the use of functional equivalents of writing and /or printing, but there is obvious scope for updating the earlier directives to take account of modern technology.
29. The information requirements in these directives are imposed for different reasons. It is therefore understandable that the substantive information requirements differ. It is less obvious that there is a justification for different requirements as to the time when or manner in which information is supplied.

Cancellation rights

30. Five of the directives considered in this report - the Doorstep Sales, Package Travel, Timeshare, Distance Selling, and Sale of Goods directives - give the consumer the right to cancel, withdraw from or terminate the contract.. However, the nature of the rights, the circumstances in, time at and manner in which they can be exercised, and the consequences of their exercise differ from directive to directive. The reason for the differences in treatment of the different rights is not always apparent.
31. In some cases the cancellation period may be extended as a sanction for failure by the seller to satisfy relevant information requirements under the directive but the effects of non-compliance and nature of the extension differ from directive to directive.
32. As a result it may be difficult for consumers or businesses to understand the relevant cancellation rights in any particular case, at least without professional advice, which

⁹ Definitions have been developed for other directives, including those on the distance selling of financial services, and insurance mediation.

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 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.

Penalties, remedies and sanctions

33. The eight directives here considered use a range of remedies, penalties and sanctions for non-compliance with their requirements, including both private law remedies and criminal or administrative sanctions. In many cases however the directives are remarkably vague as to the consequences of non-compliance with their requirements and in some cases the provision of adequate sanctions or remedies is left as a matter for the member states.
34. A significant gap in the range of remedies provided is the general absence of any remedy by way of compensation or damages.

Part III

34. Part three of our report contains a summary of our findings and our conclusions.
35. We conclude from our analysis in Part I of the eight directives and their implementation that the UCPD is unlikely to have any significant impact on the existing consumer *acquis*. There is, however, in our view scope for some rationalisation of the existing eight directives.
36. The task of advising consumers and businesses upon their rights would be simplified by rationalisation, or harmonisation, of the 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.
37. Similarly the coherence of the *acquis* would be improved by rationalisation of the various information duties under the eight directives and the rules governing cancellation/withdrawal, to remove unnecessary differences between them.
38. We conclude that the broad information requirements of the UCPD are too vague to be an adequate replacement for the specific requirements of the individual directives, but that there might be some value in adopting a general principle requiring the

supplier to furnish the consumer with appropriate transactional and other information, which could be fleshed out by detailed requirements for individual sectors.

39. Similarly we think there is no scope for replacement of the individual cancellation rights with a general principle allowing cancellation of consumer contracts. However, again there is scope for rationalisation or harmonisation of such matters as the time during which the right can be exercised, the consequences of its exercise and the effects on the cancellation right of the trader's failure to provide prescribed information.
40. There is less scope for rationalisation of the remedies and sanctions for breach of the various directives' requirements. The law would be improved by development of a general compensatory remedy for breach of a European law requirement, but that is more properly a matter for the ECJ or for consideration in the Common Frame of Reference rather than for revision of the consumer *acquis*.
41. One other striking gap 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.
42. We also identify some areas where there is scope for improvement of individual directives.
43. Finally we consider various options for consolidation of the directives which make up the consumer *acquis*. We conclude that there is much merit in the concept of a general European consumer code, which would bring together all the EU consumer protection measures in one piece of consolidated legislation. However we recognise that there would be practical and political difficulties in attempting such a project and that it may be necessary at the present time to settle for a less ambitious, or partial consolidation.
44. At the present time work is proceeding on the production of the European Commission's *Consumer Compendium* and the proposed *Common Frame of Reference*. It may be that more extensive reform of the *acquis* will have to await completion of those projects, but there is no reason to delay work on the more limited reforms which we have identified as necessary, including the streamlining and harmonisation of definitions and reforms to the text of individual directives: there is an urgent need to rationalise and streamline the existing directives to deal with the current problems; it cannot wait for another 5 years.

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.

Annexe: Summary of Part I

Chapter 1

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”) 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.
2. Little use has been made of the minimum harmonisation clause in the 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
3. The additional detail of the effects of cancellation is required to provide effective implementation of the directive. Art 7 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.”
4. 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.
5. Under the directive the consumer may exercise the right to cancel the contract at any time within 7 days of receipt of the trader’s notice. 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. However, although this may be said to be more protective than the provisions of the directive, 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.
6. The UCPD offers little scope for rationalisation in this area. 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.

7. 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.

Chapter 2

8. Council Directive 90/314/EEC on package travel, package holidays and package tours (the “Package Travel Directive” (90/314/EEC)) is implemented in the UK by the Package Travel, Package Holiday and Package Tours Regulations 1992 (PTR).
The Directive
 - requires certain prescribed information to be provided to the consumer, some of it before the contract, some in the contract itself;
 - prohibits price increases save on certain stipulated grounds,
 - allows the consumer to withdraw from the contract if certain particulars of the holiday are varied;
 - makes the organiser and/or retailer responsible for the proper performance of the contract; and
 - requires the organiser/retailer to provide evidence that security has been put into place to provide refunds to consumers in case of insolvency, and to deal with the repatriation of the consumer in such circumstances
9. In general, the PTR do no more than implement the Directive’s requirements. The scope of the PTR mirrors that of the Directive, save in two respects. 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 in the price 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.
10. 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, it is difficult to see how a consumer could be misled, unless the consumer is given incorrect information about the nature of the variations in the cost of the items specified.

11. The UCPD does not prohibit post-contractual price variations. The Package Travel Directive prohibits these except in defined circumstances. Variation in accordance with these provisions 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.
12. 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

13. Directive 93/13/EC on unfair terms in consumer contracts 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.
14. 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.
15. In addition the Directive requires all written contract terms presented to consumers to be drafted in “plain and intelligible language.”
16. A limited range of contracts is excluded from the scope of the Directive; otherwise it is universal in its application.
17. 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.
18. The Directive is implemented in the UK by the Unfair Terms in Consumer Contracts Regulations 1999, SI 99/2083.
19. The 1999 Regulations follow the text of the directive almost verbatim. However, the UK already had common law rules and legislation governing the use of certain types of contract term, including exclusion clauses as many other types of term covered by

the directive. In particular, the Unfair Contract Terms Act 1977 imposes restrictions on the validity of exclusion and similar clauses.

20. In many respects those rules provided higher levels of protection for consumers than do the provisions of the directive. In particular the UCTA 1977
 - subjects all terms in a contract between a business and a consumer, whether standard or negotiated, by which the business seeks to exclude or limit liability when in breach of contract, or in respect of all or part of its contractual performance to be entitled to render no performance or a performance substantially different from that which was reasonably expected of it¹⁰ and
 - wholly invalidates certain terms¹¹.
19. In addition, the 1977 Act is wider in scope than the directive. First, it applies not only to exclusion clauses in contracts between businesses and consumers but also to some types of exclusion clause in contracts between businesses. Second, although in general terms it provides higher level of protection for consumers than it does to businesses, it has been held that a business may "deal as a consumer" for the purposes of the Act and thus obtain the higher levels of protection afforded to consumers¹².
20. 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 under art 3.5 UCPD.
21. 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.
22. It may be harder to justify the UCTA controls on negotiated terms in this way. However, we 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.
23. The Law Commission has published proposals for the reform and rationalisation of the domestic law rules governing exclusion clauses and unfair terms. Those proposals include a unified regime governing consumer contracts, a separate regime governing business to business contracts and a third, a special regime to protect small businesses. Insofar as they relate to consumer contracts, the Commission's proposals recommend that there should be no reduction in existing levels of protection. Insofar

¹⁰ UCTA s 3.

¹¹ UCTA s 2(1), s6, s7.

¹² *R&B Customs Brokers v UDT Finance Ltd* [1988] 1 All E.R. 847

as the existing rules provide higher levels of consumer protection than are provided for by the directive, the position would therefore remain the same under the Commission's proposals. For the reasons outlined above, adoption of the Commission's proposals for business-to-business contracts (including those relating to small businesses) would fall outside the scope of the unfair terms directive and the UCPD.

24. 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

25. 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 covers the following main areas.

(a) Supply of information

The directive requires the supply of certain prescribed information and its incorporation in the contract¹³. The information must be accurate and complete.

(b) Contract language

(c) Right of cancellation

In order to protect purchasers against ill-considered decisions the directive gives purchaser a right to cancel or withdraw from the contract without giving any reason within ten days of its conclusion.

(d) No advance payments

In order to ensure that the purchaser's exercise of the right to cancel is not inhibited the directive prohibits the taking of advance payments before the end of the cancellation period.

(e) Credit agreements

Cancellation of the main contract automatically cancels any credit agreement made with the seller or a third party with whom the seller is affiliated.

(f) Forum shopping

¹³ Recitals 7 and 8

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

26. 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.
27. For the most part the implementation tracks, 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
28. The extension of the regulations to caravans broadens the scope of the implementing legislation beyond that of the Directive and is therefore not based on the minimum clause. The consequences of failing to comply with the obligation to provide information in respect of caravans may fall within the UCPD, but will do so independently of the Directive and therefore not be within Art.3(5).
29. 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.
30. 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.
31. There is some overlap between the information requirements of the Timeshare directive and the UCPD's prohibition of misleading omissions. Annex II of the UCPD explicitly includes Art. 3 (3) of the Timeshare Directive as a provision covered by the UCPD. 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

32. Directive 97/7EC on the protection of consumers in respect of distance regulates aspects of the distance selling of goods and services. Its rationale is that distance selling offers consumers opportunity to benefit from the internal market and that the existence of common minimum standards of protection in relation to distance transactions enables the consumer to be confident of at least a minimum level of protection throughout the market. The directive is implemented in the UK by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334, and in part by the Privacy and Electronic Communications (EC Directive) Regulations 2003, SI 2003/2426.
33. 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 technologically neutral and can also be applied to electronic communications such as online transactions and to potential future technological developments.
34. The directive applies to all distance sales and supplies of all forms of goods and services, subject to certain defined exemptions, but where there is specific EU legislation applying to a particular type of distance contract the provisions of the directive are displaced in favour of the special rule.
35. The directive requires
- that before entering into a contract, the consumer be supplied with certain prescribed information relating to the goods/services, the contract and the supplier;
 - that that information be confirmed in writing or other “durable medium”; “durable medium” is not defined;
 - that the consumer have the right to withdraw from/cancel the contract for a period of not less than 7 days from the conclusion of the contract; certain contracts are exempt from the right of cancellation;
 - that in the case of fraudulent, unauthorised use of his payment card the consumer should be entitled to have his card re-credited with the unauthorised payment;
 - that the supplier must perform the contract within 30 days of its conclusion;

- Member States to prohibit “inertia selling” where goods or services are supplied to a consumer without a prior order from the consumer, and to exempt the consumer from paying for an unsolicited supply;
 - the imposition of restrictions on the use of certain forms of distance communication;
 - that a remedy be provided in national law for breach of the Directive’s provisions;
34. The implementing legislation is more detailed than the directive in a number of respects, but on the whole the additional detail is merely “gap filling” for effective implementation, and is contemplated by the directive..
35. There are four instances in which the implementation goes beyond the directive.
- It provides for reimbursement to the consumer on cancellation of sums paid on his behalf as well as sums paid by him. We suggest that the directive would be interpreted as requiring the same.
 - It permits the supplier to recover the costs of recovery of the goods only if that right is reserved in the contract but although there is no express corresponding restriction in the directive, we suggest that the directive implicitly requires the same.
 - 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 go further than those in the directive since in some circumstances they protect businesses as well as consumers.
36. 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. As a result none of these provisions is affected by the UCPD.
37. The information requirements of the directive are included in the indicative list of material information requirements in Annex 2 to the UCPD and would therefore be considered material information for purposes of the UCPD. 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.

38. 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

39. Directive 98/67/EC on consumer protection in the indication of the prices of products offered to consumers is implemented in the UK by the Price Marking Order 2004, adopted under the Prices Act 1974.
40. The directive requires that where goods are offered for sale to consumers both the selling price and unit price be indicated so as to be unambiguous, easily identifiable and clearly legible, and that Member States should prescribe penalties for infringement of the implementing legislation.
41. The implementation makes use of the derogations and exceptions permitted by the directive. It also contains a number of additional provisions which do not arise directly from the Directive, but assist in the application of the implementing legislation. These provisions do not seem to depend on the minimal clause or to broaden the scope of the implementing legislation.
42. The failure to provide an indication of the unit price would not of itself necessarily constitute a misleading action or omission. We therefore conclude that the UCPD cannot be used to replace Directive 98/6/EC, although there is some overlap in how the provisions of the two 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

43. The purpose of Directive 98/27/EC on injunctions for the protection of consumers' interests (the Injunctions Directive) 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”. It was initially implemented by the Stop-Now Orders Regulations, 2001. These were replaced when the Enterprise

Act 2002 came into force and the implementing provisions are now contained in Part 8 of the 2002 Act which also replaces consumer protection provisions previously contained in Part III of the Fair Trading Act, 1973.

44. The Directive requires “qualified entities” to be given power to seek orders to prohibit infringements of legislation implementing certain listed directives in a member state of the European Economic Area (EEA) - including provisions which provide “additional permitted protections” based on a minimum harmonisation clause, which harm the collective interests of consumers. Qualified entities must have a legitimate interest in ensuring that the directives on consumer law are complied with, and include independent public bodies as well as other organisations. They may apply for (i) orders requiring the cessation or prohibition of an infringement; (ii) the publication of the decision and/or a corrective statement; and (iii) orders for payments to the public purse for failing to comply with an order terminating or prohibiting an infringement. A qualified entity from one Member State should be entitled to take action in another Member State where an infringement originates.
45. The UK implementation has taken up the options, permitted by the directive to require a qualified entity seeking an injunction for the termination of an infringement first to negotiate with the defendant and to consult with the OFT.
46. The UCPD will have no impact on the Injunctions Directive or its implementation. The UCPD has been added to the list of community legislation in the Annex to the Injunctions Directive and the legislation implementing the Injunctions Directive will be one of the means by which the UCPD’s provisions will be enforced.

Chapter 8

47. Directive 99/44/EC on the sale of consumer goods and associated guarantees requires that where goods are supplied by a business to a consumer the goods supplied must be in conformity with the contract, provides a scheme of remedies for the consumer where the seller supplies goods not in conformity with the contract and requires that where goods are offered to the consumer with the benefit of a guarantee, the guarantee should be legally enforceable in accordance with its terms.
48. The directive is implemented by the Sale and Supply of Goods to Consumers Regulations, 2002, SI 2002/3045, which for the most part amend existing legislation governing the sale and supply of goods¹⁴, (a) by amending the statutory implied terms requiring goods to be of satisfactory quality and reasonably fit for the buyer’s purpose

¹⁴ Sale of Goods Act 1979, Supply of Goods and Services Act, 1982.

and (b) introducing provisions allowing the consumer, in the event that the goods do not conform with the contract, to have the goods repaired or replaced, the contract price reduced or the contract rescinded. In addition the regulations provide for a consumer guarantee, as defined, to be contractually enforceable against the guarantor.

49. Arguably the implementation goes further than required in several respects.
- The rule on passing of risk under consumer contracts was amended but amendment was arguably required to comply with the directive.
 - The directive's remedial scheme is applied to contracts for the supply of goods other than sales, covered by the SGSA 1982.
 - The definition of "consumer" in the implementation allows a business to qualify as a consumer and claim protection of the rights derived from the directive.
 - Retention of the right to reject goods for breach of condition under the SGA gives consumers an additional right to escape the contract, not available under the directive.
 - Under domestic law the consumer is entitled to invoke the rights derived from the directive for up to six years, rather than for two as under the directive.
50. The matters covered in points (2) – (5) above fall outside the scope of the UCPD and are therefore not covered by art3(5) UCPD.
51. There is potential for overlap between some of the provisions of the Guarantees Directive and the information requirements of the UCPD but since the Guarantees Directive gives private law rights to individuals whereas the UCPD provides for administrative action, there is no scope for replacing the guarantees directive with the UCPD. The one exception is the requirement in art 6 of the guarantees directive that a guarantee offered to a consumer must 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. No sanction for breach of this duty is provided for in the directive or in the UCPD. Arguably failure to provide a complying guarantee would be a misleading act or omission for the purposes of the UCPD.
52. In a number of respects the guarantees directive has not been properly implemented, particularly in relation to contracts to manufacture and supply and contracts to supply and install goods. Detailed consideration of this point is outside the scope of this report but the point should be addressed.

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Consumer & Competition Policy Directorate

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