EC Consumer Law Compendium
- Comparative Analysis -

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The Comparative Analysis presented here is a core part of the results of a research project called EC Consumer Law Compendium, which has been conducted by an international research group on behalf of the European Commission. A detailed description of the project can be found in the call for tenders which led to the underlying contract between the European Commission and the University of Bielefeld¹. A short outline is also given in various Commission documents². These materials will not be repeated here. This introduction just sketches some basic lines of the study and its methodology.

**Scope of the Study**

The study covers eight Directives, namely:

- The Doorstep Selling Directive (85/577/EEC);
- The Package Travel Directive (90/314/EEC);
- The Unfair Terms in Consumer Contracts Directive (93/13/EEC);
- The Timeshare Directive (94/47/EC);
- The Distance Selling Directive (97/7/EC);
- The Price Indication Directive (98/6/EC);
- The Injunctions Directive (98/27/EC); and

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¹ N° of the call for tenders: 2003/S 153-138854; published in different places on the website of the European Commission, e.g. under ted.europa.eu (document n° 2003-138854).
The choice of these Directives may seem somewhat arbitrary. In particular, on the one hand, Directives 98/6/EC (Price Indication) and 98/27/EC (Injunctions) could be considered as foreign elements, because all the others share a common feature in that they regulate contract law aspects of EC consumer law. On the other hand, the abovementioned list does not contain several directives which one would expect to be core elements of EC consumer contract law, such as the Consumer Credit Directive (87/102/EEC) or the Distance Selling of Financial Services Directive (2002/65/EC). But the choice had been made by the responsible Commission services when issuing the call for tenders and was, therefore, not to be questioned by the contractors. However, there is obviously a political ratio behind this choice. With regard to the Consumer Credit Directive 87/102 it may be worth noting that it is currently undergoing a thorough review, which will lead to substantial changes. Therefore, any analysis would be outdated very soon after the amendments will have come into force. As to the Distance Selling of Financial Services Directive 2002/65, the period since it was enacted may be considered as being too short for a profound assessment of its impact on the laws of the member states.

**Outputs of the Study**

The study has led to two main outputs: firstly, a legal Database has been created linking the eight directives, relevant ECJ jurisprudence, national transposition measures as well as national case-law. This Database is about to be finalised and should be available more or less at the same time as this volume is published by the Commission. Secondly, the study has produced this volume which is to be, as the Commission has put it, a “Comparative Analysis of the different national regulations, including possible barriers to trade or distortions of competition resulting from them”. Both parts of the study, the Database and the Comparative Analysis complement each other. For example, in order to unburden the text from thousands of footnotes, the Comparative Analysis often abstains from giving a full reference of particular transposition measures in individual member states. The relevant information can easily be found in the Database.

**Time Schedule**

It was a great challenge to undertake a comprehensive transposition review for eight directives in 25 member states. This has never been attempted before to such an extent and
density. In the course of this endeavour, it turned out that the task needed much more effort and time than originally expected by the participating researchers and seemingly also the European Commission. Work began in October 2004 and was initially envisaged to be concluded in April 2006. When it became clear then that the study could not be finalised at this point of time, the Commission granted an extension until December 2006. This is the reason why the Comparative Analysis and the Database are presented in the version of December 2006, although some remaining desiderates are still lacking and the remaining few cross-checks are still pending. Readers should be aware that the study has been conducted under severe time constraints. The situation required a concentration on the core tasks, above all, on a detailed report on the individual transposition of the directives in the member states. Thus, we focused on creating a common basis for further analysis and academic discussion. It goes without saying that we are aware of much of the legal literature and studies existing in the field of this study, as far as these materials are written in the languages accessible to us. However, we decided to give only some very basic references.

Leaving aside minor editorial shortcomings, in particular, the translation of this report into other languages is still pending. A translation of the Comparative Analysis into French and German is in progress and should be available at the beginning of next year. Also, the functionalities of the Database will be extended to these other two languages as well.

Methodology

The preparatory research in the 25 member states has been conducted by colleagues from the individual countries. A list of participants and contributors is appended to this introduction. The initial step, in order to build up the Database and to draft the Comparative Analysis, was to develop questionnaires which were to structure the national reports in a way that the editors of the study could identify the relevant issues for each member state. Already at this stage, several of the national contributors participated in the drafting of questionnaires. This has proven to be extremely useful. Thus, we were able to ensure as far as possible that the questions were understood in the same way by lawyers from so many different legal backgrounds.

Guided by these questionnaires, individual researchers or teams from each of the current 25 member states have drafted reports on the respective national transposition measures for each
directive. As an added value, these reports also revealed how the national laws have been influenced by EU legislation and whether there have been difficulties or shortcomings of transposition.

On the basis of the national reports, the authors of this study drafted, on the one hand, a very short characterisation of the general “transposition culture” of each member state (Part 2 of the Comparative Analysis) and on the other hand, a detailed report on each directive, which intends to draft an EC-wide legal map after the transposition of the eight directives (Part 3). These reports are intended to chart the transposition across the 25 member states, and individual authors have determined how much depth was required in order to present a meaningful analysis of this process. A balance had to be struck between lengthy papers giving an exhaustive account on the transposition of each provision of every directive in all 25 member states, and a sketch providing only a very broad brush overview. Our intention has been to draw out those aspects where the national transposition measures vary, rather than to list every provision that has been accurately transposed. We therefore selected an appropriate level of depth for each individual section, hopefully thereby having ensured that the Analysis provides a valuable picture of the state-of-play across the European Union, without obscuring the broader picture with too much detail.

These core parts of the study are complemented by key conclusions with regard to common structures in the directives (Part 4) and particular recommendations to solve some of the problems highlighted in this study (Part 5). Of course, these conclusions and recommendations express just the personal views of the individual authors, although we do not shy away from encouraging deep reforms to these directives.

Editors and Authors

The research project has been conducted in close co-operation of numerous contributors. It has been co-ordinated by Hans Schulte-Nölke (HSN). This part of the study, the Comparative Analysis, has been edited by him in co-operation with Christian Twigg-Flesner (CTF) and Martin Ebers (ME). The editors have also served as the authors of individual parts of the study, partially together with other co-authors as indicated in the relevant parts. A general overview on the allocation of editorial responsibilities is given in the following table.
Part 1. Introduction

Part 2. Overview of the member states’ legislative techniques ME, CTF, HSN

Part 3. Transposition of the individual Directives

A. Doorstep Selling Directive (85/577) HSN
B. Package Travel Directive (90/314) HSN
C. Unfair Contract Terms Directive (93/13) ME
D. Timeshare Directive (94/47) HSN
E. Distance Selling Directive (97/7) HSN
F. Price Indication Directive (98/6) HSN
G. Injunctions Directive (98/27) CTF
H. Consumer Sales Directive (99/44) CTF

Part 4. Common structures in the Directives

A. Notion of consumer ME
B. Notion of trader ME
C. Right of withdrawal HSN
D. Information duties CTF

Part 5. Recommendations ME, CTF, HSN

**Apologies and Invitation for Comments**

Overall, the Comparative Analysis contains about 6000 individual references to national laws. Almost all of these have been double-checked by at least one national consumer law expert, in many cases also by other interested experts, e.g. from consumer organisations or national ministries. We have taken all reasonable care to process the enormous bulk of material in more than 20 languages, but despite all diligence, the complexity of the exercise most certainly will have led to some inaccuracies. Some of the references to national laws might have escaped the procedure of cross-checks and in other cases a few inaccuracies might have missed the eyes of the proof-readers, being hidden in very bulky materials. Certainly, some
additional court decisions or administrative acts could also have been mentioned in order to illustrate the application of national transposition laws. The editors would like to point out that they have to take the academic responsibility for such shortcomings, not the national correspondents or proof-readers. We apologise for any of the inaccuracies readers may find.

The editors and all contributors hope that the study will be acknowledged as a very serious attempt to draw a map of European consumer law in the field of the eight directives. We would gratefully welcome any, in particular critical, comment, which helps to improve it. We intend to compile a new version of the Comparative Analysis, when the translations into French and German are ready. We will thereby most gratefully correct any mistakes we have been alerted to by readers.

**Cut-off date**
We originally intended that the Consumer Law Compendium should reflect the law in force on 1 October 2005. Due to the delays we were able to include some later developments. Therefore, we have also caught many important changes in the law or other developments which took place up to mid-2006.

**Acknowledgments**
Finally, we would like to thank the many people who contributed and supported the project. First of all, we need to mention the national correspondents who invested an enormous amount of time into this project and who patiently answered dozens of questionnaires and questions without complaining. We especially have to thank those who took the responsibility to evaluate the Database and who will also evaluate this Comparative Analysis. The Database team and many other interested people from enterprises, national authorities and consumer law organisations gave invaluable comments and recommendations. We are also very grateful to many members of the Acquis Group who, even though not formally involved in the project, gave advice and support. It has proven impossible to name everyone who supported this exercise, but the incomplete list of contributors and supporters enclosed may give an impression.
We are grateful for a lot of comments made on earlier versions of the study by many Commission officials who helped us to avoid some inaccuracies. Last, but certainly not least we also thank the responsible Commission officials, in particular and pars pro toto Giuseppe Abbamonte and Mikolaj Zaleski, who, despite of all time constraints caused by our delay, constantly supported us to an extent much beyond one could have expected.

We wish to reiterate that comments and suggestions are most welcome: schulte-noelke@uni-bielefeld.de.

Bielefeld, April 2007

Hans Schulte-Nölke
- on behalf of the editors of this study -
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<td>Derecho Civil Departamento</td>
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<td>de Derecho Universidad de</td>
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<td>La Rioja</td>
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<td>La Rioja</td>
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<td><strong>Schweden</strong></td>
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<tr>
<td>Prof. Dr. Lars Gorton</td>
<td>Department of Law</td>
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<td>Department of Law</td>
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<tr>
<td>University of Lund</td>
<td></td>
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</tr>
</tbody>
</table>
7. **Independent Evaluator appointed by the Commission**

Centre for European Economic Law / Study Centre for Consumer Law,  
Prof. Dr. Jules Stuyck, University of Leuven

8. **Acquis Group**

Many members of the Acquis Group (http://www.acquis-group.org) have contributed with all sorts of invaluable advice and other support, namely Prof. Dr. Gianmaria Ajani, University of Turin; Prof. Dr. Reiner Schulze, University of Münster, and Prof. Dr. Fryderyk Zoll, University of Krakow.
## Part 2: Overview of the Member States’ Legislative Techniques

### A. Austria – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in (Translation)</th>
<th>Date of Transposition (due date)</th>
<th>ECJ decisions in relation to Austria</th>
</tr>
</thead>
</table>
3. ECJ 12 March 2002 C-168/00 Simone Leitner v. TUI Deutschland GmbH & Co KG, |
### I. State of Consumer Protection in the Field of the Directives before Transposition

By 1979 AUSTRIA had already adopted its Consumer Protection Act which contained provisions for Doorstep Selling (including a right of withdrawal), Unfair Contract Terms and actions for injunction. However, before the transposition of the European Directives Austrian

<table>
<thead>
<tr>
<th>Directive</th>
<th>Legal Text</th>
<th>Date</th>
<th>Relevant Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>94/47</td>
<td>Timeshare Act</td>
<td>1 April 1997 (29 April 1997)</td>
<td></td>
</tr>
<tr>
<td>97/7</td>
<td>Distance Selling Act</td>
<td>1 June 2000 (4 June 2000)</td>
<td>ECJ 11 July 2002 C-96/00 Rudolf Gabriel, [2002] ECR I-06367</td>
</tr>
<tr>
<td>98/6</td>
<td>Price Indication Act</td>
<td>1 June 1992, the Act was amended in 2000 (18 March 2000)</td>
<td></td>
</tr>
<tr>
<td>98/27</td>
<td>Art. 28-30 of the Consumer Protection Act</td>
<td>1 October 1979, amended in 1999 (1 January 2001)</td>
<td></td>
</tr>
<tr>
<td>99/44</td>
<td>CC Art. 922-933b; Art. 8-9b of the Consumer Protection Act</td>
<td>1 January 2002 (1 January 2002)</td>
<td></td>
</tr>
</tbody>
</table>
law contained no effective regulations concerning Package Travel, Timesharing or Distance Selling.

II. Legislative Techniques of Transposition

AUSTRIA transposed most of the European Directives at issue by making amendments and additions to the existing Consumer Protection Act instead of enacting single transposition laws or amending the ABGB (Austrian Civil Code). This was the case with the transposition of the Directives 85/577, 90/314, 93/13 and 98/27. For Timeshare and Distance Selling, however, the legislator adopted separate Acts. In the course of the transposition of the Consumer Sales Directive Austria considerably modified both the Austrian Civil Code and the Consumer Protection Act.

III. Timeliness of Transposition

AUSTRIA transposed all the Directives in time except for Directive 90/314 which (as in many other member states) was transposed with a delay of one year.

IV. Use of Minimum Harmonisation

When transposing the European Directives AUSTRIA made use of minimum clauses on various occasions. The provisions to implement the Directive 85/577 are considerably more extensive than the Directive, as the core scope of application of the right of withdrawal in Art. 3(1), sent. 1 of the Consumer Protection Act is basically defined in the negative: the provisions apply if the consumer has not concluded the contract at the supplier’s business premises and not at a trade fair or market stand (see OGH 28 July 2004, 7 Ob 78/04b as well as OGH 11 February 2002, 7 Ob 315/01a). Even where the consumer concluded the contract at the supplier’s business premises, Art. 3(2) nevertheless affords him a right of withdrawal, if he has been enticed there by the business or his representative in the course of a promotion or through individual contact on the street. For timeshare contracts the Timeshare Act provides a period of withdrawal of 14 days whereas the Directive requires only 10 days.
V. Other Extensions

Generally the definition of the term “consumer contract” is broader than in the EC Directives. The Austrian notion in the Consumer Protection Act comprises all types of bilateral contracts and also unilateral legal transactions such as public offers for reward, offers for the conclusion of a contract or withdrawal. According to the Consumer Protection Act even legal entities may be protected as consumers. These extensions concern the transposition of the Directives 85/577, 90/314, 93/13, 97/7 and also 94/47 (since the Timeshare Act refers to the notion consumer as defined in the Consumer Protection Act).

A significant deviation from the Directive 85/577 consists in the fact that contracts for real property or for the supply of foodstuffs or beverages are not excluded from the scope of application of the Consumer Protection Act. Furthermore, the scope of application of the distance selling regulations in Austrian law extends, in contrast to the Directive (Art. 3(1) 3rd indent), also to distance contracts, that are concluded with telecommunications operators through the use of public payphones.

The national provisions on Unfair Contract Terms cover both standard terms and individually negotiated terms which are excluded from control according to Article 3(1) of the Directive. Also in contrast to the Directive 93/13 (Art. 4(2)) Austrian law does not exclude a control of the main subject matter of the contract nor of the adequacy of the price and remuneration.

The Austrian provisions on Package Travel also go beyond Article 1 of the corresponding Directive since they are applicable even to travel services of less than 24 hours duration without overnight accommodation. Finally, also the provisions to implement the Directive 99/44 extend their scope beyond those of the Directive, since in Austrian law the exceptions envisaged in Art. 1(2) lit. (b) of the Directive were not adopted; apart from that, in principle it also encompasses real property.

VI. Possible Infringements of EC Law

The Austrian legislator has in the past accommodated the case law of the ECJ, and repeatedly approximated consumer law to European imperatives. To suffice the guidelines laid down in Simone Leitner, in 2003 the provisions on package travel in Art. 31e(3) of the
Consumer Protection Act were amended to provide a right to appropriate compensation in respect of loss of holiday enjoyment where the travel organiser deliberately or negligently fails to perform a considerable part of its obligations. Also the Heininger decision (concerning the German Doorstep Selling Act) led to changes in Austrian law: The Consumer Protection Act prescribed in 2003, that the right of withdrawal ceases to exist at the latest one month after complete performance by both contractual parties. This also applied where the consumer was not informed of his right of withdrawal. According to the present-day law the consumer’s right of withdrawal in contrast does not expire, if the consumer has not been informed of his right of withdrawal. The problem nevertheless remains, that according to Austrian law the notification of the right of withdrawal does not have to be dated. This is correctly regarded as a breach of Art. 4 of the Directive 85/577.

Furthermore it is argued, that CC Art. 864(2) on the sending of unsolicited goods breaches Art. 9 of the Directive 97/7. According to the preparatory works of the Act (explanation of the Government’s reference, 311 of the addenda to the stenographic protocol of the national council, XX. Legislative period) CC Art. 864(2) is to be understood as meaning that the recipient of unsolicited goods is not obliged to keep the goods or return them, but rather that he is entitled to dispose of them, but if he uses the goods for himself then he can be liable for restitution.

Finally it is also discussed whether and to what extent the redress rule of CC Art. 933b suffice Art. 4 of the Directive 99/44. Extremely diverging opinions are proffered as to the substance of the directive provision. In contrast to the Directive the implementing provision of CC Art. 933b does limit the redress to the expenditure of the business in question. Moreover, the claim for redress expires two months after performance of the warranty-related duties incumbent on the entitled party.

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Package Travel in Part 3.B. and on Unfair Contract Terms in Part 3.C.).
### B. Belgium – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition (due date)</th>
<th>ECJ decisions in relation to Belgium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 97/7</td>
<td>Articles 76-83 of the Act of 14 July 1991 on trade practices and consumer information and protection, TPA</td>
<td>1 October 1999 (4 June 2000)</td>
<td></td>
</tr>
</tbody>
</table>
Note: The existing section in the TPA on distance contracts was completely revised by the Act of 25/5/1999 in order to transpose the Directive

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>Directive 99/44</td>
<td>Act of 1 September 2004 on the protection of consumers in respect of the sale of consumer goods Note: From January 1st 2005 onwards, the articles 1649bis-1649-octies are embedded in the Belgian Civil Code, as a constitutive part of the section relating to the sale of goods</td>
<td>1 February 2005 (1 January 2002)</td>
</tr>
</tbody>
</table>

I. State of Consumer Protection in the Field of the Directives before Transposition

Already before the transposition of the European Directives there had been a tradition of regulation of certain areas of consumer protection law in Belgium. The former *loi sur les pratiques du commerce* (Trade Practices Act, TPA) of 1971 contained a provision on itinerant trade which was defined as each sale, offer or promotion aimed at selling products (movable property) to consumers (defined as an exclusively non-professional person) by a merchant or...
an intermediary outside his central place of business, his branch(es) mentioned in the Register of Commerce or the premises normally used for trade fairs. The subsequent Trade Practices Act of 14 July 1991 transposed the Directive 85/577 and largely anticipated the implementation of the Directive 93/13. Furthermore the Act provided protection in certain fields related to travel contracts and distance selling. However, in Belgian law there was no specific regulation on timesharing contracts concluded by consumers. The Royal Decree of 30/6/1996 (RD 1996) imposed on sellers the obligation to indicate unit prices on products sold in bulk or pre-packaged products with a variable quantity. As to injunctions, only those (national) consumer organisations recognised by the Minister of Economic Affairs or represented in the “Raad van Verbruik” (Consumers’ Council), were entitled to commence an action for injunction.

II. Legislative Techniques of Transposition

All of the Directives at issue have been transposed by the national legislator and except for the Royal Decree of 30 June 1999 on price indication (statutory instrument) all transposition laws have been enacted by an Act of Parliament.

The legislative techniques applied are diverse. For package travel contracts, timesharing contracts and intra-Community injunctions the Belgian Parliament in each case enacted a special, separate Act. In contrast, the Directives 93/13, 85/577, 97/7 have been implemented via amendments and insertions to the existing Trade Practices Act (TPA) of 14 July 1991. Moreover particular forms of marketing are limited by trade rules for example the Law of 25 June 1993 on the carrying on of itinerant activities and the organisation of public markets (Belgisch Staatsblad, 30 September 1993, 21526, ‘the Law on itinerant activities’): According to this act, the itinerant sale of subscriptions to periodicals without prior authorisation constitutes an offence. Finally, for consumer sales the Parliament adopted a special legislative Act which was inserted into the Belgian CC, as a constitutive part of the section relating to the sale of goods.
III. Timeliness of Transposition

BELGIUM has transposed the Directives 93/13, 97/7, 98/6 in due time. In the case of the provisions on Unfair Contract Terms, after the Commission had pointed out a number of shortcomings in transposition, the Belgian Parliament amended the Trade Practices Act twice in order to secure conformity with the Directive. The other Directives have been implemented with a delay of between 19 months (Directive 98/27) and 50 months (Directive 85/577). For its failure to implement the Directive 94/47 in time the Commission has successfully brought an action against Belgium before the ECJ.3

IV. Use of Minimum Harmonisation

When transposing the European Directives BELGIUM made extensive use of the minimum clauses: Unlike the Directive 90/314, the Travel Act requires that the information to be supplied pursuant to TPA, Article 7 (Art. 4(1) of the Directive) is in writing.

As to unfair contract terms the TPA as well as the Liberal Professions Act (LPA) contain a “blacklist” of clauses that are always considered unfair (per se unfair), whereas the Directive uses a list of clauses that may be considered unfair. If the consumer demonstrates that a contract term comes within the clauses listed in TPA, Article 32, no further judicial assessment is required. For timesharing contracts under Belgian law the withdrawal period is extended to 15 working days (Art. 5(1) of the Directive 94/47: 10 days). The Timesharing Act also obliges the vendor to provide more information in the prospectus and in the contract than required by the Directive.

V. Other Extensions

Article 1 no. 7 of the TPA defines consumers as all natural or legal persons who are exclusively acting (buying products or services) for purposes outside their business or trade. Consequently a person who acquires a product or a service for a combined private and professional purpose will cease to qualify as a ‘consumer’ for the purposes of the TPA. In contrast to the Directives, under the TPA and the LPA legal persons may qualify as consumers, but in the light of recent case law of the Court de Cassation it is difficult to see

how legal persons may be regarded as consumers since the TPA requires consumers to act exclusively for purposes outside business and trade.

As to doorstep selling, the TPA does not provide for a similar exemption as in Article 1(2) of the Directive 85/577 and consequently applies to products or services even when the consumer knew or should have known that they form part of the seller’s commercial and professional activities. The definition of travel intermediary contracts is broader than the definition in the Directive: the Travel Act (TA) also covers contracts where a seller takes up the obligation to perform just one action which enables the consumer to travel or to stay somewhere (TA, Art. 1, 2°). As to unfair contract terms, the TPA applies not only to pre-formulated standard contracts but also without any reservation to individually negotiated terms in consumer contracts. The scope of application of the provisions on distance selling is broader since many of the exemptions in Art. 3 of the Directive (concerning automatic vending machines, public payphones, auctions, supply of foodstuffs) have not been adopted.

VI. Possible Infringements of EC Law

The ECJ decided in C-20/03 - Burmanjer, Van Der Linden, De Jong⁴ (based on a reference for a preliminary ruling from the Rechtbank van eerste aanleg te Brugge, Belgium), that “Art. 28 EC does not preclude national rules under which a Member State [Belgium] makes an offence of the itinerant sale within its territory, without prior authorisation, of subscriptions to periodicals, where such rules apply, without distinction based on the origin of the products in question, to all the economic operators concerned carrying on their activity within that State, provided that such rules affect in the same manner, in law and in fact, the marketing of products originating in that State and that of products from other Member States.” However, it is now for the referring Rechtbank Brugge to determine, taking into consideration the facts of the main proceedings, whether the application of Belgium law is such as to ensure these requirements.

As to the rules on standard terms the wording of some of the clauses listed in the Belgian list of unfair terms in Article 32 of the TPA was criticised for demonstrating a certain a lack of coherence: some of the clauses of the black list may overlap, some of the rules of the TPA

need further clarification e.g. the exclusion of key-clauses. There is also a controversy about the real nature of the sanction of nullity and the competence of the Commission and of unfair contract terms that are not well-defined. Since the Annex of the Directive displays merely an indicative grey list, it is arguable that the aforesaid does not constitute an infringement of EC law.

As to timesharing the rule that advance payments can not be demanded before the end of the withdrawal period is subject to certain limitations in Art. 9(1), 1° of the Timesharing Act. The prohibition only applies to the regular withdrawal period but not to the prolonged withdrawal period in case of lack of information. One could argue that this constitutes an infringement of Art. 6 of the Directive 94/475.

The provisions on distance selling refer to the general scope of application of the TPA which is limited to ‘moveable property’. According to well-established case law the TPA is also applicable to service contracts relating to immovable property, provided those services qualify as commercial acts. In case of rental of immovable property this may possibly lead to a scope which diverges from that of the Directive 97/7.

C. Cyprus – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition</th>
<th>ECJ decisions in relation to Cyprus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 97/7</td>
<td>The Law for the Conclusion of Consumer Distance Contracts of 2000, L.14(I)/2000, as amended by L. 237(I)/04</td>
<td>28 March 2000</td>
<td></td>
</tr>
<tr>
<td>Directive 98/27</td>
<td>In all legislative measures transposing consumer protection Directives. Examples include:</td>
<td>28 March 2000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Misleading Advertising Law</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>• The Law for the Conclusion</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Before the transposition of the Directives CYPRUS had already established a high level of consumer protection in some areas of law. Some fields of consumer protection as price indication, injunctions, package travel and timesharing, for instance, were already subject to some special regulations and so the consumers were provided with a significant amount of protection. In contrast to that, doorstep and distance selling contracts were not subject to any special regulations and therefore the state of protection could only be granted by provisions of law that applied and still apply to contracts in general and to contracts for the sale of goods. Furthermore, consumers enjoyed all other rights being conferred to them by the English Common Law which is applicable in Cyprus by virtue of Article 29 of the Courts Law of 1960, L 14(I)/60.

II. Legislative Techniques of Transposition

In CYPRUS the obligation of implementation was mostly met by making special legislative Acts that implemented the particular Directive into national law. The Directive 94/47, for instance, was transposed by the Timeshare Lease Law of 2001 (Law 113 (I) of 2001). The

|-----------------|----------------------------------------------------------------------------------------------------------|----------------|

Law for the Consumer Contracts Concluded Away from Business Premises of 2000 (Law 13 (I) of 2000) for example serves as transposition for the Directive 85/577. Only the Directive 98/27 was transposed in a different way. Instead of making a special legislative act, Articles 2 and 3 have been implemented in every legislative Act that was introduced to transpose other consumer protection Directives.

III. Timeliness of Transposition

The timeliness of the transposition of the Directives in CYPRUS cannot be judged by comparing the dates when their laws entered into force with the given deadline because all the deadlines ended before Cyprus even became a member of the EC. So, transposing the Directives into Cypriot law was part of the necessary preparations for the membership. Except for the Directive 93/13 and the Directive 90/314 which were transposed in 1997 and 1999 all the Directives were implemented in 2000 and 2001. Concerning the Directive 97/7 and the Directive 99/44 Cyprus was even able to meet the obligation of complete transposition in the given time frame.

IV. Use of Minimum Harmonisation

CYPRIOT legislation often goes beyond the regulations of the different Directives. The Republic of Cyprus has adopted more stringent provisions for the protection of consumers than those envisaged in the Directives. As another example the Cypriot law states, in case of a public holiday, a period of withdrawal of 15-days instead of the 10-day period provided by the Directive 94/47 and the time limit is 14 days long and not 7 days as it is prescribed by the Directive 85/577 and the Directive 97/7. Concerning the latter, after exercising the right of withdrawal any money paid by the consumer to the supplier has to be reimbursed forthwith instead of within 30 days, and in the case where the supplier is unable to process the order of the consumer he must offer a refund within 14 days which is sooner than the period of 30 days in the European provision. Furthermore, the Cypriot transposition law of the Directive 97/7 saddles the supplier with the additional obligation to provide the consumer with a standard form of the notice of renunciation of the contract which the consumer must fill in case that he decides to exercise the said right. This applies also to the Directive 94/47 and the
Directive 85/577. Here the supplier has to perform the contract within 14 days after the conclusion of the contract, an element which is not required by the community text.

On the one side the law implementing the Directive 98/6 has not extended to situations outside the scope of the Directive. On the other side however, the law is wider than the Directive. The Directive does not specify the place where prices must be indicated, but the transposition law requires them to be indicated on the products as such or on their package or on the shelves the products are displayed to prevent any confusion to the consumer.

Cyprus has also made some use of the minimum clause in Article 7 of the Directive 98/27. Qualified authorities are given more extensive rights to bring an action at national level. They are entitled to seek a larger variety of orders, which includes an order ordering the infringing trader to take corrective measures correcting the violation or an order ordering any other act or measure that may be necessary or reasonable under the circumstances of a particular case. Most importantly, they can bring an action not only for infringements against consumer collective interests but also against the interests of one or more specific individual consumer.

V. Other Extensions

Often the CYPRIOT law provides more definitions as the European provisions: For timeshare contracts these are “Authorised Officer”, “Court”, “Credit Contract”, “Informative Document”, “Minister” and “Ordered Service”. Regarding unfair contract terms the definitions of “business”, “court” and “director” are added. In the implementation of the Directive 99/44 “Authorised Service”, “Contract of Sale”, “Court”, “Minister” and “Permanent Means of Communication” are defined and the wording “the quality of the goods” is specified (which means the safety of the goods, the reasonable durability in time and use, the appearance and finishing, and the non-existence of defects).

Besides, the consumer benefits of the regulations relating to unfair contract terms also if those are not individually negotiated. Furthermore, the Doorstep selling transposition law also covers contracts concluded as a result of an unsolicited visit to the consumer regardless of the place where the said visit takes places. It can take place at any place.
VI. Possible Infringements of EC Law

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Package Travel in Part 3.B., on Unfair Terms in Part 3.C. and on Injunctions in Part 3.G.).
## D. Czech Republic – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition</th>
<th>ECJ decisions in relation to the Czech Republic</th>
</tr>
</thead>
<tbody>
<tr>
<td>Act No. 159/1999 concerning conditions of entrepreneurs in the area of tourism and travel agencies</td>
<td>1 October 2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Directive 97/7</td>
<td>Civil Code (Act No. 40/1964)</td>
<td>1 January 2001</td>
<td></td>
</tr>
<tr>
<td>Consumer Protection Act No. 634/1992</td>
<td></td>
<td>31 December 1992</td>
<td></td>
</tr>
<tr>
<td>Act on cross-border payments No. 124/2002</td>
<td></td>
<td>1 January 2003</td>
<td></td>
</tr>
<tr>
<td>Act on technical specification of products No. 22/1997, as amended by Act No. 226/2003</td>
<td></td>
<td>1 September 1997</td>
<td></td>
</tr>
<tr>
<td>Consumer Protection Act No. 634/1992</td>
<td></td>
<td>31 December 1992</td>
<td></td>
</tr>
</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Before 1989 there was no particular legislation concerning consumer protection in the Czech Republic, as the Communist Civil Code of 1964 did not know such a category. The Act 367/2000 Coll. by which several Directives were transposed amended the Civil Code.

II. Legislative Techniques of Transposition

The Czech Republic has a Consumer Protection Act (No. 634/1992) which came into force on 31 December 1992 and was amended a few times. It contains rights and duties of the trader, rights of the consumer and the functions of the public administration in the field of consumer protection. In addition to that the Czech Republic enacted different kinds of laws dealing with the regulations of the Directives for example the Act on Prices (No. 526/1990), the Act on technical specification of products (No. 22/1997) or the Act on cross border payments (No. 124/2002).
III. Timeliness of Transposition

The CZECH REPUBLIC became member of the European Union on 1 May 2004. So the timeliness of the transposition of the Directives in the Czech Republic cannot be judged by comparing the dates when their laws came into force with the given deadlines. Transposing the Directives into Czech law was part of the necessary preparations for the membership according to the Treaty of Accession.

IV. Use of Minimum Harmonisation

The CZECH legislator has made use of Minimum Harmonisation in the transposition of Directive 97/7, Directive 94/47 and Directive 99/44. Regarding to the Directive 97/7 the Czech law grants a period of withdrawal of 14 days to the consumer. In the case of Timeshare contracts the period of withdrawal is 15 days.

V. Other Extensions

According to the CC also a legal person who is not acting within his commercial activity is considered as consumer.

VI. Possible Infringements of EC law

### E. Denmark – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in⁶</th>
<th>Date of Transposition (due date)⁷</th>
<th>ECJ decisions in relation to Denmark</th>
</tr>
</thead>
</table>
| Directive 90/314   | Regulation no. 503/2004 on registration and security etc. in the Travel Guarantee Fund  
|                    | Regulation no. 776/1993 on Package Travels  
|                    | Act no. 315/1997 on the Travel Guarantee Fund  

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⁶ The acts, consolidated acts and regulations listed under this heading are the present acts etc containing the transposed rules. They are not necessarily the same as the original instruments of transposition.

⁷ The dates mentioned (without brackets) refer to the original instrument of transposition.
<table>
<thead>
<tr>
<th>Directive</th>
<th>Description</th>
<th>Date of Implementation</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>97/7</td>
<td>Consolidated Act on Means of Payment</td>
<td>31 May 2000 (1 January 2002)</td>
<td></td>
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<tr>
<td></td>
<td>Act no. 451 of 9 June 2004 on certain consumer contracts</td>
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<tr>
<td></td>
<td>Consolidated Act no. 699/2000 on Marketing Practices</td>
<td></td>
<td></td>
</tr>
<tr>
<td>98/6</td>
<td>Executive Order no. 866 of 18 September 2000 on information on sales price and price per unit for consumer goods. The price indication rules were transferred to the Marketing Practices Act in July 2006.</td>
<td>18 September 2000 (18 September 2000)</td>
<td></td>
</tr>
</tbody>
</table>
I. State of the Consumer Protection in the Field of the Directives the Transposition

DENISH national law already provided a great amount of consumer protection before the Directives in the field of consumer protection came into force. For example, concerning package travel, “The Travel Guarantee Fund” was established by an Act of Parliament in 1979 in order to secure a refund of money, accommodation and when necessary, repatriation. With regard to unfair contract terms, a general clause, which was added to Art. 36 in the Formation of Contracts Act in 1975, gives the consumer the possibility to completely or partly disregard an agreement if it would be “unreasonable or contrary to principles of fair conduct”. As another instrument of consumer protection “good marketing practices” were implemented as rules on preventive control of unfair contract terms in Art. 1 of the first Marketing Practices Act in 1975. By transposing the Directives, consumer protection was expanded and some of the rules that were already in force were clarified.

II. Legislative Techniques of Transposition

DENMARK met the obligation of transposition by amending the existing national laws and by making special legislative acts. For instance, the Directive 97/7 was transposed into national law by amending different statutes, especially the Act on Certain Consumer Contracts and the Marketing Practices Act. Act no. 1257/2000 on the protection of the consumers’ interests serves as an implementation of the Directive 98/27.

III. Timeliness of Transposition

For the most part, DENMARK transposed the Directives into national law within the timeframe or slightly after the deadline as with the Directive 98/6.

IV. Use of Minimum Harmonisation

Except for the transposition of the Directive 98/27, DENMARK has always made use of the minimum clause. In the case of distance selling contracts the period of withdrawal is 14 days instead of the seven days foreseen in the Directives. Regarding the Directive 99/44, for instance, the consumer also has the right to rescind the contract even when the lack of performance is minor in cases where the seller has not fulfilled an offer (or a demand) to
repair/replace the product. Concerning the Directive 90/314 and the Directive 94/47 the minimum clause has been used while implementing the European provisions into national law. In contrast, regarding the Directive 99/44 and the Directive 85/577, for instance, existing rules which provided the consumer with a wider protection than the Directive have simply been upheld.

V. Other Extensions

In order to provide the consumer with greater protection, Denmark has often extended the definitions which were given in the Directives. For instance, by transposing the Directive 99/44, the Directive 97/7 and the Directive 94/47 Denmark extended the term of consumer in a way that it does not only cover natural persons, but also legal persons, provided that they act outside their profession. The transposition of the Directive 94/47 extended the Directive in various ways. Besides the wider definition of the term of consumer, the term of vendor and the definition of the contract are broader than in the Directive. The Act is not limited to contracts where the right of use of the immovable property is set to a maximum length of one week per year. In addition, the Act also applies to contracts where there has been no agreement on a payment of “a certain global price”. Regarding Doorstep Selling not only contracts concluded at an excursion organised by the trader, but all contracts concluded outside the trader’s business, for example in streets, squares, restaurants or railway stations, are covered. The consumer’s right of withdrawal also applies if the consumer has expressly requested a visit from the trader and also if the trader contacts the consumer by telephone. The price indication rules were transferred to the Marketing Practices Act in July 2006 and now also apply to services.

VI. Possible Infringements of EC Law

There seem to be no infringements of EC law.
### F. Estonia – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition</th>
<th>ECJ decisions in relation to Estonia</th>
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<td>Tourism Act</td>
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<tr>
<td>Directive 97/7</td>
<td>Electronic Communication Act</td>
<td>1 January 2005</td>
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<td>Private International Law Act</td>
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<td>Private International Law Act</td>
<td>1 July 2002</td>
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</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

In Estonia, consumer law used to be regulated by the Civil Code of the former Estonian Soviet Socialist Republic of 12 June 1964, in force since 1 January 1965. The law contained strict rules concerning consumption, for example doorstep selling was forbidden. There were no special rules on doorstep selling, package travel, unfair contract terms and the other fields of the Directives in consideration. With the Law of Obligations Act (LOA), which came into force on 1 July 2002, the largest part of Civil Code of Estonian Soviet Socialist Republic (part III „Obligation Law“) was declared null and void. In the LOA for example, the Directive 97/7 was transposed. On 15 December 1993 the Parliament passed the Consumer Protection Act (CPA) which came into force on 1 January 1994. The CPA contained general provisions concerning responsibilities and restrictions of the seller (Art. 7 and 8), but no special rules comparable to the Directives. Therefore, on 11 February 2004, a new Consumer Protection Code came into force in order to completely harmonise Estonian law with the _acquis communautaire_.

II. Legislative Techniques of Transposition

All the Directives were transposed into Estonian law by the Law of Obligations Act (LOA) in 2002. This Act, made by the national legislator, was inserted into the existing civil law codification. Furthermore, some Directives, for instance the Directive 85/577, the Directive 98/6 and the Directive 98/27, were additionally implemented by a statutory instruments set up by the Minister of Economy and Communication. These statutory instruments were implemented by amending the existing statutory laws. Concerning the Directive 97/7 there
has been an amendment after the initial transposition of the Directive. A part of the Law of Obligations Act was amended in October 2004 in order to harmonise the distance selling regulations with Directive 2002/65 which itself also amended Directive 97/7.

### III. Timeliness of Transposition

ESTONIA became a Member State of the European Union on 1 May 2004. On that date the transposition deadlines for all the directives had already expired. Estonia was required to ensure that the Directives were transposed - as part of the *aquis communautaire* - in accordance with its Treaty of Accession.

### IV. Use of Minimum Harmonisation

Concerning the transposition of the directives on consumer protection ESTONIA has made use of the minimum clauses given in the Directives. In the area of doorstep selling and distance selling Estonian law grants a withdrawal period of 14 days. Concerning the Directive 98/27 it has been submitted that the consumer’s right to appeal to the consumer committee is not restricted at all, thus it cannot be expanded.

### V. Other Extensions

Extensions can only be found in the transposition of the Directive 85/577, the Directive 90/314 and the Directive 93/13. Concerning the Directive 90/314 and the Directive 93/13 the scope of application is not restricted to consumers. Consumers, non-commercial and commercial legal persons are covered by the law transposing the Directives. Furthermore, the contracts of package travel service that fall into the scope of application of the package travel regulations do not necessarily have to cover a period of more than 24 hours as prescribed in the Directive. As long as the service includes accommodation the time of duration can be less than 24 hours. Regarding the Directive 85/577 the regulation in Art. 3(2) of the Directive, which stipulates that some kinds of contracts are banned from the scope of application, has not been implemented into ESTONIAN law.
VI. Possible infringements of EC law

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Package Travel in Part 3.B., Unfair Terms in Part 3.C. and on Injunctions in Part 3.G.).
G. Finland – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition (due date)</th>
<th>ECJ decisions in relation to Finland</th>
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<tr>
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<td>The Personal Data Act, 01.06.1999/523</td>
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<td>Com data protection Act, 01.09.2004/516</td>
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The Consumer Protection Act
20.01.1978/38
1 September 1978

Directive 98/27
Act on Cross Border Injunction Procedure
21.12.2000/1189
1 January 2001
(1 January 2001)

Directive 99/44
The Consumer Protection Act
20.01.1978/38
1 September 1978
(1 January 2002)

I. State of the Consumer Protection in the Field of the Directives before Transposition

Before the transposition of the European Directives at issue FINLAND had already established a high level of consumer protection which is heavily based on a single act. The Consumer Protection Act of 1978 applying only to goods even so covered a great number of both selling and marketing situations such as Doorstep Selling, Unfair Contract Terms and Consumer Sales and included a right of withdrawal. Consequently, the concept of consumer is in contrast to EC-law relatively uniform. In case of a lack of specific provisions, for one concerning Package Travel, general rules and principals were applicable.

II. Legislative Techniques of Transposition

As FINLAND set up an effective consumer protection a long time before any European initiatives, nearly all Directives were implemented in a technical way and transposed by amendments and additions to the existing law, namely the Consumer Protection Act. However, the Directive 90/314 and Directive 98/27, covering situations for which specific provisions did not exist in Finland before, are each codified in a special act where the principal of lex specialis derogat lex generalis applies.

A special feature of the Finnish system is the capital role of public authorities having considerable discretion. According to 3:4 Consumer Protection Act, The Consumer Ombudsman, who is a Chief of the Consumer Agency supervises the consumer protection. He can also apply interim measures such as injunctions (3:3.2 Consumer Protection Act) in case
of application of unfair contract terms as well as enacting non-binding guidelines (such as for the marketing of packet travels) which are nevertheless authoritative sources for the traders referring to relevant acts and recent case law. Besides, he may assist a consumer in an individual case (Act on Consumer Agency, Article 9), especially in case the trader does not comply with the decision of the Consumer Complaint Board.

The consumer authorities can react relatively fast to the changing marketing practices and trading activities. This allows flexibility and wider applications of general clauses, a fundamental element of Nordic consumer protection. As a result, when transposing the European Directives, the Finnish legislator is not in favour of implementing black lists (for example, one contained in the Directive 93/13/ or other similar legal instruments.

All in all, the Directives have not changed much Finnish consumer law and it can be argued that the impact on businesses, consumers and lawyers has been low. The Directives have not lowered the level of consumer protection for they are harmonized to a minimum except for the Directive 98/27. Some slight amendments might have improved the level of protection.

III. Timeliness of Transposition

On the whole, FINLAND transposed the European Directives within the time limit. Only the Directive 90/314 was implemented with a remarkable delay of more than two years.

IV. Use of Minimum Harmonisation

FINLAND is likely to use the minimum clauses in order to maintain the high level of consumer protection which goes often beyond the directives (this is expressed in the travaux preparatoires (HE 2001/89 vp) at 2.7.), for instance by granting in the Consumer Protection Act a longer period for right of withdrawal (14 days compared with 7 days of the European provision) or ignoring the time limit of two years of Art. 5(2) of the Directive 99/44. To quote an example concerning package travel the passenger has already a right to withdraw from the contract when he has sufficient reasons not to participate in a trip to a dangerous region even if the organiser is not going to cancel it (Art. 15(1) of the Package Travel Act). Besides, contrary to the Directive, the duty to provide a travel brochure is mandatory (Art. 6 of the
Package Travel Act) and the assistance duty applies also in cases where the traveller himself has caused difficulties (Art. 16 of the Package Travel Act). The provisions relating to force majeure situations are more specific (Art. 12 of the Package Travel Act).

Another special derogation concerns the Directive 99/44. It is important to notice that the Directive does not impose obligations to the consumer (tilaaja), whereas Chapter 8 of the Consumer Protection Act imposes obligations and liabilities on the consumer in the case of breach of contract.

V. Other Extensions

Generally, the Finnish provisions contain a wider scope of application than the European Directives. An exception is the Directive 98/27 which is harmonised without extension of the scope or providing higher protection.

VI. Possible Infringements of EC Law

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Package Travel in Part 3.B. and on Timeshare in Part 3.D.).
### H. France – Legislative Techniques

<table>
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<th>Directive</th>
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<td>C-361/89</td>
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<td><em>Patrice di Pinto</em> [1991] ECR I-01189</td>
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<td><em>André Ambry</em> [1998] ECR I-07875</td>
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<td>Cofidis SA c. Jean-Louis Fredout</td>
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<td>[2002] ECR I-10875</td>
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</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Before the transposition of the European Directives in the field of consumer law France had already integrated a profound consumer protection in its national legislation. With regards to door-to-door sale, for instance, the law no. 72-1137 of 1972 established rules comparable to the ones of the Directive 85/577 of 20 December 1985. With the law no. 78-23 of 1978 a special code of consumer law had been enacted and in chapter IV an administrative controlling system of unfair terms was regulated. In 1992 the existing laws related to consumer protection were combined in the French Consumer Code by the law no. 93-949 of 26 July 1992. The contents of the prior laws remained unmodified except for editorial changes.

II. Legislative Techniques of Transposition

In the course of the transposition of the Directives France chose to integrate most of the European provisions in the existing Consumer Code instead of enacting single transposition laws or amending the Civil Code. As an example, the transposing law no. 89-421 of the Directive 85/577 was codified in Art. L. 121-16. et seq. C. Cons.; the law no. 95-96 and the regulatory act no. 2001-741 implementing the Directive 93/13 modified Art. L. 132-1 C. Cons.; in Art. L. 121-60 et seq. C. Cons. the regulations transposing the Directive 94/47 were embodied. Most recently, on 24 February 2005, the French legislator created a Tourism Code including herein the transposition legislation of the Directive 90/314 (law no. 92-645, decree no. 94-490).
III. Timeliness of Transposition

In general, France exhausted the given time to transpose the Directives. The transposition acts have been enacted just in time or slightly after the deadline, the implementation of the Directive 93/13 being two months later than the date determined in the Directive. Only the Directive 99/44 was not transposed at all in the time frame granted by the European legislator until 1 January 2002. The European Commission initiated an infringement procedure because of the lacking transposition on 14 July 2003. The Directive 99/44 is now codified in Art. L. 211-1 et seq. C. Cons. (regulatory act no. 2005-136 from 17 February 2005).

IV. Use of Minimum Harmonisation

Whereas the French legislation sometimes even goes beyond the European provisions, other regulations almost literally adopt the Directive texts (such as the provisions transposing the Directive 97/7, Directive 98/6).

V. Other Extensions

As an example of the French extension of consumer protection, the regulations implementing the Directive 93/13 can be considered. No express definition of the consumer can be found. Nevertheless, the jurisdiction has a wider understanding of the notion of consumer. As the Cour de Cassation ruled on 5 March 2002 tradesmen acting without direct connection to their profession can also be regarded as consumers.

VI. Possible Infringements of EC Law

The French manner of transposition has also given reason to complaints from the European Court of Justice. In C-410/96 - Ambrý the implementation of Art. 7 Directive 90/314 was objected. The French provisions stipulated that insurance could only be effected with a company registered in France. The court ruled that this violated the European regulations of free market barriers. Also the seven “jour francs” withdrawal period for distance contracts is a breach of EC law.
More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Distance Selling in Part 3.E. and on Injunctions in Part 3.G.).
### I. Germany – Legislative Techniques

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</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Before the transposition of the European Directives at issue there had not been special rules on consumer protection law in GERMANY. From 1976 onwards, the Unfair Contract Terms Act protected all natural and legal persons (including businesspersons) confronted with standard contract terms drafted in advance by another party. The Doorstep Selling Cancellation Act was adopted almost simultaneously with the Directive 85/577. Although generally based on the protection concept of the Directive, the Doorstep Selling Cancellation...
Act did not explicitly mention the term “consumer”, instead the Act referred only to “Kunde” which can be translated as customer. The notion “consumer” was used for the first time in German private law in 1987 in the Consumer Credit Act which served the transposition of the Directive 87/102.

The level of consumer protection of the German provisions so formulated lagged considerably behind the requirements of Community law prior to transposition of the directives. Neither did there exist a general right of withdrawal in doorstep sales, distance sales and time sharing contracts, nor were any detailed information requirements in the area of these directives prescribed in German law. In terms of monitoring unfair terms no clauses could be controlled before transposition of the directive that were created for single use or incorporated into the contract on the initiative of a third party. Sales law guarantees were subject to a six month limitation period before implementation of the directive; moreover guarantees could in principle be excluded or restricted.

II. Legislative Techniques of Transposition

Regarding the legislative techniques of transposition in Germany three different phases can be identified: In the first phase Germany transposed the European Directives by making marginal modifications to already existing pieces of law. This applies to the provisions on doorstep selling (transposed in the Doorstep Selling Cancellation Act, which was enacted shortly before the Directive was adopted), package travel (transposed via modifications to the already existing rules on travel contracts) and to the provisions on unfair terms (transposed by amendments to the already existing Unfair Contract Terms Act).

In the second phase, the German legislator adopted separate special Acts following the European guidelines; the legislative method applied came close to a word for word transposition. This was the case with the Timeshare Act and the Distance Selling Act. By the time of transposition of the Directive 97/7 the German legislator opted for a two-pronged approach: On the one hand the Community law provisions were regulated in accordance with the then employed legislative technique, i.e. in a separate consumer act outside of the CC. On the other hand, for the first time the central structural elements of consumer law in the CC were standardised and rules established that apply to all consumer contracts. These include
the unitary definitions of consumer (CC Art. 13) and business (CC Art. 14) as well as the rules on withdrawal and returns (CC Art. 361a, 361b old version, now: CC Art. 355, 356).

This strategy was pursued further in the third phase with the Act to modernise the law of obligations in relation to transposition of the Directive 99/44. The formerly separate consumer protection Acts (on doorstep selling, distance selling, unfair contract terms, timesharing and consumer credit contracts) were integrated into the CC. At the same time the withdrawal provisions of the CC were unified to a greater extent than before. Likewise in relation to sales contracts the legislator opted for a so-called “big solution”. The rules of the Directive 99/44 were implemented not only for consumer sales, but for all sales contracts. Many of the rules of the Directive 99/44 are now applicable to all kinds of sales contracts irrespective of whether or not a consumer is involved; solely in CC Art. 474-479 do special rules exist, that apply exclusively to contracts between consumers and businesses concerning moveable goods (Verbrauchsgüterkauf – sale of consumer goods). Certain principles of the Directive 99/44 (for example the concept of rescission) are even to be found in the general part of the law of obligations and are thus applicable to all contracts in personam (e.g. in the case of rules on rescission, to all “synallagmatic contracts”).

III. Timeliness of Transposition

GermANY transposed most of the Directives either in time or with a relatively slight delay of a couple of months (Directive 97/7 and Directive 98/6). Solely the Directive 90/314 (as in many other member states) was transposed with a notable delay of nearly 2 years (see on this point the decision of the ECJ in the case of Dillenkofer, op. cit.).

IV. Use of Minimum Harmonisation

When transposing the European Directives GERMANY made use of minimum clauses on various occasions. The time limit for withdrawal for doorstep selling, distance selling and timesharing contracts has been extended to 14 calendar days, whereas the directives only require seven (Directive 85/577 and 97/7) and ten days (Directive 94/47). If at no time the consumer is informed of his right of withdrawal in accordance with the statutory provisions, then according to German law an unlimited right of withdrawal exists not only for doorstep
selling, but also for distance selling and timesharing contracts, as the legislator implemented
the requirements of the *Heininger* decision for all rights of withdrawal. According to the
Directive 97/7 by contrast the right of withdrawal, even in the event of non-notification
thereof, expires after six months (Art. 6(1), sent. 4 of the Directive 97/7) and for timesharing
contracts after three months and ten days (Art. 5(1) of the Directive 94/47).

Moreover, the German rules on Doorstep selling protect the customer even if only the
negotiations, but not the conclusion of the contract, take place in a doorstep situation. The
national rules apply also to cases where the customer is approached in public or on public
transport. Furthermore the revocation period has been extended to 14 days (the Directive
requires only seven days).

For distance contracts and timesharing contracts the information duties are in part more
comprehensive than as laid down in the directives. In contrast to the Directive 90/314 the
corresponding provisions of the CC also encompass occasional travel organisers; furthermore
neither a minimum length of 24 hours nor an overnight stay are required. Also the possible
remedies for the travellers for non-performance are more comprehensive in German law.

Certain rules of the Directive 99/44 also exist in relation to consumer guarantees, as under
German law a seller who issued a guarantee may be liable irrespective of any fault or
negligence.

**V. Other Extensions**

Generally the definition of the term “consumer” is broader than in the EC Directives, as in
contrast to Community law the notion of consumer in CC Art. 13 also encompasses the
employee acting in the course of a business. As mentioned above, both the provisions on
unfair terms and the rules for guarantees in sales contracts basically apply to all kinds of
contracts irrespective of whether or not a consumer is involved.

Certain rules of the Directive 99/44 (such as e.g. the norms on rescission, *ante*) have general
application for all bilateral contracts. Concerning Price Indication the German provisions are
also applicable to contracts for services. The German provisions on injunctions are not limited
to infringements listed in the Annex of the Directive, instead applications for injunctions can be filed for violations of all consumer protection laws.

**VI. Possible Infringements of EC Law**

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Doorstep Selling in Part 3.A., Package Travel in Part 3.B., Distance Selling in Part 3.E. and on Consumer Sales in Part 3.H.).
### J. Greece – Legislative Techniques

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<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition (due date)</th>
<th>ECJ decisions in relation to Greece</th>
</tr>
</thead>
</table>
### I. State of Consumer Protection in the Field of the Directives before Transposition

Although there were no comprehensive provisions on consumer protection prior to transposition of the directives in Greece, certain sub-areas were however already subject to regulation. According to the Greek Civil Code it was only possible to intervene in party autonomy in exceptional circumstances, e.g., if the conduct of the other contractual party was contrary to good morals, good faith or the social or economic purpose of the law (CC Art. 174, 178–179, 281, 288).

Article 9(1) subpara. c (γ) of the Act 393/1976 laid down certain information duties for travel agencies which offered package tours, however the travel contract was not regulated as an independent type of contract, but was treated as a contract for services. However the legislator addressed the issue of time sharing relatively early on. Pursuant to Art. 1(2) of the Act 1652/1986 time sharing contracts are concluded through a notary, whilst the ministerial resolution A 9953/DIONOSE/1789/1987 prescribes a comprehensive list of obligatory contractual requirements, whose content by and large corresponds to the minimum requirements of the Annex to the directive. Art. 31 of the Act 1961/1991 on consumer protections.

<table>
<thead>
<tr>
<th>Directive</th>
<th>Act/Resolution</th>
<th>Date of Approval</th>
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<tbody>
<tr>
<td>98/27</td>
<td>Presidential regulation no. 301/2002 to approximate Greek legislation to the rules of Directive 98/27</td>
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<tr>
<td>99/44</td>
<td>Act 3043/2002 to amend Arts. 534 et seq. Of the Civil Code (Liability of the seller for defective products) and Art. 5 of the Consumer Protection Act</td>
<td>(1 January 2002)</td>
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</tbody>
</table>
protection lays down the mandatory requirement that contracts concluded away from business premises must be done so in writing and confers a right upon the consumer to withdraw from the contract within ten days of receipt of his copy of the contract. The contract of sale and thus also the liability of the seller for defective products was subject to general regulation, independent of the nature of the parties, in CC Art. 534 to 561, whilst the Greek legislator regulated the case of sale of new, durable goods (long-life consumer goods) in Art. 5 of the Act 2251/1994 on consumer protection, which obliged the supplier to provide a written guarantee to the consumer-buyer.

II. Legislative Techniques of Transposition

Various concepts were chosen to transpose the consumer protection directives in GREECE: The Directive 85/577, 93/13, 97/7 and most parts of the Directive 98/27 were transposed via respective amendments in the Consumer Protection Act 2251/1994. The Directive 99/44 was transposed by amending the provisions of non-conformity with the contract of the CC (Art. 534 et seq.) and also Art. 5 of the Consumer Protection Act. With the Directive 85/577, 93/13, 99/44 this occurred through respective Parliamentary Acts, whereas the Directive 97/7 was transposed via ministerial regulation on the basis of statutory authority and the Directive 98/27 via presidential regulation. The Directive 90/314 and 94/47 by contrast were transposed by the President of the Republic by separate legal acts via presidential regulation, copying the wording of the Directives almost verbatim. The Greek provisions on unit prices were approximated via resolution of the minister for economy and development.

III. Timeliness of Transposition

The transposition of the directives in GREECE did not always happen in a timely fashion, in some respects the European guidelines went unheeded for many years. Following an action by the Commission the ECJ declared Greece to be in breach of its Treaty obligations in respect of the Time Sharing Directive (C-401/98 - Commission v. Hellenic Republic).
IV. Use of Minimum Harmonisation

In many respects the Greek legislator secured a level of protection beyond that of the directives: By means of example the provisions on doorstep selling require not only a written explanation of the right of withdrawal, but also prescribe that the whole contract is to be in written form and specify certain minimum particulars to be contained therein. Also the time limit for withdrawal is ten days (as oppose to seven calendar days in the Directive 85/577). The provisions on package travel contain, alongside additional information duties, an operating licence of the tourist accommodation, an extension of the requirement to hold insurance to the extent that the consumer has a direct insurance claim against the insurance provider in respect of all claims arising out of imperfect performance or non-performance of the travel contract; this even applies in the absence of insolvency or bankruptcy of the organiser/agent.

In consumer sales the rights of redress of the consumer stand alongside each other, i.e. there is no hierarchy of remedies. The new Art. 540 of the CC allows the purchaser to require a reduction in price or to rescind the contract, even where the non-conformity could be remedied by repairing the good or by replacement thereof without disproportionate expenditure on the part of the seller. Furthermore CC Art. 536, sent. 1, in contrast to Art. 2(5), sent. 1 of the Directive 99/44, does not require that the non-conformity be attributable to incorrect installation; therefore the seller is also liable in cases where the non-conformity with the contract exists independently of assembly of the product.

V. Other Extensions

The notion of consumer in Art. 1(4) lit. (a) of the Consumer Protection Act 2251/1994 encompasses natural or legal persons, for whom the products/services on the market are intended, so long as they are their final addressee. In contrast to the European law concept it is not necessary that the final addressee uses the good or service solely for his own private needs, also the addressee who uses the good/service for business purposes is protected. The provisions on contracts of sale (CC Art. 534 et seq.) also apply to all contracts and not only those which fall within the objective or subjective scope of the directive. The Greek legislator regarded the rules of the Directive 99/44 to be of general application and consequently, in amending the corresponding provisions of the CC, opted to regulate all contracts for sale of
moveable and immovable goods between all parties (B2B, B2C, C2C) in a uniform fashion, to avoid legislative inconsistencies in the regulation of similar problems.

For distance contracts the legislator has extended the scope of the national provisions to apply also to construction contracts and the contracts for the purchase of immovable property (and concerning rights thereover) as well as to contracts concluded in the course of auctions.

VI. Possible Infringements of EC Law

The Greek legislator, in transposing Art. 1(2) of the Directive 85/577 into Greek law through Art. 3(2) of the Act 2251/1994, neglected to include the supply of other, non-requested services by the supplier in the context of visits by a sales representative on the basis of an express invitation by the consumer. Likewise, subject to criticism is the transposition of Art. 7(1) of the Directive 97/7, according to which the supplier is required, unless the parties have agreed otherwise, to execute the order within a maximum of 30 days from the day following that on which the consumer forwarded this order to the supplier. According to Greek law, namely Art. 4(8) of the Act 2251/1994, the time limit first begins after the supplier has received the order.

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Distance Selling in Part 3.D. and on Consumer Sales in Part 3.H.).
### K. Hungary – Legislative Techniques

<table>
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<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition</th>
<th>ECJ decisions in relation to Hungary</th>
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<tr>
<td>Directive 97/7</td>
<td>Government Decree No. 17/1999. (II.5.) on Distance Contracting</td>
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<tr>
<td>Directive 97/7</td>
<td>Act CXLI of 1997 on Real Estate Registration</td>
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<td>Directive 98/6</td>
<td>Act CLV of 1997 on Consumer Protection</td>
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<td>Directive 98/6</td>
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<td>(V.8.) on Consumer Supervisory Authority</td>
<td>Hungarian Civil Coder</td>
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<td>Law-Decree No. 13 of 1979 on the International Private Law</td>
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<td>Ministry of Justice Decree No 13/2004 (IV.16) IM listing the acts of legislation corresponding to the directives listed in the Annex to Directive 98/27/EC on injunctions for the protection of consumers' interests</td>
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<td>Directive 99/44</td>
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<td>Government Decree No.181/2003. (XI. 5.)</td>
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<td>Government Decree. No. 151/2003. (IX.22.) on guarantees of consumer durables</td>
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<td>GKM Decree. No. 49/2003. (VII.30.)</td>
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<td>Unfair Contract Terms Decree no. 2/1978</td>
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<td>Law-Decree No. 13 of 1979 on the</td>
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</tbody>
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| 1 July 1979 |
| 1 May 1960 |
| 23 December 1997 |
| 1 March 1978 |
| 1 July 1979 |
I. State of Consumer Protection in the Field of the Directives before Transposition

With regard to Doorstep Selling HUNGARY had already enacted some decrees dealing with consumer protection before the transposition of the Directive 85/577 which corresponded to the Directive in general. Only the scope of application was wider than the one prescribed by the Directive and elements of the right of withdrawal differed from the regulations of the Directive 85/577.

Before the transposition of the Directive 98/6 regulations on the indication of the unit price had not existed in Hungary, meaning that only selling prices were apparent on the goods or on price lists hung beside the goods. More general provisions have been included in the Hungarian Consumer Protection Act (Act No CLV of 1997 on Consumer Protection). As before the transposition of the Directive 94/47 there was no particular piece of legislation regulating specifically the area of timeshare in Hungary, the Consumer Protection Act and the Competition Act have been applied in this context. The public administrative body, responsible for the enforcement on deceptive practices, namely the Hungarian Competition Authority has been dealing with several complaints regarding this area of law, where case handlers have been applying the relevant section of the Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices). According to Article 8 (1) thereof “It shall be prohibited to deceive consumers in economic competition.” Before the transposition of the Directive 90/314 in 1996 the activities of travel agencies were regulated in two government decrees (VO 2/1992. (I. 13.), VO 11/1978 (III. 1.). Regarding the Directive 98/27, 99/44, 93/13 legal techniques were established even before the transposition for example the possibility of actio popularis which was guaranteed by the Consumer Protection Act and the Civil Code and legal instruments to protect the consumers. One of the main instruments of this system was the CC which developed a wide field of guarantees. The provisions of the CC were applicable to all contractual relations, which means that these provisions were applicable for contracts between suppliers and consumers and between non-consumers as well. Consequently the guarantees were also applicable to all kinds of contract and not only to consumer contracts.
II. Legislative Techniques of Transposition

The different Directives were all transposed into the Hungarian law by the enactment of Government Decrees and amendments of the CC. As an example the Directive 97/7 was transposed into the Hungarian law by the Government Decree No. 17/1999. (II.5.) on Distance Contracting and shall be implemented into the CC.

III. Timeliness of Transposition

HUNGARY became a Member State of the European Union on 1 May 2004, when the transposition deadlines for all the Directives had already expired. Hungary had to transpose the Directives in accordance with its Treaty of Accession.

IV. Use of Minimum Harmonisation

Regarding the Directive 97/7 HUNGARY has made use of the minimum clause. The supplier has to inform the consumer about the right of withdrawal in good time prior to the conclusion of the contract. The period of withdrawal is 8 days instead of 7 days like in the Directive. The burden of proof concerning the existence of prior information is placed on the supplier. Doorstep Selling is more restricted than foreseen in the Directive 85/577 since it is only allowed to sell products door-to-door of which the purpose is generally known and which are industrially packed and not dissected. Furthermore it is forbidden to visit the consumer at home between 7 o’clock p.m. and 9 o’clock a.m., if the consumer has not agreed to the visit in advance. The period of withdrawal in the case of timeshare contracts is 15 days instead of the 10 days foreseen in Directive 94/47.

The Hungarian legislator has made extensive use of the minimum harmonization clause regarding the Directive 99/44. The consumer can hold back a proportionate portion of the price until the repair or replacement of the sold goods is completed. If the goods are replaced or if the consumer rescinds from the contract, he is not obliged to pay any compensation for the loss in value caused by proper use of the good. Furthermore, in the case that the non-conformity of the good could not be detected by the consumer, for example due to the nature
of the good or the character of the fault, within the given timeframe, the consumer can enforce his or her guarantee rights within one year and in the case of goods designated for long-term use, within three years of delivery. In addition, any clause in a consumer contract which differs from the statutory guarantee rights in disadvantage to the consumer is void. In the area of unfair contract terms the Hungarian legislation goes beyond the provisions of the Directive 93/13, as it is possible for the consumer to contest any unfair contract clause, even if the clause has been negotiated.

V. Other Extensions

As already mentioned above HUNGARIAN Law is wider than the regulations of the Directives. The definition Package Travel for example is wider than foreseen by the Directive 90/314, because the definition includes in difference to the Directive trips with a duration of less than 24 hours, too. The term “organizer” is wider than prescribed by the Directive. The scope of application covers outgoing and incoming tourism Business. Concerning Directive 97/7 there are several acts which stipulate exceptions of the scope, for instance government decree 175/2003. (X. 28.) concerning the public safety of endangering materials or Law XXXV of 2000 on pesticides. Whereas the term of consumer of the Directive 99/44 covers every natural person, the guarantee rules of the CC can be applied to any person who is a party of a contract, concluded for reasons different from economic or professional activities. “Any person” can be a natural person but also a legal person or other organizations. The rules of guarantees and warranties are applicable on consumer contracts and non-consumer contracts as well. Hungarian rules concern all the types of contracts when the parties are bound to owe mutual service to one other. Consumer protection is also warranted for contracts concerning less than 60 Euros. Contracts of catalogue commerce are also covered by the Hungarian legislation. The consumer can arraign the contract because of unfair contract terms even if they were negotiated between him and the supplier before the conclusion of the contract. The regulations on doorstep selling are applicable also if the price is below 60 Euros.
VI. Possible Infringements of EC Law

The principle of transparency prescribed in Art. 5, sent. 1 of Directive 93/13 has not explicitly transposed in Hungary. Therefore it is doubtful whether the requirements of the directive have been sufficiently adhered to; see Part 3 C.V.1.b.

More detailed information is provided in the individual reports on the transposition of the Directives (cf. in particular, the executive summaries of the reports on Unfair Contract Terms in Part 3.C. and on Injunctions in Part 3.G.).
### L. Ireland – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition (due date)</th>
<th>ECJ decisions in relation to Ireland</th>
</tr>
</thead>
</table>
### I. State of Consumer Protection in the Field of the Directives before Transposition

Before the transposition of the EC consumer Directives under consideration, there was no consumer protection comparable to that in most of the Directives established in Ireland (e.g. in the area of the Timeshare Directive, Price Indication Directive and the Injunctions Directive). In other areas of law the general rules of contract law were applied. For instance, contracts negotiated away from business premises were governed under general contract law and other specific statutory instruments, such as the Sale of Goods Act 1893, the Sale of Goods and Supply of Services Act 1980, and, and the EC (Misleading Advertising) Regulations 1988. The Act of 1980 allowed the responsible Minister to rule by order for contracts negotiated away from business premises for a specific period within which the
consumer may withdraw from the contract. In fact, this option has never been used. Also for packages, the general contract law was applicable. Tour operators were regulated under the Transport (Tour Operators and travel Agents) Act 1982. In the area of distance selling there was no pre-existing legislation, again general contract law was applicable. Protection only existed for inertia selling of goods. For consumer sales, there existed already a comparable protection of consumers by the provision of the Sale of Goods Acts 1893 and 1980. These acts already gave the consumer rights which were similar to those foreseen by the later adopted Directive. The consumer had the right to reject the goods, terminate the contract and sue for damages. The provisions determining whether a good is conforms to the contract were comparable as well. Nevertheless, these acts granted a greater freedom to exclude the liability of the seller and difficulties regarding the burden of proof.

II. Legislative Techniques of Transposition

Ireland has transposed all Directives in single acts. The Directives have been implemented into Irish law by statutory instruments. Only the Package Travel Directive has been transposed by an Act of Parliament. Ireland often uses the copy and paste approach.

III. Timeliness of Transposition

Ireland only transposed the Unfair Contract Terms Directive on time. The Timeshare Directive was implemented slightly late. The other directives were transposed with a delay ranging from nine months for the Injunctions Directive to 33 months for the Package Travel Directive.

IV. Use of Minimum Harmonisation

IRELAND has not intensively made use of the Minimum Harmonisation clauses provided in the Directives. The Directives 85/577, 94/47, 98/6 and 97/7 have been transposed faithfully without implementing a higher consumer protection level than given in the Directives. Only when transposing the Directive 90/314, Ireland extended the catalogue of information obligations for the brochures. In addition to the Directive, the consumer has to be informed in

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8 Package Holidays and Travel Trade Act 1995.
relation to any tax or compulsory charge, an agent with an address within the State in case the organiser has no office in the consumer’s state and the arrangements for security for money paid over and (where applicable) for the repatriation of the consumer in the event of insolvency of the organiser.\(^9\) The regulations transposing the Directive 99/44 expressly do not substitute, but complete other existing enactments relating to the sale of goods or the terms of contracts concluded with consumers. The consumer can choose the enactment which is more favourable to him.

V. Other Extensions

Generally, the implementing legislation is restricted to the scope given to it by the corresponding Directives.

VI. Possible Infringements of EC Law

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Injunctions in Part 3.G.).

\(^9\) Section 10 (1) of the Package Holidays and Travel Trade Act 1995.
### M. Italy – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
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<th>ECJ decisions in relation to Italy</th>
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<tr>
<td>Statute 6/02/1996, n. 52, art. 25</td>
<td>6 March 1992</td>
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<tr>
<td>“Consumer code” (Art. 69 – 81)</td>
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<tr>
<td>“Implementation of the 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 one or more immovable properties on a timeshare basis”</td>
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| “Consumer code ” (Art. 13 – 17)  
| Statute 25/02/2000 n. 84  
| 12 May 2000  
| (18 March 2000) |
| “Consumer code ” (Art. 137, 139, 140) | 23 October 2005  
| (1 January 2001) |
| “Consumer code ” (Art. 128 – 139)  
| Legislative decree 2/02/2002, n. 24  
| “Implementation of Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees” | 23 October 2005  
| in force since 18 February 2002  
| (1 January 2002) |

**I. State of Consumer Protection in the Field of the Directives before Transposition**

Before the transposition of the Directives into **ITALIAN** law the issue of Consumer Protection was regulated by the general provisions on contract law in the Italian Civil Code.

**II. Legislative Techniques of Transposition**

The **ITALIAN** legislator enacted a few legislative decrees and statutes to transpose the regulations of the different directives. The new Consumer Code came into force on 23
October 2005. While implementing the regulations of the Directives Italy regularly made use of the instrument of copy and paste.

**III. Timeliness of Transposition**

Italy did not transpose all the Directives on time. The delay concerning Directive 98/6 was quite short, namely 2 months. The Directive 94/47 was transposed 2 ½ years and Directive 90/314 almost 3 years after the transposition period expired. The transposition of the Directive 98/27 was delayed 4 years. Directive 85/577 and Directive 97/7 were transposed 4 ½ years after the transposition timeframe ended.

**IV. Use of Minimum Harmonisation**

When transposing the European Directives the Italian legislator did not make use of the minimum clauses of Directive 94/47, Directive 98/6 and Directive 93/13. Concerning the other Directives Italy has made use of Minimum Harmonisation, but not in a very extensive way. As an example, the Italian provisions concerning the right of withdrawal in case of distance selling and timeshare contracts give a longer period of withdrawal, namely 10 working-days. Then, the minimum clause in Directive 94/47 was additionally used to stipulate the voidness of the contract if it is not in written form, to forbid the use of the notion “multiproprieta” in Timeshare contracts and to oblige the vendor to provide a bank or insurance guarantee. Concerning Directive 85/577 it is stipulated that a clause that derogates the place of jurisdiction away from the domicile of the consumer is void. The regulations implementing Directive 97/7 contain, compared with the Directive, some further specifications of information duties.

**V. Other Extensions**

In Italy, the scope of application is sometimes extended. In the regulation implementing the Directive 99/44, other contracts such as those mentioned by the community text are included, more particular “permuta” (contracts of exchange of goods, not of good with price as the contract of sale), “somministrazione” (the delivery of goods is distributed during the time), “appalto” and “opera” (the professional agrees to do all the work necessary to produce or
build a consumer good). In regard to distance selling, the Italian law has a larger scope than the Directive, including contracts concluded by mail, on the basis of a trader's catalogue and in any public space. On the contrary, in the case of Timeshare the scope is not extended, but it is considered that the use of minimum clauses described above leads to a better information and protection of the consumer.

**VI. Possible Infringements of EC Law**

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Doorstep Selling in Part 3.A and on Package Travel in Part 3.B).
### N. Latvia – Legislative Techniques

<table>
<thead>
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<th>ECJ decisions in relation to Latvia</th>
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<tbody>
<tr>
<td>Directive 85/577</td>
<td>Republic of Latvia Cabinet Regulation No 327 “Regulations Regarding Contracts Entered Into Outside the Permanent Location of Sale or Provision of Services of an Undertaking (Company)”</td>
<td>25 September 1999</td>
<td>1 April 1999</td>
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<tr>
<td>Directive 90/314</td>
<td>Cabinet Regulation No 163 “Regulations regarding Package Tourism Services”</td>
<td>1 October 2000</td>
<td>1 April 1999</td>
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<tr>
<td>Directive 93/13</td>
<td>Consumer Rights Protection Law - Chapter 2 “Contracts”</td>
<td>1 April 1999</td>
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<tr>
<td>Directive 94/47</td>
<td>Cabinet Regulation No 325 “Regulations regarding Contracts on Obtaining the Right to Temporary Use of a Residential Building or a Part Thereof”</td>
<td>1 October 1999</td>
<td>1 April 1999</td>
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</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

In Latvia the first regulations concerning Consumer Protection were established by the Law on Consumer Right Protection 1992 after the collapse of the Soviet Union. The law contained basic rights for consumers, for example the right to receive goods and services in an appropriate quality, and few criteria regarding the voidness of contractual terms. Between 1992 and 1999 consumer rights protection developed intensively. The Latvian legislator revised the existing law on basis of the experiences of the western countries and the different Directives of the European Community.
II. Legislative Techniques of Transposition

In the course of the transposition of the Directives the LATVIAN legislator chose to transpose most of the European provisions into the Consumer Law Protection Act. This act is supplemented by individual cabinet regulations for the different Directives, for example Cabinet Regulation No 178 “Procedures for Displaying Prices of Products and Services” for Directive 98/6 or Cabinet Regulation No 325 “Regulations regarding Contracts on Obtaining the Right to Temporary Use of a Residential Building or a Part Thereof” for the Directive 94/47. As there were no regulations concerning Timeshare before, the Directive 94/47 was completely transposed by using the copy and paste technique. For the same reasons the Latvian legislator has used the technique of copy and paste for the transposition of the Directive 93/13 and 97/7.

III. Timeliness of Transposition

LATVIA became a Member of the European Union on 1 May 2004. As a new member state joining after the transposition deadlines for all the Directives had expired, Latvia was required to ensure transposition of the directives in accordance with its Treaty of Accession. The Consumer Right Protection Act came into force on 1 January 1999. In this law the Directives 99/44, 93/13, 94/47, 85/577 were transposed. The Directives 97/7 and 98/6 were partly transposed. The missing provisions were transposed in Cabinet Regulations (No. 207, adopted on 28 May 2002 for Distance Selling and No. 178 adopted on 8 May 1999 for Unit Prices). The Directive 90/314 was transposed in the Tourism law from 17 September 1998 and was amended on 7 October 1999, 24 January 2002 and 27 February 2003. The Directive 98/27 was partly transposed in 2001.

IV. Use of Minimum Harmonisation

The LATVIAN legislator has made no use of Minimum Harmonisation in the transposition of the Directive 98/6, 98/27 and Directive 99/44. On the contrary Minimum Harmonisation has been used in the transposition of the Directive 97/7, 85/577 and 94/47 granting to the consumer a period of withdrawal of 14 days instead of seven days as provided in these Directives.
V. Other Extensions

The Latvian legislator formerly used a wider notion of consumer in Art. 1(1) sec. 3 of the Latvian Consumer Rights Protection Law. Also legal persons could be consumers if they “wish to purchase, purchase or might purchase goods or utilise a service for a purpose which is not directly related to his or her professional activity”. Now, since 11 November 2005, legal persons are excluded from the scope of “consumer” in the Consumer Rights Protection Law.

VI. Possible Infringements of EC Law

In Latvia there is a lack of transposition concerning the Directive 97/7. The Latvian regulations do not transpose Art. 8 of the Directive 97/7, which provides consumers’ rights in case of fraudulent use of their payment cards. In addition, Art. 9, 2nd indent of the Directive 97/7\textsuperscript{10} is not transposed in Latvian law either. Another shortcoming can be found in the transposition of the Directive 93/13. According to Art. 6(1) of this Directive unfair terms shall not be binding. This regulation is transposed by Art. 6(8) of the Latvian Consumer Rights Protection Law, but there is a technical nuance that practically makes an important difference with the idea of the Directive. Latvian Law states that only after a consumer’s request the particular contractual term could be declared as unfair and therefore not binding. Until the consumer makes a claim, all contractual terms are valid and legal. Regarding the Directive 90/314 the Latvian law only regulates packages sold or offered in Latvian territory, not in the territory of the Community as foreseen in Art. 1 of the Directive.

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Doorstep Selling in Part 3.A., Unfair Terms in Part 3.C., Timeshare in Part 3.D. and on Consumer Sales in Part 3.H.).

\textsuperscript{10} Art 9 Directive 97/7
Member States shall 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,
- exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent.
### O. Lithuania – Legislative Techniques

<table>
<thead>
<tr>
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<th>ECJ decisions in relation to Lithuania</th>
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</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Before adopting the 10 November 1994 Law No. I-657 of the Republic of Lithuania “On Consumer Protection”, LITHUANIAN Consumer law was regulated by the Soviet Civil Code (dating from 7 July 1964). In the Soviet Civil Code there were no regulations on Consumer Protection comparable to those in the Directives. According to the European Agreement Establishing an Association between the European Communities and their Member States and the Republic of Lithuania, which came into force on 1 February 1998, the Lithuanian legislation had to be harmonized with the acquis communautaire. In this process of integration the Directives were transferred into Lithuanian law.

II. Legislative Techniques of Transposition

In LITHUANIA there is a Law of Consumer Protection which contains regulations regarding each Directive. For example the Lithuanian legislator uses a unitary definition of consumer,\(^\text{11}\) which is applicable for all Directives. The definition of seller\(^\text{12}\) is unitary and applicable to all Directives. Some provisions of the Directives were transposed by amending the Lithuanian Civil Code. Concerning the Directive 85/577, 94/47, 98/6 Orders of the Ministry of Economy supplement the regulations of the laws.

\(^\text{11}\) Art. 2(1) of the Law on Consumer Protection of the Republic of Lithuania.

\(^\text{12}\) Art. 2(2) Law on Consumer Protection of the Republic of Lithuania.
III. Timeliness of Transposition

LITHUANIA became a Member of the European Union on 1 May 2004. The Law on Consumer Protection of the Republic of Lithuania, by which all the Directives are (partly) transferred, came into force on 30 April 2004. As a new member state joining after the transposition deadlines for all the Directives had expired, was required to ensure transposition of the directives in accordance with its Treaty of Accession.

IV. Use of Minimum Harmonisation

The LITHUANIAN legislator has made no use of Minimum Harmonisation. Consumers are not given greater protection than envisaged in the Directives and the legislation. The Lithuanian legislator has made no use of options either.

V. Other Extensions

LITHUANIAN law does not extend to situations outside the scope of the Directives.

VI. Possible Infringements of EC Law

### P. Luxembourg – Legislative Techniques

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<th>ECJ decisions in relation to Luxembourg</th>
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</thead>
<tbody>
<tr>
<td>-----------</td>
<td>-------------------------------------------------------------------------------------------------</td>
<td>-------------------------</td>
<td></td>
</tr>
<tr>
<td>Directive</td>
<td>Loi du 19 décembre 2003 fixant les conditions d’agrément des organisations habilitées à intenter des actions en cessation en matière de protection des intérêts collectifs des consommateurs et portant modification… et transposant la directive 97/55/CE … modifiant la directive 84/450/CEE sur la publicité trompeuse afin d’y inclure la publicité comparative</td>
<td>31 December 2003 (1 December 2001)</td>
<td></td>
</tr>
</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Legislation in the grand Duchy shows that a considerable effort had been made to promote consumer rights before any European initiatives. The main fields of LUXEMBOURG’S pre-existing consumer legislation cover prices, packaging, labelling, advertising, selling methods and unfair competition, the quality and safety of consumer products and services and consumer credit. The main gaps are liability for products and services, access to justice, control over unfair terms and consumer education.

In Luxembourg law consumer interests are not always easy to distinguish from general interests or from the interests of competition. Consumer protection is actually considered as a kind of reflex to competition law. However, legislative measures in the field of competition law have a long tradition. The core of unfair competition law is contained in the Act of 27 November 1986 regulating certain trade practices and sanctioning unfair competition (Loi du 27 novembre 1986 réglementant certaines pratiques commerciales et sanctionnant la concurrence déloyale).

One of the most important legal acts is the one of 25 August 1983 on the legal protection of the consumer (Loi du 25 août 1983 relative à la protection juridique du consommateur), modified by Act of 26 March 1997 on the basis of the Directive 93/13 concerning unfair contract terms. This law deals with consumer protection mainly on the contractual level. Another provision of great relevance is the Act of 16 July 1987 on hawking, peddling, display of goods and solicitation of orders (Loi du 16 juillet 1987 concernant le colportage, la vente ambulante, l’étalage de marchandises et la sollicitation de commandes). In addition, a law of 11 August 1982 on the protection of privacy prohibits molesting persons by repeated and unannounced telephone calls or in written form and other messages (Loi du 11 août 1982 concernant la protection de la vie privée).
II. Legislative Techniques of Transposition

As to the transposition of European Directives the LUXEMBOURG legislator uses both the copy and paste technique and the technique of implementation through amendment of pre-existing domestic law. Partly the copy and paste technique prevails - e.g. with regard to the transposition of the Directives 94/47, 97/7, 98/6 and 99/44 - and, partly the amendment technique – e.g. regarding the Directives 85/577 and 93/13. In order to implement the latter Directives the Luxembourg legislator revised two Acts of great relevance: the Act of 25 August 1983 on the legal protection of the consumer and the Act of 16 July 1987 on hawking, peddling, display of goods and solicitation of orders.

III. Timeliness of Transposition

LUXEMBOURG has not managed to implement the above-mentioned Directives by their deadline. Indeed, the transposition into national law was carried out with a couple of years’ delay (on the average 2 to 3 years). In the case of the Directive 85/577, the European Commission launched a legal action against Luxembourg for non-transposition.

IV. Use of Minimum Harmonisation / Other Extensions

LUXEMBOURG has practically made no use of the minimum harmonisation clauses. Options in Directives in favour of higher consumer protection are rarely used. Generally, the implementing legislation is restricted to the scope given to it by the corresponding directives. On occasion, there are slightly more generous definitions, which has the effect of broadening the scope of application. One example might be Art. 1(3) of the Act of 16 April 2003 on the protection of the consumer concerning distance selling contracts, which provides a broader definition of the “supplier” in comparison to Art. 2(3) of the Directive 97/7.

V. Possible Infringements of EC Law

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Unfair Terms in Part 3.C.).
### Q. Malta – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition (due date)(^{13})</th>
<th>ECJ decisions in relation to Malta</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 97/7</td>
<td>Distance Selling Regulations, 2001</td>
<td>4 September 2001 (1 January 2002)</td>
<td></td>
</tr>
</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

In general, the amount of protection in MALTA before the transpositions was not comparable to the one laid down in the Directives. In a lot of cases, there were no special legal rules that dealt with the area of consumer protection, so that the general provisions of the Civil Code were applied. However, before the implementation of the Directive 85/577 and the Directive 98/6, consumers were already granted a great amount of protection. By enacting the Door-to-Door Salesmen Act (Cap. 317 of the Laws of Malta) in February 1987, the Maltese legislator took the European Directive as a model. The consumer was not only granted the right of withdrawal, but also other measures of protection that in some points, for example the burden of proof, even went beyond the minimum measures stated in the Directive. The Control of the Sale of Commodities Regulations, 1972 which dealt with the display of prices obliged the traders to “exhibit conspicuously” a sample of every type of product they had in stock. Each of those samples had to be indicated with a white label showing the selling price which had to fulfil very strict requirements concerning the way the single figures had to be printed.

II. Legislative Techniques of Transposition

The eight Directives were transposed into MALTESE law either by Act of Parliament which were enacted by amending existing statutory law or else by regulations promulgated by the competent Minister under the legislative powers granted to him by Parliament under the applicable parent law. Whereas for instance, the Door-to-Door Salesmen Act was amended by Act No. XXVI of 2000 in order to bring the legislation in line with the EC Directive, the Directive 93/13, 98/27 and 99/44 were each transposed into Maltese law by amendments to
the Consumer Affairs Act (Cap. 378 of the Laws of Malta). These amendments were enacted by Parliament. The Directive 97/7 and the 98/6 were transposed by the Minister responsible for consumer affairs after consultation with the Consumer Affairs Council by virtue of his powers to make regulations under Article 7 of the Consumer Affairs Act, whereas the Directive 90/314 and the Directive 94/47 were transposed by the Minister responsible for tourism after consultation with the Malta Tourism Authority by virtue of his powers under Article 47 of the Malta Travel and Tourism Services Act.

III. Timeliness of Transposition

MALTA became a member of the European Union on 1 May 2004. As a new member state joining after the transposition deadlines for all the Directives had expired, Malta was required to ensure transposition of the Directives in accordance with its Treaty of Accession.

IV. Use of Minimum Harmonisation

Except for the Directive 90/314 and 98/6 the MALTESE legislator has always made use of minimum harmonisation clauses in the Directives. Concerning the Directive 85/577 and 97/7 the period for the consumer to exercise his right of withdrawal has been extended to 15 days as opposed to 7 days as in the Directives. Furthermore, regarding the Directive 94/47, separate regulations have been enacted in order to stop the harassment of timeshare salespersons by prospective buyers. These regulations state that the salespersons have to be licensed, that they have to carry personal identification with them while working and that they must not take part in any conduct which is misleading or deceptive.

Concerning the Directive 93/13, a black list of terms has been included. All in all, the consumer is granted a greater deal of protection by the extensive use of the minimum harmonisation.

Additional extensions with regard to this the Directive 99/44 have been made with regard to the requirements of commercial or voluntary guarantees. Extensions have also been made in the context of the implementation of the Directive 90/314: the obligation of the trader to give brochures to the customer which should contain adequate information relating to any tax or
compulsory charge and relating to any nominated agent with a permanent business address in MALTA. Furthermore, these brochures should include information on arrangements for security for the refund of monies paid and for the repatriation of the consumer in the event of the insolvency of the organiser.

V. Other Extensions

In general the scope of application is not extended to such a great extent that one can state that consumers overall have much more protection at law than the minimum required under EC legislation, though there are significant variations as stated above notably with regard to unfair terms and timeshare. Regarding the Directive 93/13, 99/44, the 97/7, and 98/6 the term “consumer” covers natural persons. Moreover in relation to the laws transposing these Directives the Minister responsible for consumer affairs after consulting the Consumer Affairs Council has the power to designate any other class or category of persons including legal persons as consumers. In the case of the Directive 98/6 ‘consumer’ also includes the final purchaser.

Concerning the Directive 93/13, Maltese law extends the protection to all contractual terms without making any distinction as to whether the term was individually negotiated or not.

VI. Possible Infringements of EC Law

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Doorstep Selling in Part 3.A., Unfair Terms in Part 3.C., Injunctions in Part 3.G. and on Consumer Sales in Part 3.H.).
### R. Netherlands – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition (due date)</th>
<th>ECJ decisions in relation to the Netherlands</th>
</tr>
</thead>
</table>
| Directive 85/577 | Dutch Civil Code  
Law of the 31st of December 1989, containing changes to the Canvassing law | 1 January 1992  
(26 July 1989) | |
| Directive 90/314 | Dutch Civil Code  
Decree of the 15th of January 1993, containing rules concerning data that organisers of organised trips must state on behalf of travellers | 1 January 1992  
(27 January 1993) | |
| Directive 93/13 | Dutch Civil Code  
Law of the 28th of October 1999 to the adaptation of Book 6 of the Civil Code to the directive unfair terms in consumer contracts | 1 January 1992  
(17 November 1999) | ECJ 10 May 2001 C-144/99  
Commission of the European Communities v Kingdom of the Netherlands  
ECR [2001] I-03541 |
| Directive 94/47 | Dutch Civil Code  
Decree of the 25th of June 1997, containing rules concerning data that sellers of the right of part- | 1 January 1992  
(29 April 1997) | |
<table>
<thead>
<tr>
<th>Directive</th>
<th>Law</th>
<th>Description</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>97/7</td>
<td>Dutch Civil Code</td>
<td>Time use of real estate should be mentioned in the contract on behalf of the buyer</td>
<td>1 January 1992</td>
</tr>
<tr>
<td></td>
<td>Dutch General act on terms</td>
<td></td>
<td>1 April 1965</td>
</tr>
<tr>
<td></td>
<td>Mediawet</td>
<td></td>
<td>25 May 2005</td>
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<tr>
<td></td>
<td>Telecommunicatiewet</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wet bescherming persoonsgegevens</td>
<td></td>
<td>1 January 2001</td>
</tr>
<tr>
<td>98/6</td>
<td>Decree of the 21st of May 2003, containing rules in regard to the indication of prices as replacement for the Decree price-indication on goods 1980</td>
<td></td>
<td>11 June 2003</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>(18 March 2000)</td>
</tr>
<tr>
<td>98/27</td>
<td>Dutch Civil Code</td>
<td></td>
<td>1 January 1992</td>
</tr>
<tr>
<td></td>
<td>Law of the 25th of April 2000 to the adaptation of Book 3 and 6 of the Civil Code to the directive</td>
<td></td>
<td>(1 January 2001)</td>
</tr>
</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Before the transposition of the European Directives in the field of consumer law the Netherlands had already integrated some general provisions concerning consumer protection in the CC (Burgerlijk Wetboek). CC Title 7.1 mentions specific provisions for consumer contracts for example the principle of conformity (CC 7:17). This principle means that any good delivered should be conform to the contract, which means that the good should have all qualities that a buyer could reasonably expect given its nature and the information given by the seller. With regard to Directive 85/577 the Canvassing Act of September 7 1973 established rules comparable to those of the Directive 85/577. Especially in the field of Unfair contract terms the Dutch Civil Code did not contain specific provisions before 1 January 1992.

II. Legislative Techniques of Transposition

Most of the provisions established by the different directives were transposed in the Dutch CC except the regulations of the Directive 98/6. In terms of the transposition of the Directive 98/6 the Dutch law established the decree of the 21 of May 2003 which contains rules in regard to the indication of prices as replacement for the Decree price-indication on goods 1980. In addition to the amendments of the Dutch Civil Code single transposition laws were enacted for example the Decree of the 25 of June 1997, containing rules concerning data that sellers of the right of part-time use of real estate should mention in the contract on behalf of the buyer (Directive 94/47), or the Law of the 28 of October 1999 to the adaptation of CC Book 6 to the directive unfair terms in consumer contracts.
III. Timeliness of Transposition


IV. Use of Minimum Harmonisation

In several cases Dutch law is broader than the scope of the Directive. As an example the Directive 93/13 contains an indicative and non-exhaustive list of terms which may be regarded as unfair. Dutch law contains a list of terms that must be regarded as unfair. Also several of the limitations allowed in Article 3 of the Directive are not implemented. Various articles and paragraphs of CC Section 7.1 on contracts of sales, including articles and paragraphs similar to those in the Directive 99/44, also apply to buyers that are not a consumer. Examples are CC Article 7:17 and CC Article 7:21 (1), (2) and (3) and CC Article 7:23 (2) BW. In the field of the Directive 97/7 the legislator has not made any use of the possibility to offer the consumer more comprehensive protection than the minimum protection prescribed by the Directive. Moreover, the Dutch legislation has not been extended to situations outside of the scope of the directive. According to the legislator CC Article 7:17 (4) gives greater protection than Article 2(2) lit. (a) of the Directive because the burden of proof of the function of the sample or model is on the seller. The reasoning is that if a sample or model is shown, it does not necessarily mean that the seller and buyer have entered into a contract of sale of goods where the goods should be in exact conformity with the sample. Article CC 7:17 (2) gives greater protection than Article 2(2) lit. (b) of the Directive because the goods should be in conformity with the particular purpose not only as far the seller has accepted this purpose, but also which are foreseen by the contract, which may be broader.14 CC Article 7:21 (1) (a) grants the right to the delivery of missing goods, which is not granted by Article 3(2) of the Directive. If the seller has not repaired the good within a reasonable

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time, CC Article 7:21 (6) allows the consumer to have a third party repair the goods and hold the seller liable for the costs. CC Article 7:23 (2) offers more protection than Article 5(1) of the Directive. The Article is more favourable to the consumer, because (a) the lack of conformity does not have to become apparent within two years after delivery; and (b) with regard to the limitation period, the moment of notification, and not the moment of delivery is taken as the starting point.  

V. Other Extensions

In some cases Dutch law offers a greater consumer protection than prescribed by the European Directives. In the case of Doorstep Selling Dutch law also covers contracts where the total payment to be made is less than € 34 and situations in which there is a standing relationship between parties concerning the selling of food. The original broader scope of the law is maintained in a sense that the field of work is broader than Article 1(1) of the Directive indicates and the several of the limitations allowed in Art. 3 of the Directive are not implemented.

The scope of the Canvassing Act contains a broader field of work than is prescribed by Article 1(1) of the Directive 85/577.

Regarding the transposition of the Directive 94/47 the application of CC chapter 7.1.10A is not limited to contracts for the transfer of property, but is extended to include inter alia contracts of rent or lease. The explanatory note explicitly states that, like Art. 2 first indents of the Directive, CC Art. 48a aims to encompass all the different forms of rights to part time use of immovable property (Kamerstukken II 1995/96, nr. 3, 5). The definition of CC Art. 48a also includes contracts that create indirect rights to part time use of unmovable property (for instance trough membership of a club). This provision allows an extension of the period if the deed does not contain all of the required information. In contrast to Art. 5, 2nd indent, of the directive no distinction is made as to the type of information that has been omitted.

The consumer protection with regard to contract of sales is also applicable to contracts of barter (CC Article 7:50). The consumer protection does not only include tangible moveable

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goods, but also intangible goods such as claims (CC Article 7:47). Various articles and paragraphs of CC Section 7.1 on contracts of sales, including articles and paragraphs similar to those in the Directive, also apply to buyers that are not a consumer.

VI. Possible Infringements of EC Law

The Dutch government thought that Dutch law was in compliance with the Directive 93/13. Therefore, Dutch law was initially not changed. However, the ECJ ruled that several provisions were not in compliance with Directive 93/13 (Jur. 2001, I-2541). For that reason, a clarification was introduced in the Dutch code, making sure that the assessment of the unfair nature of the terms shall not relate to the definition of the main subject matter of the contract, provided that these terms are in plain intelligible language. Also, an extra provision was introduced to the code which had to make sure that where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. In general, the Dutch law on unfair contract terms was already in compliance with the Directive. The Directive 99/44 has not been implemented in time. Otherwise no major difficulties have been encountered as a result of incompatibilities of the Directive with Dutch legal system, or as a result of ambiguities, inconsistencies or other weaknesses in the Directive, or as a result of lack of coherence with other Directives.

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Package Travel in Part 3.B., Unfair Terms in Part 3.C. and on Consumer Sales in Part 3.H.).
### S. Poland – Legislative Techniques

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<th>ECJ decisions in relation to Poland</th>
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<tbody>
<tr>
<td>Directive 93/13</td>
<td>Act of 2 March 2000 on the protection of some consumer rights and liability for an unsafe product</td>
<td>1 July 2000</td>
<td></td>
</tr>
<tr>
<td>Directive 94/47</td>
<td>The Act of 13 July 2000 on the protection of purchasers in respect of the right to use buildings or dwellings during certain time each year</td>
<td>8 December 2000</td>
<td></td>
</tr>
<tr>
<td>Directive 97/7</td>
<td>Act of 2 March 2000 on the protection of some consumer rights and on liability for unsafe products</td>
<td>1 July 2000</td>
<td></td>
</tr>
</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Before the implementation of the Directives in most cases there existed no specific provisions, concepts and definitions dealing with terms of the different Directives in POLISH law. For example the definition of ‘consumer’ did not exist in Polish law until the Act of 2 March 2000 and there was no right of withdrawal given to the consumers and no specific information duties were imposed upon traders. Only general provisions concerning contracts and contractual liability of the Civil Code were applied. But the available remedies did not, however, correspond to the remedies prescribed by the Directives.

Also no specific provisions covering timeshare existed in POLISH law. Timesharing was only known by the Polish legal literature, legal practice and case law. The general provisions of the CC on contractual relations and contractual liability were applied. But there were no obligations of the trader to provide specific information to the consumer, not even the trader’s address or other details concerning him. No specific rules concerning the functionality of travel agencies as well as the package travel existed in the POLISH legal system until the 1990s. There was no regulation concerning the qualifications required for persons dealing with tourism. Traders who dealt with such type of business activity had to respect the provisions concerning any business activity (the Act on economic activity of 23 December 1988) and relations between the consumers and the travel agents or organisers of tourist events were regulated by the law of contracts (CC).

Since 1990 certain mechanisms aimed to protect consumer interests were established, but they were still unsatisfactory in comparison with the standards required by the Directives. The idea of unfair contractual clauses has always been based upon the concept of ‘standard forms’ – ‘wzorce’ – as it has been perceived that such clauses derived from standard form contracts (adhesion contracts). ‘Standard forms’ were defined as any contractual clauses (either in the form of ready lists of clauses, standard contractual forms, or sets of rules) unilaterally drafted before the conclusion of the contract justified by the aim of protecting consumer interests. One such Regulation of the Council of Ministers was indeed adopted on 30 April 1995 (on the conclusion and execution of contracts of sale of movable goods with consumers). Article 384 of this regulation was repealed as unconstitutional by the Act implementing the Directive 93/13.
II. Legislative Techniques of Transposition

In the course of the transposition of the Directives POLAND enacted single transposition laws for example the Act of 2 March 2000 on the protection of certain consumer rights and liability for an unsafe product or the Act on Tourist Services of 29 August 1997. In terms of the transposition of the Consumer Sales Directive the Polish legislation amended the Polish Civil Code.

III. Timeliness of Transposition

Poland, as a new member state joining the European Union after the transposition deadlines for all the Directives had expired, was required to ensure transposition of the Directives in accordance with its Treaty of Accession.

IV. Use of Minimum Harmonisation

The POLISH legislation makes use of Minimum Harmonisation in many areas. Regarding Doorstep Selling Directive the period for withdrawal is 10 days long and not 7 days as it is prescribed by the Directive. This extension, however, does not constitute a significant advantage to the consumer in comparison with the regime of the Directive, because time periods in Poland are calculated using all calendar days, not working days. If Poland would have followed the Directive and introduced a 7 days’ period it could have been taken as decreasing the level of protection provided by the Directive. The trader is not only obliged to inform the consumer, before the conclusion of the contract, about his right of withdrawal, but also has to provide him with a standard form for withdrawal.

In the case of Directive 97/7 the consumer does not have to bear the costs for returning the goods and in case of deposit payments by the consumer, statutory interest should be paid to him (calculated from the date of payment). What regards restrictions of the use of certain means of distance communication the Polish legislator uses the opt in system whereas the Directive uses the opt out system. In consequence, for the use of telephone, videophone, fax, electronic mail, automated calling system and any other means of distance communication, if their use is for the purpose of making an offer, the consent of the consumer is required.
In case of the Directive 94/47 the Polish Act on the protection of purchasers in respect of the right to use buildings or dwellings during certain time each year restricts the possibility of amending the contents of the prospectus prepared by the trader only to situations which are beyond the trader’s control (in contrast with Article 3.2 of the Directive which also allows amendment if both parties agree to it). The Act also makes express references to the prohibited contractual terms, and even mentions a particular examples of a term which may be treated as prohibited. The buyer has the right to withdraw from the contract within a period of 10 days which starts running on the day when the written copy of the contract was supplied to the buyer.

The POLISH Act transposing Directive 98/6 does reach further than the Directive – regarding the obligations for traders. The price must not only be indicated on products, but also on services.

Also in terms of the Directive 99/44 the POLISH Act covers a wider range of situations than the scope of the Directive. It requires the sellers to provide all the required information to the buyers – such as the price of the goods. It also requires them to confirm in writing all the crucial clauses of the contract of sale in sales by instalments, sales to order, sales based on a sample or trial period and sales exceeding 2000 PLN. In other sales contracts the seller must confirm in writing the fact of conclusion of the contract (specifying the seller and his address, date, the goods – their quantity and price) if the buyer so requires. Any seller operating within the territory of POLAND has to impart clear and understandable information in Polish language, allowing the use of the consumption goods in a proper manner. In particular, the name of the goods, the producer or importer and the country of origin, any safety marks and compliance marks, information on licenses to be marketed in Poland as well as, determined by further provisions, efficiency and other information, must be specified. This information must be placed on the product or be joined with it (if the goods are sold individually or in a set), or placed on the premises where the goods are sold (in the latter case – only the name of the goods, the producer, importer and country of origin and the main function must be specified). Further, every seller has to ensure that the appropriate conditions are present at the sales premises to enable the buyer to choose the goods and examine their quality and functioning. The sellers must attach to the goods all the instructions and other information required by other provisions (written in Polish language).
The Act on tourist services which implemented the Directive 90/314 into the POLISH legal system regulates more than simply the provision of package travel - it also regulates the activities of tour agents, tour guides or hotels, for instance the procedure for licensing such activities.

V. Other Extensions

The POLISH transposition laws often have a wider objective or personal scope of application than the Directives. With regard to Doorstep Selling and Distance Selling the definition of ‘consumer’ given in the POLISH CC is applicable. According to that definition a consumer is a physical person conducting a ‘legal act’ not directly related to his business or professional activity, whereas the European definition also includes persons acting in a manner related to their business indirectly. The Act transposing the Directive 98/27 applies to ‘traders’. The definition of trader covers all physical or legal persons providing public services which are not economic activity as such, or professions. The Act implementing the Directive 90/314 also covers ordinary ‘tourist services’ which do not involve a package for example. The POLISH Act implementing the Directive 93/13 applies also to financial services such as banking services or insurance. Concerning Directive 98/6 the only type of relations to which the Act does not apply are those between two „physical persons who are not traders“, so it is applicable in case of commercial sales, too. All types of contracts can be subject to the protection provided by the Act implementing the Directive 85/577, and indeed the scope of the Act is wider than the scope of the application of the Directive. For instance, the protection applies also if the consumer requested the visit of the trader (including a visit in the consumer’s place of work), or if the contract was concluded on the business premises, provided the offers were collected outside these premises. In fact, Article 1.1 of the Act extends protection to all situations where a trader invited the consumer to conclude a contract outside business premises.

VI. Possible Infringements of EC Law

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Package Travel in Part 3.B.).
## T. Portugal – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition (due date)</th>
<th>ECJ decisions in relation to Portugal</th>
</tr>
</thead>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Although the aim of consumer protection has been mentioned in the PORTUGUESE constitution since 1976 (see Art. 110 Portuguese constitution [old version]; since 1989: Art. 60), the Portuguese legislator had regulated only certain parts of consumer protection law prior to the implementation of the European directives. The Consumer Protection Act, Law 29/81 of 22 August 1981; now: Law no. 24/96 of 31 July 1996 enacted by the Parliament established a general obligation to protect consumers and introduced the principles of «equality» and «loyalty». The Act was particularly directed against aggressive sales methods impairing the customer’s freedom of decision. From 1985 onwards the Decree law 446/85 of 25 October 1985, modelled after the German Act on Unfair Contract Terms provided quite comprehensive protection regarding standard contract terms. Its scope of application was not limited to consumers. The general Decree-Law 264/86 of 3 September 1986 contained provisions dealing with organised travels taking place entirely in Portugal.

Certain types of contracts for timesharing were regulated by Decree-Law 130/89 of 18 April 1989 and Decree-Law 275/93 of 5 August 1993. As to distance selling, Decree law 272/87 of 3 July 1987 as amended by Decree law 243/95 of 13 September 1995 prescribed written form for contracts, imposed a number of information duties on the seller and granted a right of withdrawal to the purchaser.

There was no special separate Act on consumer sales, but Articles 913-922 of the PORTUGUESE Civil Code generally provided for warranties/guarantees for defective goods and Decree law 24/96 of 31 July 1996 (Consumer protection Act) contained special regulations concerning the quality of goods sold to consumers.

|-----------------|-------------------------------|--------------------------------|
II. Legislative Techniques of Transposition

The PORTUGUESE Constitution prescribes since 1997 that all Directives have to be implemented through a legislative act by the national legislator i.e. either by Parliament or by the Government. In most cases, the Government has chosen to enact a special legislative act separate from the Civil Code and the Consumer Protection Act. The Directive 93/13, the Directive 94/47 and the Directive 98/6 have been transposed via making amendments to already existing pieces of law.

III. Timeliness of Transposition

PORTUGAL has transposed the Directive 85/577 and the Directive 98/6 in due time. The other Directives have been implemented with a delay. The average delay amounts to nearly 20 months.

IV. Use of Minimum Harmonisation

When transposing the European Directives PORTUGAL made use of the minimum clauses at various occasions. The domestic legislation concerning package travel grant the customer a general right of cancellation, compensation for “ruined holiday”, transfer/assignment of the package. Additionally organiser and retailer are jointly liable and there is a special Travel Guarantee Fund. As to timesharing contracts there is a prohibition in Art. 6 of the Directive against any advance payments. Under PORTUGUESE law this prohibition may also comprise mortgages, as the law states that it includes any form of advance payment “with any other goal directly or indirectly related to the contract to be concluded”. Furthermore the withdrawal period for timesharing contracts is extended to 10 working days as opposed to 10 calendar days under Art. 5(1), indent 1 of the directive. According to decree law 25/2004 qualified entities may bring actions for injunctions for infringements of rights and interests other than those granted in the course of implementation of EC directives. In contrast to Art. 1(2)(b) of the Directive 99/44, the corresponding Portuguese provisions are not restricted to movable items, therefore contracts for the sale of immovable goods are also covered.
V. Other Extensions

The definition used in the Consumer Protection Act (Law 24/96, of 31 July), upholds a uniform concept of the notion “consumer” in all the PORTUGUESE statutes regulating contract law matters. According to Art. 2 CPA a consumer is a person for whom another person conducting a business as a professional delivers goods, provides services or transfers rights as long as the goods, services or rights are not ordered for professional purposes. Nevertheless, the specific provisions also refer to the “client” (package travel) or “purchaser” (timesharing). Irrespective of the different wording the definitions of consumer and trader/supplier do not seem to deviate significantly from those prescribed by the directives.

VI. Possible Infringements of EC Law

It has been criticised that the Unfair Contract Terms Act (Decree law 446/85 of 25 October 1985, amended as described above), unlike Art 4(1) of the directive does not explicitly mention that for the assessment of unfairness of a term, all circumstances have to be taken into account. Thus it remains unclear whether individual, concrete particulars of a contract, such as the experience of the party accepting the terms or the situation in which the contract has been concluded, can be regarded.

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Consumer Sales in Part 3.H.)
### U. Slovakia – Legislative Techniques

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<thead>
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<td>Directive 93/13</td>
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<td></td>
<td>Act No. 99/1963 Code of Civil Procedure as amended</td>
<td>1 April 1964</td>
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</tr>
</tbody>
</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

Before the transposition of the Directives, SLOVAKIA provided the consumer with protection by applying the CC as well as the Consumer Protection Act to most of the different contracts negotiated between a consumer and a trader. Concerning package travel contracts, for instance, the right of withdrawal and the general responsibilities of the provider are regulated in the CC and the conditions for fair trade of products and services are laid down in the Consumer Protection Act. Regarding injunction matters, the Slovakian law was totally not conform to the content of the Directive as an injunction only existed in competition law. Besides that, a great amount of consumer protection is to be found in the Slovakian law before the implementation of the Directive.

II. Legislative Techniques of Transposition

Most of the directives were transposed by amending existing law codifications or statutory law. For instance, the Directive 98/27 was implemented into SLOVAKIAN law by Amendment No. 616/2004 of the Consumer Protection Act and the Directive 93/13 was transposed by Amendment No. 150/2004 of the CC. As opposed to that, two Directives were transposed by special legislative Acts of other measures. The Directive 85/577 and the Directive 97/7 were enacted by the Act No. 108/2000 Coll. on Consumer Protection and Doorstep Selling. The Directive 98/6 was implemented by a Decree of the Ministry of Economy of the Slovakian Republic which executed the Act No. 18/1996 Coll. on Prices which provided consumer protection before the transposition of the Directive 98/6.

III. Timeliness of Transposition

SLOVAKIA became a Member of the European Union on 1 May 2004. As a new member state joining after the transposition deadlines for all the Directives had expired, Slovakia was required to ensure transposition of the directives in accordance with its Treaty of Accession.
IV. Use of Minimum Harmonisation

Except for the Directive 98/6, the Directive 98/27 and the Directive 99/44, SLOVAKIA has made use of the Minimum Harmonisation. In most cases, the greater amount of consumer protection is provided by § 547 of the CC, which regulates that rights that are conferred to someone by the law may not be waived by this person. Furthermore, rights of the consumer cannot contractually be excluded or limited in advance by the parties. Regarding the Directive 85/577 and the Directive 97/7, Act. No. 377/2004 on Non-smoker Protection provides non-smokers with a greater amount of protection by prohibiting such contracts on tobacco products. Concerning the Distance Selling, Act No. 22/2004 Coll. on Electronic Communications states, that in case of contracts being concluded by use of electronic communication, the provisions of the Act on Consumer Protection in Doorstep Selling and Distance Selling must be applied.

V. Other Extensions

In most cases, SLOVAKIA has extended the amount of consumer protection by implementing a broader definition of the term consumer than required by the Directives. In Slovakian law, non-commercial and commercial legal persons are regarded as consumers, provided they act outside their area of trade, business or profession and buy products or use services for the direct personal use. Only concerning the Directive 85/577 and the Directive 97/7, these persons are excluded from the scope of application of the Act on Consumer Protection in Doorstep Selling and Distance Selling. Although the transposition of the Directive 93/13 and the Directive 98/27 do not adopt the wider consumer definition, a broader definition than the one required by the Directive is laid down.

VI. Possible Infringements

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Timeshare in Part 3.D. and on Consumer Sales in Part 3.H.).
## V. Slovenia – Legislative Techniques

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<tr>
<td>Directive 85/577</td>
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<td>Code of Obligations (Art. 460)</td>
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</table>
I. State of Consumer Protection in the Field of the Directives before Transposition

In SLOVENIA much of the legislation on consumer protection was contained in the Consumer Protection Act 1998, with some rules also found in the Code of Obligations. Prior to implementing the various directives, there was already legislation in place dealing with matters, such as rules on door-step selling, package travel, limited rules on timeshares (“tourist property”), distance selling and consumer sales. Matters on which there was no specific pre-existing legislation were unfair terms, price indications and injunctions. To the extent that there was earlier legislation, it covered some of the aspects addressed in the corresponding directives, but in many ways existing law was not up-to-date and in need of some improvements.

II. Legislative Techniques of Transposition

SLOVENIA has a Consumer Protection Act which contains the vast majority of the rules relevant to the protection of consumers. To the extent that this Act did not already contain adequate provisions to comply with the various directives, amendments were made to the existing legislation to slot the additional requirements into the Consumer Protection Act. The only measure in respect of which this has not been followed is the Administrative Order implementing Directive 98/6 on price indications, which is a completely separate measure.

III. Timeliness of Transposition

SLOVENIA, as a new member state joining after the transposition deadlines for all the directives had expired, was required to ensure transposition of the directives in accordance with its Treaty of Accession.

IV. Use of Minimum Harmonisation

The minimum harmonisation clauses have been used extensively by the SLOVENIAN legislator. In some instances, this was done to preserve existing rules which were already more favourable to consumers, but in others, there appears to have been a deliberate decision
to give consumers more protection. For example, the cancellation period in Slovenia is fifteen days, rather than the 7 days envisaged under the Directive 85/577 and the Directive 97/7. Also, “individually negotiated terms” are subject to assessment under the Slovenian rules on unfair contract terms. It is noteworthy that the rules on package travel provide better protection in a number of different aspects.

V. Other Extensions

In some instances, the rules which are now considered as implementing an EC directive extend beyond the immediate scope envisaged in the Directive. For example, the rules on the sale of consumer goods also apply to consumer services, and are also not restricted to consumer goods as defined in Art 1(2)(b) of Directive 99/44.

VI. Possible Infringements of EC Law

There appear to be a number of instances where the SLOVENIAN transposition deviates from the requirements of a particular directive. In some instances, this may have the effect of improving consumer protection, and as such is probably justifiable on the basis of the minimum harmonisation clause (e.g., in respect of Art.2(4) of 99/44 – no transposition in Slovenia). There are instances where Slovenian law is more restrictive – for example, Slovenian law excludes the same contracts from the doorstep-selling rules as it excludes from the distance selling rules – but only the latter are permitted under Directive 97/7. In respect of some measures (Package Travel, Timeshare, Consumer Sales), it is possible to identify a number of departures from the directive which could be classed as infringements of EC law, although some may be the result of ambiguities within the directives themselves.

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Doorstep Selling in Part 3.A., Package Travel in Part 3.B. and on Consumer Sales in Part 3.H.)
### W. Spain – Legislative Techniques

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<td>98/6</td>
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### I. State of Consumer Protection in the Field of the Directives before Transposition

SPANISH legislative activity in the field of consumer protection first began in the 1980’s under the new regime established after the Spanish Constitution. According to Art. 51 of the
Spanish Constitution of 27 December 1978, the public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, guarantee their safety, health and legitimate economic interests.

Before the transposition of the European Directives at issue, most areas were only governed by the general rules of the Spanish CC. Alongside these there existed only very few special rules for the protection of the structurally weaker party to the contract. In relation to the monitoring of Standard Contract Terms for example, although there was no separate Law on unfair contract terms, there did exist a concise regulation on the topic with a protection to some extent comparable to that of the Directive. In 1980 the Law 50/1980 of 8th of October on the insurance contract was enacted, whose Art. 3 dealt with (and deals with, since it is still in force) standard terms and unfair terms in contracts of insurance.

With a more general approach, the General Law for the Protection of Consumers and Users embraced a full regime on unfair contract terms in contracts concluded by consumers. Moreover, the Law 26/1984 contains some general definitions and rules, which have been complemented by special statutes and regulations on the various matters of consumer protection. The Law 26/1984 includes a general definition of “Consumer” (consumidor) and “User” (usuario) (Art. 1(2) and (3)), provisions on information duties (Art. 13-17), rights to representation, consultation and participation (Art. 20-22) and rules on strict liability enabling consumers and users to obtain compensation for damage caused by the use of a thing, product or service (Art. 25-31; however, these provisions do not apply to civil liability for damage caused by defective products; see on this ECJ, case C-183/00 – María Victoria González Sánchez v. Medicina Asturiana SA).

II. Legislative Techniques of Transposition

First of all it is worth mentioning that every Autonomous Community (“Comunidad Autónoma” such as Basque Country, Catalonia, Asturias, Madrid, etc) still has its own rules on consumer protection, normally in its Law on Internal Trade, but some of them have enacted specific Decrees on it. The exclusive competence of these Autonomous Communities, however, is limited to the public law provisions relating to consumer protection, as for example the regulations governing that the relationships between individuals shall be under
exclusive competence of the State (with a few exceptions in only a few regions). Therefore, the regulations at regional level actually contain administrative provisions (licences, authorisations, concessions, etc.).

The national legislator transposed the European Directives applying various legislative techniques. For the Directives 85/577, 94/47 and 99/44 the SPANISH Parliament passed individual implementing acts. The Directive 98/6 was integrated into domestic law through a Decree Law. The Directive 97/7 and Directive 98/27 have been implemented solely via amendments to existing statutory laws.

In the course of the transposition of the Directive 93/13 and the Directive 90/314 the legislator adopted a set of different measures consisting of national separate transposition laws, amendments to existing statutory laws on national and regional level, codes of conduct (business associations agreed upon 2 different models for standard terms on package travels) and administrative sanctions.

III. Timeliness of Transposition

SPAIN has transposed none of the European Directives at issue in time. The delay differs from 9 months (Directive 98/6) to a considerable 40 months (Directive 93/13); on average 26 months. The failure to implement Directive 97/7 has given rise to complaints from the Commission to the ECJ (Case C-414/01, Commission v. Spain, [2002] ECR I-11121).

IV. Use of Minimum Harmonisation

When transposing the European Directives SPAIN made use of minimum clauses on various occasions. The use of the right of withdrawal requires no special formality. For brochures on package travels Art. 3(1)(h)-(j), (d) and (f) of the Law 21/1995 prescribe more comprehensive information duties than Art. 3 of Directive 90/314. It is also compulsory for the organiser or retailer to make a brochure containing this information available to the consumer. Moreover, the duty of the consumer to communicate any failure in performance in Art.5(4) of the Directive has not been transposed into SPANISH Law. Finally, the Spanish law provides a right of withdrawal for the consumer whose existence does not depend on an alteration of terms or
any other non-performances. This cancellation right (that is not in the Directive 90/314) is only accompanied by a requirement to make a small compensation to the seller (Art. 9(4) of the Law 21/1995). Law 42/1998 on timesharing contains more comprehensive information duties than Art. 3(1) and Annex of the Directive 94/47. Additionally, the consumer benefits from the fact that Art 7(2) of Law 42/1998 requires the owner of the building to conclude an insurance contract covering the liability for torts caused by the titleholder of the timeshare rights.

In case of non performance of information duties, the SPANISH provisions on distance selling state that the consumer shall not bear the costs of returning the goods (Art. 44(5) in fine Law 7/1996). In inertia selling, Art. 43 of fine Law 7/1996 prescribes rules even more protective of the consumer, since he has no duty to return the goods and can keep them free of charge, and in case of depreciation in value, the consumer has no duty to compensate for damages or deterioration. If the dispatch of the goods was based upon an evident mistake, the burden of proof of that fact is for the seller and the addressee has a right of compensation.

Pursuant to Art. 10 of the Law 23/2003 on consumer sales the consumer has an action not only against the seller (the rule in the Directive), but also directly against the producer if the consumer cannot claim against the seller or that claim is too burdensome. In the Directive 99/44 the subsidiary remedies (reduction of price or rescission) are only available when both the repair and the replacement are impossible or disproportionate in relation to the value of the goods, whereas in the SPANISH rule it is sufficient that just one of the primary remedies is impossible or disproportionate (Art. 6 and 7 of the Law 23/2003). The limitation period (prescription) for the action of the consumer is three years (Art. 9(3) of Law 23/2003) in Spain, thereby increasing the minimum two years of the Directive.

V. Other Extensions

The definition of the term consumer in the SPANISH legal system is not coherent. However, the transposition laws for most Directives (exceptions: Directive 90/314 and Directive 98/27) contain a reference (e.g. Art. 1(3) of the Law 23/2003 on consumer sales) to the general definition of consumer in Art. 1(2) of the General Law for the Protection of Consumers and Users, Law 26/1984. This general definition of “consumer” is wider than the one mentioned
in the EC Directives since it also covers atypical transactions of a business which are not related to a further transfer. Moreover, the definition of “consumer” also encompasses legal persons; cf. for more details Part 4 A.III.1 and 3 of this study.

The Spanish provisions on doorstep selling (Law 26/1991) do not explicitly include contracts concluded during an excursion organised by the trader (Art. 1(1) of the Directive) but uses a broader wording: contracts concluded away from the commercial premises. It also adds in Art. 1 lit. (c): “contracts concluded in public transport”. The Spanish provisions on distance selling have a wider scope of application since they include contracts concluded at auctions by electronic means (Art. 38(3)(a) of the Law 7/1996).

VI. Possible Infringements of EC Law

Most possible infringements of EC law are caused by “dual transpositions” in different Acts, lack of coordination, inconsistencies within the Spanish legal system and poor legal transposition techniques in general:

- The requirements articulated by the ECJ in C-70/03 (ECJ judgment of 9 September 2004, C-70/03 - Commission v. Kingdom of Spain [2004] ECR I-0799 concerning the transposition of Art. 5 and Art. 6 of the Directive 93/13) have thus far not been implemented in Spanish law, but there is currently a draft being discussed in the Spanish parliament, modifying not only the wrong transposition, but also some other questions on unfair terms (e.g. round-off clauses against the consumer, unfair practices in service contracts, unfair clauses on requisites for termination).

- Spain has not transposed the rule of Art. 4(2) of Directive 93/13 on the exclusion of price and subject matter of the contract from the assessment of unfairness. This “silence” has produced problems of interpretation on the application of the rule into Spanish Law; academia and case law use different approaches to solve the problem with contradictory solutions.
• Art. 6(g) of the Law 23/2003 on consumer sales excludes the right of replacement in case of second hand goods and fungibles. The SPANISH academic community considers this contrast with the Directive to be excessive (the Directive does not restrict the right in respect of such goods) and even regards it as a defective transposition.

• It has been criticised that SPANISH law does not provide an exact definition of the term “means of distance communication” (Art. 2(4), Annex Directive 97/7). Furthermore the division of the norms on distance contracts into “sales” (Arts. 38-48 LOCM) and “services” (First Additional Disposition of the LOCM) lead to several inaccuracies in transposition.

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Doorstep Selling in Part 3.A., Package Travel in Part 3.B., Distance Selling in Part 3.E. and on Consumer Sales in Part 3.H.).
### X. Sweden – Legislative Techniques

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### X. Sweden – Legislative Techniques


### I. State of Consumer Protection in the Field of the Directives before Transposition

**Sweden** can be considered a precursor in the development of consumer protection law. Already in the 1970s consumer law evolved as a separate part of the law alongside the general law. The Swedish approach combined methods of private law such as widespread general clauses like section 36 of the Swedish Contract Act (SFS 1915:218 as amended by SFS 1976:185) in civil law and different administrative methods to improve consumer protection.

Measures were taken to fend off the use of unfair marketing practices such as contract clauses which are regarded as unfair by the Consumer Contract Terms Act (SFS 1971:112, later substituted by Act SFS 1994:1512). Such cases are dealt with separately via the Consumer Ombudsman, a key feature of Nordic legal systems, or via the Swedish Consumer Agency. Judicial protection is provided by the Market Court, a special court dealing exclusively with consumer protection law. It constitutes the only and final instance since Market Courts’ judgments cannot be appealed.
Additionally there is a Complaints Board (Allmänna reklamationsnämnden) which has been established in order to achieve more speedy and efficient resolution of disputes involving consumers. The Complaints Board is divided into different departments and handles consumer purchases, package tour disputes, consumer services, etc. Although some of its decisions can be appealed to the courts, there are certain restrictions. Often third parties, for example trade organisations follow the Complaints Board’s decisions and they are also taken into account by the courts in deciding subsequent cases.

In addition to the general purchase Act, a special consumer purchase Act had been in effect since 1973, marking another step in the development of consumer law as a separate domain of law. In 1981 the legislator adopted the Doorstep Selling Act (SFS 1981:1361) which placed certain information duties upon the seller and granted a right of withdrawal to the customer. The Act also applied to contracts concluded via telephone, by this representing an early stage of distance selling legislation. In the following years the legislation on doorstep selling, distance selling, unfair terms and consumer sales has been updated several times. There was no legislation on package travel, but the Swedish Consumer Agency together with the major Swedish organisations of travel professionals had negotiated general agreements on package travel which in practice lead to contracts whose fairness was not substantially less than that envisaged in the directive. In 1990 the Swedish Parliament adopted a special Price Information Act.

II. Legislative Techniques of Transposition

The legislative techniques applied are more or less unitary as all directives have been transposed by the national legislator via Acts of Parliament (Riksdagen). Since SWEDEN had a long tradition of consumer protection law long before its accession to the EU most Directives could be transposed by making minor amendments to existing pieces of law. However there were no specific provisions on package travel and timesharing. Thus these Directives have been transposed by introducing new, separate Acts. Furthermore it is worth noting that doorstep selling and distance selling are regulated in a common Act (Distance and Doorstep Selling Act SFS 2005:59).
III. Timeliness of Transposition

In this respect it has to be noted that Sweden acceded to the EU with effect from 1 January 1995. In contrast to many other member states the Swedish legislator paid close attention to the time limits set for implementation of the directives at issue. In fact nearly all Directives were transposed in good time, some even before accession. Only the Directives 94/47 and 99/44 were transposed with a slight delay of 2 and 6 months respectively.

IV. Use of Minimum Harmonisation

When transposing the European Directives Sweden made use of minimum clauses at different occasions. The Distance and Doorstep Selling Act SFS 2005:59 provides an extended withdrawal period of 14 days instead of seven days as prescribed by the corresponding Directives (Art. 5(1) of Directive 85/577, Art. 6(1) of Directive 97/7).

V. Other Extensions

The consumer concept in Swedish law is not unitary. The doorstep and distance selling Act defines consumers as natural persons that act for mainly private purposes. As regards the administrative law method, according to section 1 in the Consumer Contract Terms Act (1994:1512) a consumer is a natural person who is acting for purposes which are mainly outside his or her business. The reason for this difference in the wording is to avoid any deviation from EC law, this goal seems to have been achieved.

In respect of package travel, the Swedish provisions use the term “package tour” which has an established legal meaning, so it can be argued that the scope of application may be broader than that of the directive. Section 1 of the Consumer Contract Terms Act 1994:1512 is applicable to all unfair contract terms, even if they have been individually negotiated.

Unlike the Directive 98/6, the domestic Price Information Act (Art. 10) applies to all kinds of services and products including financial services, electricity, phone subscriptions, arts and antiques (with the exception of sales at auctions). The law does not cover real estate or marketing of job vacancies though. In the course of transposition of the Directive 99/44 the legislator adopted separate acts on consumer services and consumer insurance.
VI. Possible Infringements of EC Law

More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Package Travel in Part 3.B.).
### Y. United Kingdom – Legislative Techniques

<table>
<thead>
<tr>
<th>Directive</th>
<th>Transposed in</th>
<th>Date of Transposition (due date)</th>
<th>ECJ decisions in relation to the United Kingdom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 98/6</td>
<td>The Price Marking Order</td>
<td>22 July 2004</td>
<td></td>
</tr>
</tbody>
</table>
## Comparative Analysis

|----------------|--------------------|---------------------------------------------|---------------------------------------|

### I. State of Consumer Protection in the Field of the Directives before Transposition

Consumer protection had been the subject of legislative action in the United Kingdom a long time before any European initiatives. In respect of half of the directives, there was pre-existing legislation which dealt with similar aspects than the directives. Thus, the Part III of the Fair Trading Act 1973 enabled the Director-General of Fair Trading to take action to prevent traders from engaging in unlawful conduct, although no such powers were available to consumer organisations. The Unfair Contract Terms Act 1977 regulated some types of contract term, but provided both more and less protection (more in that it applied to negotiated clauses, but less because it did not apply to all contract terms). The Sale of Goods Act 1979 had been reformed with consumer interests in mind in 1994, although there was no statutory right to repair or replacement. And the Timeshare Act 1992 contained a number of requirements regarding such contracts, but, again, did not cover quite the same ground as the corresponding Directive. In other areas, there was no pre-existing legislation at all, e.g., Doorstep and Distance Selling (with minor exceptions, e.g., inertia selling) and Package Travel.
II. Legislative Techniques of Transposition

The United Kingdom may have a reputation for the “copy and paste” approach to implementing European directives, but that does not portray the approach it has adopted accurately. There is, in fact, a degree of variation in how the various directives have been transposed. Thus, there are separate pieces of legislation for the directives on doorstep-selling, package travel, unfair terms, distance selling and unit prices. The Directive 94/47 was implemented through amendments of the Timeshare Act 1992. Similarly, the Directive 99/44 was implemented by amendments to the relevant legislation on the sale and supply of goods. The Directive 98/27 was first transposed through the “Stop-Now” Regulations, but soon replaced with the new integrated enforcement regime in Part 8 of the Enterprise Act. It is therefore a fair observation that the United Kingdom does attempt to integrate the relevant directive into pre-existing domestic law (and note that a proposal has been tabled to combine the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999).

III. Timeliness of Transposition

The United Kingdom has not managed to transpose all the directives by their deadline; indeed, it is usually slightly late. In the case of the Directive 99/44, the transposition occurred only days before the Commission launched a legal action against the United Kingdom for non-transposition (subsequently withdrawn).

IV. Use of Minimum Harmonisation

The United Kingdom has rarely made use of the minimum harmonisation clauses (although it often exercises options in the directives in favour of higher consumer protection), and usually only in a very restricted regard. The one notable exception is the Directive 99/44, where the clause forms the basis for retaining much of the pre-existing law overlapping with the Directive. On the whole, the United Kingdom takes a restrictive approach to what is referred to as “gold-plating”, i.e., exceeding the minimum standard set by a Directive.
V. Other Extensions

Generally, the implementing legislation is restricted to the scope given to it by the corresponding Directives. On occasion, there are slightly more generous definitions of “consumer”, which has the effect of (marginally) broadening the scope of application. In particular, the new remedies in consumer sales may be available to a professional buyer (including a company) if the goods in question are ordinarily supplied for private use or consumption.

VI. Possible Infringements of EC Law

In respect of most of the 8 Directives under consideration, there seem to be no obvious problems regarding their compatibility with EC law. One may note that the Timeshare Act is very difficult to follow, and that the plethora of criminal penalties in the Package Travel Regulations also makes this rather cumbersome to read. The one area where there do seem to be significant difficulties is the implementation of the Directive 99/44, in respect of which it is possible to identify many problems. More detailed information is provided in the individual reports on the transposition of the directives (cf. in particular, the executive summaries of the reports on Consumer Sales in Part 3.H.).
Part 3. Transposition of the individual Directives

A. Doorstep Selling Directive (85/577)

Drafted by Hans Schulte-Nölke and Christoph M. Scheuren-Brandes

Executive Summary

1. Transposition deficiencies

Besides various deviations in wording, some transposition deficiencies can be identified in national jurisdictions. Examples of at least some importance may be:

- Exclusion of all contracts concluded before a notary public from protection of national transposition law (e.g. Germany, Lithuania, Malta, Spain);

- Start of withdrawal period even in cases of insufficient or omitted information by trader (e.g. Czech Republic, Italy, Lithuania, Slovenia);

- Exclusion of contracts concluded during an excursion (e.g. Latvia).

2. Enhancement of protection

a. Extension of scope

Some member states have extended the scope of application of their national doorstep selling laws and have thereby broadened the protection provided by the Directive to other persons or situations:

- Extension of the notion of consumer e.g. also to certain legal persons (e.g. Austria, Belgium, Greece, Spain);
• Addition of other situations than those covered by Art. 3 of Directive 85/577 or prohibiting doorstep selling of specific goods in general (e.g. Austria, Belgium, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Poland), for instance:
  - contracts concluded on trader’s premises if consumer has been allured there;
  - contracts concluded in public places; and
  - contracts concluded at fairs and exhibitions.

• Not making use of restrictive options/exemptions provided by Directive 85/577 [for more detail see b.]

b. Use of options and exemptions

As to the exercise of options provided by Directive 85/577 to the national legislator the following observations could be made:

• The option granted in Art. 3 para. 1 (option to exclude contracts < 60 ECU) has been exercised by 16 member states

• Art. 3 para. 2 lit. a (exemption of contracts concerning immovable property) has been exercised by at least 15 member states

• Art. 3 para. 2 lit. b (exemption of contracts on goods for current consumption provided by regular roundsmen) has been exercised by at least 14 member states

• Art. 3 para. 2 lit. c (exemption of contracts concluded on the basis of a trader’s catalogue) has been exercised by at least 8 member states

• Art. 3 para. 2 lit. d (exemption of insurance contracts) has been exercised by at least 14 member states

• Art. 3 para. 2 lit. e (exemption of contracts for securities) has been exercised by at least 13 member states
• The option granted in Art. 3 para. 3 (option to exclude contracts concluded during a visit requested by the consumer) has been exercised by at least 10 member states
The following table provides a brief overview of the use of options and exemptions in the member states:

Legend:

1 = Art. 3 para. 1;

2 = Art. 3 para. 2 lit. a;

3 = Art. 3 para. 2 lit. b;

4 = Art. 3 para. 2 lit. c;

5 = Art. 3 para. 2 lit. d;

6 = Art. 3 para. 2 lit. e;

7 = Art. 3 para. 3

<table>
<thead>
<tr>
<th>Member state</th>
<th>Options exercised</th>
<th>Member state</th>
<th>Options exercised</th>
<th>Member state</th>
<th>Options exercised</th>
<th>Member state</th>
<th>Options exercised</th>
</tr>
</thead>
<tbody>
<tr>
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<td>1</td>
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<td>LT</td>
<td>3</td>
<td>SL</td>
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<td>12</td>
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<tr>
<td>EE</td>
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<td>PT</td>
<td>123567</td>
<td></td>
<td></td>
</tr>
<tr>
<td>FI</td>
<td>1</td>
<td>LV</td>
<td>---</td>
<td>SK</td>
<td>5</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

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

19 The exclusion is limited to sales below 15 euro, where the sum is paid immediately.
c. Use of minimum clause

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

- **Art. 4:**
  - additional information obligations imposed on the trader (e.g. phone number of trader);
  - set form for information on withdrawal right; and the
  - form requirement for contract as a whole.

- **Art. 5 para. 1:**
  - extension of withdrawal period

- **Art. 7:**
  - time limit in favour of consumer for unwinding of transaction (reimbursement of purchase price and reshipment of goods); and
  - the Lien on supplied goods to secure consumer’s reimbursement claim

d. Additional consumer protection instruments not granted by the Directive

Some member states have introduced or maintained consumer protection instruments, which are not contained in Directive 85/577. Examples of at least some importance are the:

- General ban on doorstep selling (in particular with regard to certain products);

- Licence requirement for doorstep-selling; and

- Time restrictions for doorstep-selling in late evening or early morning hours.
3. Inconsistencies or Ambiguities

Examples of inconsistencies or ambiguities of Directive 85/577:

- It is ambiguous whether a natural person in a mixed purpose case is protected by Directive 85/577 as „consumer“.

- It is ambiguous whether a non-profit organisation can also be regarded as a „trader“.

- Directive 85/577 does not contain any rules on computation of time-periods and, furthermore, does not state whether the withdrawal period also ends when the last day is a Sunday, Saturday or a public holiday.

- Directive 85/577 may be applicable in parallel with other consumer protection directives (e.g. Consumer Credit, Timesharing). It is unclear whether different information obligations and different particulars of the withdrawal rights interfere.

4. Gaps in the Directive

The review did not reveal many gaps in the Directive. Examples of at least some importance may be:

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

- The absence of a provision on the burden of proof regarding the facts and circumstances leading to the application of the national transposition law.
5. Potential Barriers to (Cross-Border) Trade

Although business models built on cross-border doorstep selling do not seem to be very frequent and, therefore, not very relevant for the functioning of the internal market, different national provisions on doorstep selling may affect the internal market\(^{20}\). Regardless of this impression, some barriers to trade of at least some importance might be:

- additional information requirements

- form requirements imposed on the consumer for the exercise of the withdrawal right (because this leads to an additional information requirement)

- obligatory standard forms for the presentation of required information

- strict form requirements for the contract as a whole

- no standard period for exercise of consumer’s withdrawal right

- no standard procedure after exercise of withdrawal right with regard to
  
  - costs of reshipment of goods and time limits for reshipment and reimbursement of purchase price
  - compensation of decreases in value

6. Conclusions and Recommendations

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

\(^{20}\) See for example the recent ECJ case *A-Punkt-Schmuckhandel*, C-441/04.
- Definition of consumer (in particular with regard to mixed purpose cases)

- Definition of trader (in particular with regard to non-profit organisations)

- Inclusion of contracts concluded in public places outside business premises

- Inclusion of contracts prepared by doorstep selling, but finally concluded in a shop or via means of distance communication afterwards

- Introduction of a provision on burden of proof

- Provision on form requirements for the exercise of the withdrawal right

- Set form for unitary information on the withdrawal right

- Harmonisation of withdrawal period and procedure in case of exercise of the withdrawal right, including the beginning and computation
I. Legislative regulation in the member states before transposition of the Doorstep Selling Directive

The member states had no coherent legislation concerning consumer protection in the case of door-to-door sales before Directive 85/577 came into effect. The level of protection varied tremendously from being at a high-level in some countries (e.g. DENMARK and SWEDEN) to practically being non-existent in others (e.g. CZECH REPUBLIC, POLAND, HUNGARY). The regulation of door-to-door sales had already been subject to regulations in some member states before the European Commission announced its intention to regulate door-to-door sales on a European level. For instance, door-to-door sales were generally prohibited except for legally regulated or permitted activities in LUXEMBOURG by the “Law on peddling and itinerant trade” (1970) and in BELGIUM by the “Trade Practices Act” (1971) and the Royal Decree 82 of 28 November 1939 on Ambulatory (Itinerant) Trade Activities. The SWEDISH “Law on door-to-door sales” (1971) as well as the FRENCH “Law no. 72-1137 on canvassing and door-to-door sales”21 (1972) and the DUTCH “Peddling Act” (1973) all provided a right of withdrawal22. Moreover, the NETHERLANDS introduced a registration obligation for peddlers connected with the avengement of inappropriate behaviour. The time frame for the exercise of the right of withdrawal varied from 7 to 8 days and started either with the registration of the contract (e.g. NETHERLANDS) or the instruction of the consumer (e.g. SWEDEN). In the time thereafter, DENMARK (1978), FINLAND (1978) and AUSTRIA (1979) also introduced regulations on door-to-door sales.

After Directive 85/577 came into force DENMARK implemented it by simply amending their existing laws in 1987, whereas GERMANY (1986), PORTUGAL (1987) and the UNITED KINGDOM (1987) as well as IRELAND (1989), GREECE (1991) and SPAIN (1991) enacted new laws. The new member states in particular mostly did not have any comparable regulation before preparing to join the EU. Thus, as in the case of CYPRUS and POLAND, only the general provisions concerning contracts and contractual liability applied. The CZECH REPUBLIC primarily adopted comparable consumer protection regulations by the amendment of the Civil Code with Act 367/2000 Coll. The first normative act in the consumer protection field in

22 Different wording: “Right of regret” in Sweden.
LATVIA came into force in October in 1992 with the “Law on Consumer Rights Protection”. LITHUANIA enacted the “Law on Consumer Protection” in September 2000 with the Chapter on the “Sale of goods or provision of services away from business premises”. In SLOVAKIA the Act 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling was enacted in 2000. As the only exception, MALTA enacted the “Door-to-Door Salesmen Act” in February 1987.

II. Scope of application

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

1. Personal scope of the Directive

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

a. Consumer

In Art. 2 of Directive 85/577 “consumer” is defined as “a natural person who (…) is acting for purposes which can be regarded as outside his trade or profession”. The member states have chosen different legislative techniques to transpose this definition. In particular, many member states have introduced a common definition of consumer applicable for several or all of their transposition laws for the individual consumer protection directives (for the general picture see Part 4.A.II.). A variation of at least some relevance in the field of doorstep selling is the inclusion of legal persons into the definition of consumer like in BELGIUM. In SLOVAKIA, legal persons in general can be considered as consumers under the Slovakian Act

23 Art. 1 No. 7 of the Act of 14 July 1991 on trade practices and consumer information and protection. Conversely, the Belgian Trade Practices Act defines consumers as persons acting exclusively for purposes outside their business or professional activity.
on Consumer Protection, but they are expressly excluded from its scope of protection with regard to Doorstep Selling\textsuperscript{24}. In Latvia\textsuperscript{25} there has been a reform in 2005 in the course of which legal persons have been excluded from the scope. In the Czech Republic there is a general definition of consumer for all consumer contracts\textsuperscript{26}. Legal persons who meet the criteria can be considered as consumers, too.

The Polish\textsuperscript{27} Civil Code uses a wider definition of consumer demanding that the legal act carried out by a natural person must not be directly related to his business or professional activity. On the contrary, the Belgian legislator requires that the person must act exclusively for purposes outside his business or trade to be considered as consumer. According to French case-law under specific conditions associations of natural persons can also be considered as “consumer”. Under Spanish law a consumer can be a natural or legal person and has to be the final addressee of the goods or services\textsuperscript{28}. The law defines which persons are not the final addressees. These are persons “with the aim of integrating them (i.e. goods or services) in production, transformation or commercialisation processes”. For instance, even trade unions can be considered as consumers in Spain\textsuperscript{29}. In Greece a natural or a legal person is always a consumer if he is the last part of the supply chain regardless if goods and services are meant for professional or business use. Similarly, a natural person as final addressee of the goods and services (consommateur final privé) is considered to be a consumer in Luxembourg. In Germany the so-called dual-use cases, where a private person uses the goods and services for his private use as well as for business use, have been subject to discussion, providing an example for the fact that the exact determination and definition of the notion “consumer” is not possible in every single case. German courts would probably focus on the question of which purpose, private or business, is predominant\textsuperscript{30}. In Italy, as well, the prevalent use shall be decisive, which the court should determine by considering the circumstances of the case, e.g. the kind of good and/or service indicated in the contract and the nature of the agreement\textsuperscript{31}.

\textsuperscript{24} Art. 1 of the Act No. 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling.

\textsuperscript{25} Amendment of Art. 1(1) of the Consumer Rights Protection Law, in force since 11 Nov 2005.

\textsuperscript{26} CC, Sec. 52.

\textsuperscript{27} CC, Art. 22.

\textsuperscript{28} Art. 1(2) of the Law 26/1984, of July 19, General for the Protection of the Consumers and Users.


AUSTRIAN jurisdiction has dealt with the question of whether transactions to establish a company (Gründungsgeschäfte) fall within the Directive’s scope. The OGH\(^{32}\) held that the fact that an individual subsequently loses his consumer status does not mean he forfeits the protection afforded to him as a consumer. In contrast, ITALIAN JURISDICTION\(^{33}\) held that a person concluding contracts in order to start a business cannot be considered as a consumer.

b. Trader

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

<table>
<thead>
<tr>
<th>AT(^{34})</th>
<th>Cumulative conditions: the trader has to possess (and not own) a business (e.g. “leaseholder”); and the legal transaction has to form part of the professional activity(^{35}); the person concerned is the party of the legal transaction disregarding third persons who might be involved without being party; public legal persons are always seen as traders because of a special legislative order, non-profit organisations can also be considered as traders.</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE(^{36})</td>
<td>The definition includes “all merchants or craftsmen”, “non-profit organisations which pursue an economic activity within the framework of their statutes”, “governmental institutions that pursue a commercial, financial or industrial activity”, “legal persons in which the government holds the majority of shares and which pursue an industrial, commercial or financial activity” and “persons acting in the name or on behalf of a third party, legal persons or other, and who pursue an industrial, financial or commercial activity”.</td>
</tr>
<tr>
<td>CY(^{37})</td>
<td>Only a slight variation.</td>
</tr>
</tbody>
</table>

\(^{32}\) OGH, judgment of 20 Oct 2004, 2 Ob 178/05y.
\(^{34}\) Consumer Protection Act, Art. 1(1).
\(^{35}\) According to a judgment of the OGH, of 14 July 2005, 6 Ob 135/05d, a legal transaction concluded between suppliers falls outside the scope even if one contract party subsequently stops trading.
\(^{36}\) Art. 1 no. 6 of the Act of 14 July 1991 on trade practices and consumer information and protection.
<table>
<thead>
<tr>
<th>Country</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>CZ&lt;sup&gt;38&lt;/sup&gt;</td>
<td>Use of term “supplier”; otherwise only slight variation.</td>
</tr>
<tr>
<td>EE</td>
<td>Person who “sells, offers or markets in any other manner”.</td>
</tr>
<tr>
<td>FI</td>
<td>Private and public legal person; no mention of representative; purpose of trader’s activity must be economic.</td>
</tr>
<tr>
<td>EL&lt;sup&gt;39&lt;/sup&gt;</td>
<td>Natural or legal persons, which also includes public or communal enterprises and non-profit-making private organisations.</td>
</tr>
<tr>
<td>LT</td>
<td>Definitions in different regulations&lt;sup&gt;40&lt;/sup&gt;; definition in Law of Consumer Protection includes the definitions of trader and service provider; no mention of other persons like agents or intermediaries, non-profit legal persons or consumers starting up a business; definition in CC also concerns agents.</td>
</tr>
<tr>
<td>MT</td>
<td>Definition includes commercial partnership; persons acting on behalf of the trader or under his direction are included; also includes a ‘door-to-door seller’&lt;sup&gt;41&lt;/sup&gt;; furthermore, the Minister responsible for consumer affairs may, after consultation with the Consumer Affairs Council, declare any other category or class of persons to be a “trader”; trader must be licensed in order to operate doorstep-selling business.</td>
</tr>
<tr>
<td>NL&lt;sup&gt;42&lt;/sup&gt;</td>
<td>Using the term “canvasser “; the objective of the seller is also included in the definition “who tries to induce a private individual to enter a contract”... “in connection with any recommendation”; also includes non-profit legal persons.</td>
</tr>
<tr>
<td>PL&lt;sup&gt;43&lt;/sup&gt;</td>
<td>Translation of the Polish notion of business would be wider than “trader” meaning a person carrying out economic activity related to some undertaking.</td>
</tr>
</tbody>
</table>

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<sup>38</sup> CC, § 52(3).  
<sup>39</sup> Art. 4 lit. (d) and Art. 3 of the Law 2251/1994 on Consumer Protection.  
<sup>40</sup> CC, Art. 6.350(1), sent. (1); Law of Consumer Protection, Art 2 para. (2) and (3).  
<sup>41</sup> Defined as a person who offers the provision or supply of any type of goods or services by means of a doorstep contract, whether the offer is unsolicited by the person to whom it is made, or is solicited by the latter person in response to any advertisement, but does not include vendors of foodstuffs and drinks who sell their goods from door-to-door.  
<sup>42</sup> Canvassing Act, Art. 1para. (1) lit. (c), para. (2).
Using the term “supplier”; natural or legal person acting in his/her professional capacity; other persons acting on behalf of the contracting party are not expressly included in the definition, but the provisions would apply to them according to a general rule.

Slightly different wording; licence requirement; other persons acting for the trader are included.

Other persons acting on behalf of the contracting party are not expressly included in definition, but the provisions would apply to them, too.

Different wording in the transposition law: “businessman” instead of “trader” and the terms “which supplies goods or services” are omitted; no direct transposition of the definition, but indirectly both interpretations of the notion of “trader” – sensu strictu and a third person acting on behalf or in the name of the trader – apply.

As in other Swedish consumer protection legislation.

Different wording: a person acting for purposes of his business including anyone acting in the name or on behalf of such a person.

2. Situations falling within the scope of the Directive

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

- during an excursion organised by the trader away from his business premises, or

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43 CC, Art. 43.
44 § 2 para. 1 lit. b, § 2 para. 3 of Act 634/1992 Coll. on Consumer Protection; § 2 of Act 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling.
45 According to Amendment 118/2006 Z.z. (date of coming into force 01.04.2006). This act amended § 2 of the Act 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling.
46 Consumer Protection Act, Art. 3(1).
47 Art. 1(1)(a) and (b) of the Law 26/1991, of November 21, on consumers’ protection in case of contracts executed out of the commercial premises.
48 Art. 2(1) of the Consumer Protection (Cancellation of Contracts concluded away from business premises) Regulations 1987.
- during a visit by a trader

(i) to the consumer’s home or to that of another consumer;
(ii) to the consumer’s place of work; where the visit does not take place at the express request of the consumer” (Art. 1 para. 1).

a. General application

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

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

Moreover, in its judgment Crailsheimer Volksbank, C-229/04, the ECJ held that, when a third party intervenes in the name or on behalf of a trader in the negotiation or conclusion of a contract, the application of the Directive cannot be made subject to the condition that the trader was or should have been aware that the contract was concluded in a doorstep selling situation. Meanwhile, the GERMAN courts, which ruled differently prior to this decision, comply with this ECJ jurisprudence.
Many member states have extended the scope of application of their doorstep selling laws. The following types of extensions can be observed:

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

Several member states have expanded the list of situations in which consumers are protected, e.g. Germany, where contracts concluded subsequent to a surprise/sudden approach by the trader in a means of transport or in an open public space are covered. Moreover, German law does not require an ‘excursion’ organised by the trader away from his business premises. It suffices, if there is a ‘leisure event’ organised by the businessperson or by a third party at least also in the interest of the businessperson. With regard to the aspect that the trader does not organise the excursion himself, the Belgian legislator has also clarified that the excursion can be organised either by the trader or on his behalf. The French and Portuguese doorstep selling laws also apply in cases where the consumer has been invited by the merchant to somewhere other than the merchant’s business premises. In Italy the transposition law is applicable to contracts concluded in transitional situations, e.g. temporary work, study, medical treatment or in public places provided that a possible order form is signed. Furthermore the transposition law also applies to contracts concluded via television or audiovisual media. In Lithuania contracts concluded during a visit at an educational institute (e.g. school, university, etc.) or any other such venue fall within the scope of the national legislation implemented to transpose Directive 85/577. Moreover, in the Danish legislation all contracts concluded outside the trader’s business premises are protected by national transposition law, e.g. contracts concluded in streets, on squares, in restaurants, at railway stations or other public places and via telephone. Also in Estonia, Malta and Spain contracts negotiated away from the trader’s premises fall within the scope of protection. In the Czech Republic contracts concluded with a trader outside of his business premises fall within the scope of protection.

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49 According to a BGH judgment (of 28 Oct 2003, X ZR 178/02) at such a leisure event, the leisure aspect and offers of sale must be organisationally intertwined with one another in such a way that the customer, with regard to the advertising and execution of the event, is put in a leisurely easygoing mood and can only withdraw with difficulty from an offer aimed at conclusion of contract.

50 Art. 86(1) no. 2 of the Act of 14 July 1991 on trade practices and consumer information and protection.

51 The situation dealt by the ECJ in Travel Vac. is expressly foreseen in the Portuguese legislation.

52 Art. 45(1) of the Legislative decree 6/09/2005, n.206 “Consumer code”.


54 Art. 3(1) of the Act 451 of 9 June 2004 on certain consumer contracts.
premises as well as contracts with a trader without any permanent business premise are covered.

Specific rules for contracts concluded at fairs are contained in Belgian\textsuperscript{55} and Slovenian\textsuperscript{56} law. In Cyprus\textsuperscript{57} the scope has been extended to visits by the trader in “any other location”. The Greek\textsuperscript{58} law refers to “the location out of his business premises chosen by the trader”. Therefore, the scope is wider as a multitude of possible locations is included. More important is the criterion that the contract must be “arising from the initiative of the trader”. On the one hand it is restrictive, as it excludes contracts in situations which were initiated by the consumer. On the other hand, the criterion of the location outside business premises is only a disputable presumption for the initiative of the trader. In consequence, also contracts concluded within the trader’s business premises can fall into the scope, if the initiative of the trader can be detected, e.g. if the consumer has been allured into the business premise by gifts or leisure events.

In Austria, as the scope is defined negatively\textsuperscript{59}, contracts concluded on excursions can also fall within its ambit. According to a judgment of the OHG\textsuperscript{60} the situation must typically bear the danger of the consumer being caught unaware. This shall not be the case if, within the context of a holiday offered at an appropriate price, there is, alongside different sightseeing trips, an organised visit to a workshop where goods manufactured there are on sale.

It may be worth considering in the frame of the planned review, whether the limited list of situations in which the consumer is protected (Art. 1 para. 1) may be expanded following such examples as Denmark, Estonia, Malta or Germany. Such an expansion might amount to a general clause covering all contracts concluded away from business premises, but being no distance contract. A more concrete expansion could be to include particular contracts concluded in public places.

\textsuperscript{55} Art. 86(1) no. 3 of the Act of 14 July 1991 on trade practices and consumer information and protection.
\textsuperscript{56} Consumer Protection Act, Art. 46(3).
\textsuperscript{57} Art. 3(1)(b) (iii) of the Law for the Consumer Contracts Concluded Away from Business Premises of 2000, L.13(I)/2000.
\textsuperscript{58} Art. 3(1) of the Law 2251/94 on consumer protection.
\textsuperscript{59} Consumer Protection Act, Art. 3 para. 2 “conclusion of the contract not on the supplier’s business premises and equally not at a market stall or stand at a fair”.
\textsuperscript{60} OGH, judgment of 10 Nov 1993, 7 Ob 599/93.
bb. Goods and Services

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

As regards guarantees, the German jurisdiction followed the abovementioned ECJ decision. In 1998 the BGH decided that a guarantee does not fall under the definition of Directive 85/577 if it secures a financial liability, which the principal debtor entered into within his official business capacity. In contrast, in Austria, the OGH has held in a decision of 2005 that at the time of conclusion of the guarantee, the creditor must be a supplier and the guarantor a consumer, also if the guarantee secures a debt of a principal debtor acting in his business capacity.

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61 Cf. Nº 20 of the judgment.
62 Cf. Nº 23 of the judgment.
63 BGH, judgment of 14 May 1998, IX ZR 56-95.
64 OGH, judgment of 20 Oct 2005, 2 Ob 178/05y.
Most member states refer in their transposition laws to goods and services without much further explanation. However, the Dutch legislator has clarified that not only movables are included but also other economic rights. In France, the Cass. Civ. decided that a contract containing provisions that the consumer rents out a place on his immobile property, so that the “supplier” may install a relay station there, falls into the scope of French doorstep selling provisions. The provisions are held applicable, although the supplier does not provide the consumer with goods or services in the proper sense. In Portugal the object of the specific contract needs to be goods or services.

From a consumer protection perspective, the formula “goods and services” may be considered as too narrow, because, for instance, donations or joining of (charitable and other) associations are not covered. But it can be doubted whether such a protection will have to be stipulated for on an EC level.

cc. Offers and/or Unilateral Juridical Acts

Art. 1 para. 3 and para. 4 of the Directive attempt to clarify that the consumer must also be able to withdraw from an offer made in a doorstep situation, independent of whether the offer is binding (as it usually is, e.g., under German law) or not binding (as it usually is, e.g., under English law). These provisions are somewhat incomplete, because it goes without saying that also unilateral juridical acts binding the consumer must be covered. Some member states have expressly clarified that at least offers made in a doorstep situation fall under their doorstep selling rules (e.g. Ireland, United Kingdom). Others must count on their courts with regard to this issue. Austria has expressly stipulated that its doorstep selling laws cover all legal transactions between a consumer and a trader and thereby do not only include all forms of bilateral contracts (excluding only working-contracts), but also unilateral acts such as rescissions, withdrawals, stipulations or membership of clubs. Those member states which

65 In the United Kingdom, in the context of UTCCR 1999 (Transposition of Directive 93/13), the Court of Appeal has suggested that “goods or services” in the UTCCR should be read very widely indeed to include tenancy agreement. It is not clear if this will be followed in the context of Doorstep Selling.
66 Canvassing Act, Art. 1 para. (1) lit. (c) and para. (3) and (4).
68 Consumer Protection Act, Art. 1(1)(1).
also apply their doorstep selling laws on contracts concluded not during, but after the doorstep situation (see next paragraph) automatically cover offers as well.

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

Some member states also cover contracts concluded inside business premises when the consumer had been influenced in a doorstep situation before. This is, for instance the case in AUSTRIA, where the transposition law also covers contracts concluded on the trader’s business premises if the consumer has been allured there. In POLAND the scope of protection has been extended to contracts being concluded on business premises, provided that the contractual offers were made outside these premises\(^{69}\). GERMAN law protects the consumer when he has been induced in a doorstep situation to conclude a contract. In France, if a contract is concluded inside business premises, but after that the consumer has been invited by telephone to go there, the provisions on doorstep selling will apply\(^{70}\).

**ee. Visits requested by the Consumer**

With regard to the specific provisions of the Directive dealing with visits requested by the consumer, varying transposition laws can be found. For instance, some member states have not implemented the provision that contracts concluded during a visit at the express request of the consumer can be excluded from the protection. In DENMARK, FRANCE, ITALY, LATVIA and POLAND the protective provisions also apply to visits taking place at the express request of the consumer, whereas in BELGIUM\(^{71}\), THE CZECH REPUBLIC\(^{72}\) and SLOVENIA the provisions only apply to unsolicited visits. However, in BELGIUM the acceptance of a telephonic offer of the seller to visit the consumer at home does not constitute a prior request made by the consumer\(^{73}\). A consumer who shows his interest for a product or a service on offer in an advertising brochure, cannot be equated with a consumer who requests a seller to visit him at

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\(^{69}\) Art. 1(3) of the Act of 2 March 2000 on the protection of certain consumer rights and liability for an unsafe product.

\(^{70}\) Cour de cassation, Chambre criminelle, 10 January 1996, Receuil Dalloz, 1996, Informations Rapides, 120.

\(^{71}\) The protective provisions are not applicable if, and only if, the consumer expressly solicited the visit and did so prior to the visit with the purpose of negotiating the sales of products or services. The burden of proof for the request rests with the seller. (CA Gent, judgment of 03 Feb 2004, 2003/AR/960 Mini-Flat n.v. / Chris Vandelannoote).

\(^{72}\) CC § 57(1), last sent.

\(^{73}\) Trade Practices Act, Art. 87 lit. a.
home with a view to negotiate the purchase of that product or that service. In the UNITED KINGDOM unsolicited visits as well as visits which were arranged by previous unsolicited visits or by telephone fall into the scope. In CYPRUS the protective provisions apply to unsolicited visits and if the trader has been invited for an item different to that which he is actually offering. According to AUSTRIAN law the consumer has no right of withdrawal if the business relationship was initiated by the consumer. According to Austrian jurisdiction “initiating” means that the consumer is instigating contact and demonstrating a willingness to conclude a specific consumer transaction.

Also in LITHUANIA solicited visits fall into the scope in cases where the consumer is provided goods and services other than those that are requested. A similar regulation can be found in GREECE. However, in the case that the trader offers products deviating from those for which he has been invited, the protective provisions do not apply if the consumer knows or should have known that the products offered are a part of the trader’s professional capacity or that the products offered are linked to the products for which the trader has been invited.

According to PORTUGUESE law visits requested by the consumer or the trader fall into the scope of protection if the consumer was not aware of the fact that the trader also sells the specific kind of goods or services. In MALTA contracts concluded exclusively on the initiative of the consumer are excluded from the scope of protection except for cases where the consumer only orders a catalogue, samples or similar items; this request by the consumer for a visit or demonstration and participation in an event by the trader is not considered to be an

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74 CA Brussels, judgment of 25 Feb 2005, 1999/AR/202 s.a. Euroconstruction/Mr. and Mrs. Danielswiz-Claes.
75 On 7 September 2006, the UK government announced two proposals to amend the legislation on doorstep selling in the UK: firstly, the right of withdrawal will also be made available in circumstances where the visit by the trader to the consumer was solicited, i.e., agreed in advance; secondly, contracts are to provide cancellation notices more prominently and clearly indicate the circumstances when the right of withdrawal may be lost. The first amendment will require primary legislation, because this exceeds the scope of the Directive, and there is no power to adopt secondary legislation under the European Communities Act 1972 to make this change. Details of the proposals can be found at http://www.dti.gov.uk/files/file33819.pdf (accessed 7 September 2006).
76 Art. 3(3)(a) and (b) of the Consumer Protection (Cancellation of Contracts concluded away from business premises) Regulations 1987.
77 Consumer Protection Act, Art. 3(3), 1st indent.
78 OGH, judgment of 8 Nov 1995, 7 Ob 95/94. According to the OGH judgment of 13 Feb 2002, 2 Ob 11/02k this can also be the case if the consumer, after a telephone call by the trader couches in general terms, shows interest in concluding a very specific transaction. The burden of proof rests with the trader. According to the OGH judgment of 09 Oct 1984, 4 Ob 521/84, a consumer who is not just requesting general information at a fair, but rather makes explicit his desire to enter into preliminary negotiations with the aim of concluding a specific transaction, is initiating a business contact with the supplier. In his judgment of 14 July 1998, 4 Ob 183/98k, the OGH held that the consumer has initiated the transaction, if he takes a closer look at coats on display in a hotel foyer of curiosity and on his initiative. This applies even if the supplier then made the initial verbal contact and began the sales discussion.
initiative of the consumer\textsuperscript{80}. Spanish\textsuperscript{81} law contains some specifications of the consumer’s initiative. According to Spanish jurisdiction the visit request must be specific and unambiguous\textsuperscript{82}.

b. Exemptions foreseen in the Doorstep Selling Directive

aa. Art. 3 para. 1 (Contracts < 60 ECU)

Art. 3 para. 1 of Directive 85/577 provides the option for the member states to exclude contracts that do not exceed the sum of 60 ECU from the scope of their national transposition law. Member states who have not exercised this option are, for instance, Cyprus, the Czech Republic, Denmark, France, Greece, Hungary, Latvia, Luxembourg and Slovakia. Although many member states have indeed exercised this option, they have fixed different limits varying from EUR 10 (Poland) up to EUR 50 (Belgium), as set out in the chart below. In Belgium, additionally, the sale must be made for non-commercial and exclusively charitable purposes. In Estonia\textsuperscript{83}, there is a limit of EUR 15 which only applies in the case that the consumer pays the price at the moment of the conclusion of the contract. The Portuguese law is applicable to contracts under EUR 60, although some provisions (regarding contract form, content and clauses) are only applicable to contracts exceeding this amount\textsuperscript{84}.

<table>
<thead>
<tr>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not transposed</td>
</tr>
<tr>
<td>CY, CZ, DK, FR, EL, HU, LU, LV, SK (9)</td>
</tr>
<tr>
<td>Exclusions</td>
</tr>
<tr>
<td>AT (EUR 15/EUR 45), BE\textsuperscript{85} (EUR 50), DE (EUR 40), EE\textsuperscript{86} (EUR 15), FI (EUR 15), IE (£ 40 = EUR 50.79), IT (EUR 26), LT (LTL 200) MT (20 Maltese liri = EUR 46.68), NL (EUR 34), PL (EUR 80)</td>
</tr>
</tbody>
</table>

\textsuperscript{80} Doorstep Contracts Act, Art. 3 lit. (a).
\textsuperscript{81} Art. 1(1)(b) of the Law 26/1991, of November 21, on consumers’ protection in case of contracts executed outside commercial premises.
\textsuperscript{82} A demand for free personal information is not considered to be such a request of the consumer because it only aims to gather information. The burden of proof for the request lies with the trader. Audiencia Provincial Burgos, judgment of 26 Oct 2001, 528/2001 “Entidad técnica de distribución X. S.L.” v María Cruz S. R. y Raúl A.S.
\textsuperscript{83} Consumer Protection Act, Art. 46 para. 2.
\textsuperscript{84} Art. 16(4) of the Decree-Law 143/2001, of April 26.
\textsuperscript{85} The exclusion is limited to sales which do not exceed the sum of EUR 50 and are made for non-commercial and exclusively charitable purposes.
\textsuperscript{86} The exclusion is limited to sales where the sum is paid immediately.
bb. Art. 3 para 2

The member states have not coherently exercised the options for limitation of scope in Art. 3 para. 2 of Directive 85/577 either. The general picture on the use of these options has already been provided in the Executive Summary of this chapter. It may be noted that, for instance, in Greece, Portugal, Poland, Italy, Ireland (exclusion of insurance and assurance contracts) and the United Kingdom\textsuperscript{87} the same situations are basically exempt from protection, as Directive 85/577 allows for. In contrast, Latvian law does not contain any restrictions in the general definition of the contract.

It is worth pointing out the following peculiarities of the individual transposition laws: Germany, Lithuania, Malta and Spain exclude contracts concluded at a public notary. This exclusion is broader than Art. 3 para. 2 lit. a (contracts related to immovable property) allows for and therefore may infringe on the Directive. In particular, the Maltese\textsuperscript{88} legislator, who implemented the exemptions stated in Art. 3 of the Directive, goes beyond the Directive’s scope by excluding contracts negotiated solely in writing, contracts concluded before a court, notary or another person who is bound to inform the parties of their rights and obligations even if they are concluded in a doorstep situation (which is – for some of these cases – hard to imagine)\textsuperscript{89}. Moreover, the Maltese Minster is empowered by law to make other contracts exempt from the national Doorstep Contracts Act. In Spain, Art. 3 para. 2 lit. a, 1\textsuperscript{st} sentence has been transposed almost literally only excluding contracts related to immovable property, whereas the second sentence (contracts for the supply of goods for

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\textsuperscript{87} Art. 3(4)(a) of the Consumer Protection (Cancellation of Contracts concluded away from business premises) Regulations 1987; (variation: instead of referring to contracts of “securities”, the UK excluded “any agreement the making or performance of which by either party constitutes a regulated activity”, e.g. dealing in and arranging deals in investments, managing, safeguarding and administering investments, establishing a collective investment scheme; no application to consumer credit contracts).

\textsuperscript{88} Doorstep Contracts Act, Art. 3.

\textsuperscript{89} The Maltese legislator has presumed that these contracts would not generally occur on the doorstep. This exemption may be considered to be necessary because the definition of “doorstep contract” includes contracts that have been negotiated at any other place or premises away from the business premises of the door-to-door seller.
incorporation in immovable property, contracts for repairing of the latter) has not been transposed at all.

In the NETHERLANDS contracts in case of a standing relationship between the parties concerning the selling of food are exempt\(^90\). The LITHUANIAN exception for the supply of foodstuffs, beverages or other goods intended for current consumption in the household does not require that the goods were supplied by *regular roundsmen*\(^91\). In SPAIN the doorstep selling of foodstuffs and beverages is prohibited\(^92\), but not their delivery by request of the consumer.

The exemption of contracts concluded on the basis of a trader’s catalogue stipulated (Art. 3 para. 2 lit. c of Directive 85/577) has not been transposed in BELGIUM, ITALY, LITHUANIA and HUNGARY. The Hungarian\(^93\) law expressly states that the provisions on distance selling are applicable. CYPRUS has exercised this option with some deviations regarding the conditions the contract has to meet in order to be excluded from the protective rules, e.g. the time limit for cancellation or return of goods and the information which must be provided on both the catalogue and the contract (extended to at least fourteen days)\(^94\). The GREEK legislator has made a further exemption: The protective provisions do not apply to itinerant traders with small businesses\(^95\).

c. Burden of proof

The burden of proof with regard to the circumstances leading to the protection under the national transposition laws has not been subject to the Directive’s provisions. Nonetheless, this aspect of the proceedings can either increase the level of consumer protection or at least complicate the enforcement of the consumer’s rights. The former, if the burden of proof of the facts necessary to make the protection law applicable lies upon the trader, the latter, if the

\(^90\) Canvassing Act, Art. 1(3).
\(^93\) § 1(6) of the Government Decree 370/2004 (XII.26.) on Doorstep Selling.
\(^94\) Art. 4 lit. (c) of the Law for the Consumer Contracts Concluded Away from Business Premises of 2000, L.13(I)/2000.
\(^95\) Art. 3(7) of the Law 2251/94 on consumer protection.
burden of proof for the application of the protective provisions lies upon the consumer. Both solutions can be found in the member states’ laws: For instance, AUSTRIA, GREECE, POLAND, SWEDEN and GERMANY impose the burden of proof on the consumer, whereas, e.g., DENMARK, SPAIN and MALTA impose the burden of proof on the trader. The BELGIAN courts rather tend to impose the burden of proof on the trader. There is no specific rule in PORTUGAL. In LATVIA no particular rule on doorstep contracts can be found either, but it is considered that it is the purpose of the Consumer Protection Act to impose the burden of proof on to the trader. In the UNITED KINGDOM the general rule applies according to which the claimant has to prove he is entitled to the legal right.

III. Consumer Protection instruments

1. Information duties

The member states mostly transposed the requirement of a written notice established in Art. 4 of Directive 85/577. In some member states the protective measures have been intensified. In certain member states the whole contract has to be in writing, i.e. in BELGIUM, GREECE, MALTA, the NETHERLANDS, PORTUGAL and SPAIN. In other member states only the information on the right of withdrawal has to be in writing, e.g. AUSTRIA, the CZECH REPUBLIC, DENMARK, FRANCE, HUNGARY, IRELAND, LUXEMBOURG, LITHUANIA, POLAND, SWEDEN, FINLAND, SLOVENIA and SLOVAKIA. ESTONIAN as well as GERMAN law requires the information to be either in writing or on a durable medium accessible to the consumer. Upon entry into a contract, in SPAIN an information note in the format approved by the

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96 In a judgment of 23 March 2005 the CA Ghent decided that taken into account the precise circumstances of the negotiating of the contract, the contract clause stipulating the prior and express request of the consumers to negotiate the contract was sufficient proof. In the same vein the CA Brussels decided on 9 May 2005 that the contract negotiated away from business premises was to be considered null and void (in absence of a withdrawal clause) now that the trader could not prove the prior request of the consumer to visit. On 14 September 2005 the CA Gent expressly stated that the burden of proof as to the prior request of the consumer rests upon the trader. However the clause in the contract indicating the consumer’s express request was not considered sufficient proof of such prior and express request, as it was drafted in exceptionally small characters which were difficult to decipher. Furthermore the Court importantly added that such clause did not prove in any case that the consumer’s request was particularly aimed at negotiating a sales contract. This latter approach was confirmed by the Court of Appeal of Ghent in its judgment of 12 October 2005.

97 Including the name and contact details of the person against whom that right may be exercised.

98 § 7(2) lit. d of the Act 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling; notice must at the latest be given at the time of conclusion of the contract.

99 In Germany, according to a judgment of the BGH (judgment of 04 July 2002, I ZR 55/00) a notice of withdrawal rights may not in principle contain any information other than as prescribed by law. Only in exceptional circumstances it may contain supplementary information which clarifies the content of the notice and does not prescind from the content.
Minister of Economic Affairs and Communications must be given to the consumer. The FINNISH law sets a general duty to provide a doorstep selling document in accordance with the model approved by the Ministry of Trade and Industry. Similar to the Finnish regulation, the FRENCH legislation demands, next to a version of the contract the delivery of a detachable document of withdrawal containing the information on the right of cancellation. In addition to that the contract must contain certain information\textsuperscript{100}. In CYPRUS the trader must inform the consumer about the right of withdrawal in a separate written notice and attach a standard cancellation form which the consumer can use to exercise his right of withdrawal. In LATVIA, upon entering into a contract, the seller or service provider shall issue to the consumer a written form of withdrawal according to which the specific contract may be identified. The consumer, in order to confirm the receipt of the withdrawal form, shall make a note on the copy of the withdrawal form.

Furthermore, in IRELAND and the UNITED KINGDOM two written forms of information documents exist: a “cancellation notice” comprising the data set by the Directive and a “cancellation form”, which is prescribed in an annex to the doorstep regulations. ITALIAN regulations state that the notice of the right of withdrawal shall be enclosed in the order form presented for signature separately from any other contractual provisions and in lettering of the same size or larger than in the other parts of the form. A copy of the order form, containing details of the date and venue of signature, has to be sent to the consumer. MALTESE law requires a clause accompanying the contract set in clear, bold and highlighted letters in which the right of withdrawal has been communicated in writing. Herein, in addition to the Directive’s requirements, the license number of the door-to-door seller has to be stated. A similar requirement to provide the license (certificate) exists in SLOVAKIA. As a novelty in POLISH law the consumer has to be informed before the conclusion of the contract; \textit{inter alia} the consumer has to be provided with a standard form for withdrawal including the name and the address\textsuperscript{101} of the trader. In LITHUANIA\textsuperscript{102} the trader is obliged to provide the consumer with a document specifying the identity and address of the trader and the identity (name, surname) of the person to whom the consumer may address his withdrawal.

\textsuperscript{100} Consumer Code, Art. L. 121-23 states that a contract must be established and that it shall contain the following information: 1. the name of the provider and of the trader, 2. address of the provider, 3. address of the place where the contract has been concluded, 4. precise description of the goods and services, 5. conditions of execution of the contract, 6. total price, 7. right of withdrawal.

\textsuperscript{101} Before the transposition of the Directive 85/577 the Polish law did not require the provision of the address, but only a seat of the trader.

\textsuperscript{102} Law on Consumer Protection, Art. 14(4) 4th and 5th indents; CC Art. 6.357(4) 4th and 5th indents.
As to the sanctions that are imposed on the trader due to a lack of sufficient information, the spectre of variations ranges from relative nullity in Greece and in Spain\textsuperscript{103} to the total invalidity of the contract (France, Hungary and the Netherlands). The Belgian law prescribes nullity and fines between EUR 250 and EUR 10,000\textsuperscript{104} in addition to a cease and desist order. Damages can only be obtained through separate proceedings based on the Belgian Civil Code.

Fines or more severe sanctions in case of infringements of protective provisions (e.g. information requirement) under national transposition law are foreseen in Belgium, Estonia, France, Greece\textsuperscript{105}, Hungary, Italy, Luxembourg, Latvia, Portugal, Poland, Finland, Slovenia, Slovakia and Ireland.

In Malta the contract is rendered null and therefore unenforceable against the consumer. Furthermore the licence, which any door-to-door-seller needs, can be withdrawn or suspended by the Director, who also issues them. A person who then acts as a door-to-door seller without a licence is guilty of an offence and liable on conviction to a fine and, or imprisonment\textsuperscript{106}.

In the cases Schulte and Crailsheimer Volksbank, the ECJ has stated with regard to the sanctions for an infringement of the obligation to inform the consumer of his right of withdrawal, that, in cases where the consumer would have been able to avoid exposure to the risks inherent in the contract, Article 4 of the Directive requires the member states to ensure that their legislation protects consumers who have been unable to avoid exposure to such risks, by adopting suitable measures to allow them to avoid bearing the consequences of the materialisation of those risks. It will have to be seen how the member states intend to comply with this requirement. The German courts which referred the issue to the ECJ, meanwhile,

\textsuperscript{103} According to the judgment of the Audiencia Provincial Cantabria of 08 Mar 2004, 118/2004 “Finanzia Banco de Crédito, S. A.” v Iván, the trader must inform the consumer not only of their right to withdraw from the contract, but also about the fact that the formalities of the contract, which must be fulfilled by the trader, are mandatory and that a failure to comply with them is sanctioned with the nullity of the contract. The legislative text only speaks of „nullity“: prevalent doctrinal interpretation and also the Audiencia Provincial Cantabria in the judgment of 26 Feb 2003, 88/2003 “BSCH., S.A.” v Ángel Juan C. M., consider the nullity to be relative.

\textsuperscript{104} Indexed a fine between EUR 1,375 and EUR 55,000.

\textsuperscript{105} Art. 14(3) of the Law 2251/1994.

\textsuperscript{106} Doorstep Contracts Act, Art. 4 and Art. 5.
consider granting the consumer a claim for damages (bases on the breach of a pre-contractual obligation) in such cases\textsuperscript{107}.

\textbf{2. Right of withdrawal}

\textbf{a. Length of withdrawal period}

The time limit for the exercise of the withdrawal right differs from 7 working days to 15 calendar days in the different member states as set out in the following chart:

<table>
<thead>
<tr>
<th>Withdrawal Period</th>
<th>Member State</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 calendar days</td>
<td>CZ, IE, FR, ES (4)</td>
</tr>
<tr>
<td>7 working days</td>
<td>BE\textsuperscript{108}, LT, LU, SK, UK (5)</td>
</tr>
<tr>
<td>8 calendar days</td>
<td>NL (1)</td>
</tr>
<tr>
<td>8 working days</td>
<td>HU (1)</td>
</tr>
<tr>
<td>One week</td>
<td>AT (1)</td>
</tr>
<tr>
<td>10 calendar days</td>
<td>PL (1)</td>
</tr>
<tr>
<td>10 working days</td>
<td>EL, IT\textsuperscript{109} (2)</td>
</tr>
<tr>
<td>14 calendar days</td>
<td>CY, DK, EE, FI, DE\textsuperscript{110}, LV, PT, SE (8)</td>
</tr>
<tr>
<td>15 calendar days</td>
<td>MT, SL (2)</td>
</tr>
</tbody>
</table>

The time limit for the exercise of the withdrawal right differs in the different member states from 7 working days up to 15 calendar days. The longest withdrawal period, 15 calendar days, can be found in MALTESE and SLOVENIAN law. In BELGIUM, LITHUANIA, LUXEMBOURG, SLOVAKIA, and the UNITED KINGDOM the withdrawal period is 7 working days. The period is 7 calendar days in the CZECH REPUBLIC, FRANCE, IRELAND and SPAIN\textsuperscript{111} and 8 calendar days in the NETHERLANDS. In HUNGARY the consumer has 8 working days to withdraw from the contract. In AUSTRIA the period is one week. According to POLISH law the period is 10

\textsuperscript{107}See, for example, judgment of the BGH of 16 May 2006, XI ZR 6/04.
\textsuperscript{108}Art. 1 No. 9 of the Trade Practices Act contains the following definition of working day: “all days other then Sundays and public holidays. If a period expressed in working days ends on a Saturday, the period is extended till the next working day”.
\textsuperscript{109}After the coming into force of the Consumer Code, prior 7 days.
\textsuperscript{110}Two weeks.
\textsuperscript{111}The law on doorstep selling speaks of “7 days”. According to CC, Art. 5(2), the period is deemed as calendar days, when a law has not specified.
calendar days, whereas according to GREEK and ITALIAN law the consumer can withdraw from a contract within 10 working days.

In the CZECH REPUBLIC, in the case where goods are not delivered, the consumer can withdraw from the contract within one month. If the trader does not inform the consumer about his right of withdrawal or supplies incorrect information, in ITALY the period is extended to 60 days\(^{112}\). This way of transposing has been criticised, because the consumer might not be sufficiently protected if he does not receive the information about his right to withdraw or if he did not receive a written notice but only oral information. Consequently, the consumer might not be aware of the possibility to withdraw from the contract within 60 days. In LITHUANIA, POLAND and SLOVENIA the withdrawal period is extended to 3 months, in cases of insufficient or lack of information; in the CZECH REPUBLIC the period is extended to one year after the conclusion of the contract. By decision of the ECJ in the *Heininger* case any limitation of the withdrawal period in cases with no notice about the right of withdrawal at all, is contrary to Art. 4 of Directive 85/577\(^{113}\). Therefore, the transition in the CZECH REPUBLIC, LITHUANIA, POLAND, SLOVENIA and ITALY infringes on Art. 4 of Directive 85/577.

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

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\(^{112}\) CC, Art. 65(3).

\(^{113}\) ECJ, C-481/99, ECR 2001, I-9945.
b. Start of the withdrawal period

Art. 5 of Directive 85/577 states that the consumer shall have the right to renounce the effects of his undertaking by sending notice within not less than seven days from receipt of the information about the right to withdraw. The member states stipulated rather different provisions for the beginning of the period. For instance, in AUSTRIA, GERMANY and LITHUANIA the withdrawal period starts with the receipt of the notice of the right of withdrawal. SPANISH law provides that the period is “seven days from reception”, which is rather unclear, because it could mean after the reception of the information or after the reception of goods sold under the contract. In IRELAND, LATVIA and the CZECH REPUBLIC the period starts with the conclusion of the contract. In ESTONIAN and POLISH law the withdrawal period commences with the conclusion of the contract, if the consumer receives the notice before entering into the contract, if not, the withdrawal period commences with the receipt of the notice of the right of withdrawal. In CYPRUS the period starts at the day following the date of conclusion of the contract or at the day of the trader’s performance, whichever act is the last one. In SLOVAKIA the period starts upon the receipt of the goods or upon the conclusion of the contract. SPANISH law does not specify whether the withdrawal period starts with the receipt of the information or of the goods. Legal literature has criticised this gap as have some courts, which have already decided that the period begins with the reception of the goods. In other member states only the date of the conclusion of the contract is decisive, e.g. in BELGIUM, FRANCE, MALTA and the UNITED KINGDOM (given that the information has been provided before or simultaneously). DANISH law distinguishes between contracts under which the trader supplies goods and such contracts under which services are provided. In the case of service-contracts the withdrawal period begins with the conclusion of the contract. If the trader supplies goods the withdrawal period

114 Art. 5(1) -and the Schedule containing a cancellation form- European Communities (Cancellation of Contracts negotiated away from business premises) Regulations, 1989
115 CC § 57(1), sent. 1.
116 § 7(1) lit. d of the Act 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling.
117 SAP Madrid, 26 March 2002 Oscar M. O. v “Servicios Integrales de F., S. L.”, and Judgment of the Spanish Constitutional Court of 30th September 1993, obiter dicta (5th legal reasoning). Most of the scholars agree (VÉRGEZ, 4038; BOTANA, Contratos, 252; against, GARCÍA VICENTE, 188-189 who supports the day of receipt of the information).
118 The withdrawal period starts the day after the signature of the contract (Trade Practices Act, Art. 88).
119 Consumer Code, Art. L. 121-25. According to the case-law, the withdrawal period starts on the day after the conclusion of the contract (Cour de cassation, Chambre criminelle, 5 October 1987, Recueil Dalloz, 1987, Informations Rapides, 236).
120 The CA expressly decided that the period commences from the date of the signing of the contract and not from when the goods are delivered to the consumer; judgment of 14 Jan 2002, 615/99SM Commonwealth Educational Society Limited vs Saviour and Bernardette spouses Saliba.
starts with their delivery. The same differentiation is made in HUNGARY. However, the withdrawal period in case of delivery of goods only starts with their delivery, if it is later than the conclusion of the contract. Similar provisions can be found in SLOVENIA and SWEDEN. According to GREEK law the consumer can exercise his right of withdrawal within 10 days after the receipt of the written contract or, as the case may be, upon the later receipt of the goods. It is disputed whether the later event is always decisive, especially if the delivery of goods takes place more than ten days after the receipt of the contract\(^{121}\).

Under ITALIAN law the withdrawal period starts with the signing of an order form containing the information on the right of withdrawal. If no order form is used, the withdrawal period starts with receipt of the information itself. Additionally, the withdrawal period starts with delivery of the goods in case of contracts for the supply of goods where the contract has been concluded without the trader being present, or where the product presented or demonstrated is different from the one in the contract. In FINLAND the withdrawal period starts with the supply of the door-to-door selling document (set form). There is a special provision concerning the sale of tangible goods according to which the withdrawal period begins with the delivery of the goods, if the delivery is later than the receipt of the document\(^{122}\). Under GREEK law the withdrawal period starts with the conclusion of the contract or, if goods are handed over at a later date, with the delivery of the goods to the consumer. An equivalent rule can be found in PORTUGAL. In the NETHERLANDS the trader is obliged to register the contract at the Kamer van Koophandel. (Chamber of Commerce). Therefore, the withdrawal period starts on the day of the registration by the Kamer van Koophandel.

c. Postal Rule / Dispatching Rule

Directive 85/577 foresees, contrary to the Distance Selling Directive, a provision specifying how the consumer can exercise the right of withdrawal on time. Member States like AUSTRIA\(^{123}\), BELGIUM\(^{124}\), DENMARK, ESTONIA, GERMANY\(^{125}\), GREECE\(^{126}\), HUNGARY\(^{127}\) ITALY,

\(^{121}\) In Greek literature it is considered that by the time the goods are delivered within ten days after the receipt of the contract the period of withdrawal will be prolonged by ten days. In the case that the delivery of the goods takes place after the period of 10 days has expired, counting from the receipt of the contract, it is disputed whether the consumer is given a new 10 day period counting from the delivery of goods or not.

\(^{122}\) Consumer Protection Act, Art. 6(9).

\(^{123}\) Consumer Protection Act, § 3(4).

\(^{124}\) Trade Practices Act, Art. 88 and Art. 89(2).

\(^{125}\) CC, § 355(1), sent. 2.
LITHUANIA\textsuperscript{128}, POLAND, PORTUGAL, SLOVAKIA\textsuperscript{129}, SLOVENIA, SPAIN\textsuperscript{130} and SWEDEN, have stated a dispatching rule. The FRENCH provisions do not contain a dispatching rule, but as the notice of withdrawal must be sent by registered letter with return receipt, it can be considered that the letter was served at the time of posting.

In the DUTCH\textsuperscript{131} regulations on doorstep selling, in deviation to the general rule, the message is assumed to have reached the addressee at the first time the letter is offered to him. In LATVIA a postal rule is provided by civil law. In IRELAND there is a form of postal rule which provides that the cancellation shall have effect from the date of the delivery of the cancellation form by hand or the date when it is posted. In CYPRUS\textsuperscript{132} and the UNITED KINGDOM\textsuperscript{133}, the transposition law contains a postal rule which states that the notice of withdrawal sent by post shall be deemed to have been served at the time of posting, whether it has been received or not. A similar provision exists in FINLAND\textsuperscript{134}: If the notice of withdrawal was sent appropriately, it can be invoked even if it is delayed, altered or lost. This point could be clarified when reviewing the Directive, also with regard to the question whether such a rule purely ensures the timeliness of the withdrawal (as in GERMANY) or whether it even makes a withdrawal valid in case that the declaration never reaches the supplier (e.g. because the letter got lost after being dispatched) as in Cyprus, Finland and the United Kingdom.

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

\textsuperscript{126} It is recognised in academic literature that the period is guaranteed if the notice is dispatched before the end of the period (Karakostas, Dikaio Prostasias tou katanaloti, margin no. 206).
\textsuperscript{127} Only in case of written notice, § 4(3) of the Government Decree 370/2004 (XII.26.) on Doorstep Selling.
\textsuperscript{128} CC, Art. 1.122(2).
\textsuperscript{129} § 7(2) of the Act 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling.
\textsuperscript{130} Art. 5(1) 2nd indent of Law 26/1991.
\textsuperscript{131} Canvassing law, Art. 25(4).
\textsuperscript{132} Art. 8 of Law for the Consumer Contracts Concluded Away from Business Premises of 2000, L.13(I)/2000.
\textsuperscript{133} Reg. 4(7) of the Consumer Protection (Cancellation of Contracts concluded away from business premises) Regulations 1987.
\textsuperscript{134} Consumer Protection Act, Ch. 12 Sec.(1) lit.(c).
d. Formal requirements

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

<table>
<thead>
<tr>
<th>Right of Withdrawal</th>
<th>Member State</th>
</tr>
</thead>
<tbody>
<tr>
<td>-Formal Requirements</td>
<td></td>
</tr>
<tr>
<td>None</td>
<td>DK, EE, FI, HU, NL, MT, PT, ES, SE (9)</td>
</tr>
<tr>
<td>Written</td>
<td>AT, CY, CZ, IE, LV, LT, PL, SL, SK, UK (9)</td>
</tr>
<tr>
<td>Text form</td>
<td>DE (1)</td>
</tr>
<tr>
<td>Return of goods</td>
<td>DE, FI, ES (3)</td>
</tr>
<tr>
<td>Registered letter with return receipt</td>
<td>BE, FR, EL IT, LU (5)</td>
</tr>
</tbody>
</table>

In several member states the right of withdrawal can be exercised without any formal requirements, e.g. in Estonia, Finland, Hungary, the Netherlands, Malta, Portugal, Spain and Sweden. In Belgium, France, Italy and Luxembourg the

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135 Art. 19 of the Act 451 of 9 June 2004 on certain consumer contracts.
136 Law of Obligations Act, Art. 49, 188.
137 Other forms are also possible, but the dispatching rule only applies in case of use of a written notice, § 4(3) of the Government Decree 370/2004 (XII.26.) on Doorstep Selling.
139 CC § 57(1), sent 1.
140 As Article 3(1) of the Act requires the trader to provide the consumer with a standard form of the statement of withdrawal, it appears that the consumer should make use of this standard form required by the trader.
141 Other party agreements possible.
142 Greek literature and jurisprudence accepts a withdrawal without formal requirements as well.
143 As a result of the amendments by Act XXVI of 2000, a consumer who wishes to cancel a doorstep contract – in contrast to the previous legal requirements – is required to substantially convey his intention of cancelling the contract within the 15 day period. This notice of cancellation can be communicated either by word of mouth, by means of telephone or fax or by delivery by hand or ordinary or registered mail. There is no obligation on the consumer to use the cancellation form provided to him by the trader. For the purposes of the law as amended it is enough if it is clear from the communication that the consumer is cancelling the contract. According to the judgment of the CA of 10 Mar 2004, 3/2003 Saviour u Patricia Muscat vs Commonwealth Educational Society Limited, the burden of proof lies with the trader. Only as far as the withdrawal of a contract in relation to law before the 2000 amendments is concerned, the consumer can only withdraw in accordance with the procedure established at that law, i.e. by using the cancellation form provided to him by the door-to-door salesman, and delivering the said form either personally or by registered mail to the trader. Qorti tal-Magistrati, judgment of 12 June 2003, 47/1999/1 Commonwealth Educational Society vs Victor Debono.
144 According to a judgment of the Audiencia Provincial Asturias of 15 Sept 2003, 369/2003 Laura v “Cambridge Institute 1908, S. L.”, the withdrawal is also valid if it is exercised verbally within the period of
consumer has to inform the trader by registered letter with return receipt. Greek law also requires a registered letter, but Greek literature and jurisprudence accepts a withdrawal without formal requirements as well. This is similar in Portugal. Portuguese law presumes that the notification is always considered effective if it is done by a registered letter, but it is considered that jurisprudence would accept another mechanism of notification if the notification could be proven. In other member states a written notice has to be sent to the trader, e.g. in Cyprus, the Czech Republic, Ireland, Latvia\textsuperscript{145}, Lithuania, Poland, Slovenia and the United Kingdom. In Latvia the consumer additionally has to make a note on the withdrawal form in order to confirm the receipt of the form. Besides a written notice Slovakian law provides the possibility to mutually agree other formal requirements for the exercise of the withdrawal right in the contract. According to Austrian law the consumer can withdraw from the contract by a written notice. He may also send the contract to the trader with a notice of withdrawal. Furthermore a verbal withdrawal notice is possible, if the trader agrees to this form of withdrawal\textsuperscript{146}. In Poland the consumer is provided with a standard form of withdrawal by the trader. Therefore, it can be assumed that the consumer should make use of this form, but it has remained unclear whether he can also withdraw by other means. In Germany the notice of withdrawal has to be sent to the trader in text form. Moreover, in Germany as well as in Finland (in the case of tangible goods\textsuperscript{147}) and Spain it is possible to withdraw from a contract by returning the goods to the trader. Also Danish law does not require the consumer to dispatch a cancellation notice but to return the received goods before the cancellation period expires.

e. Effects of withdrawal

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

\textsuperscript{145} Consumer Rights Protection Law, Art. 12(4).
\textsuperscript{146} OGH, judgment of 13 Feb 2002, 2 Ob 11/02k.
\textsuperscript{147} Consumer Protection Act, Ch. 6 sec.(9).
As the ECJ stated in its judgment Schulte and Crailsheimer Volksbank, it is up to the member states to regulate the effects of withdrawal – the transposition laws have to consider the aims of the Directive, mainly the *effet utile* of the Directive\(^{148}\). A more concrete guidance has only been given by the ECJ in these judgments for the very specific case of credit contracts concluded for the financing of houses. The ECJ clarified that the Doorstep Selling does not preclude:

- a requirement that a consumer who has exercised his right to cancel under the Directive must pay back the loan proceeds to the lender, even though according to the scheme drawn up for the investment the loan serves solely to finance the purchase of the immovable property and is paid directly to the vendor thereof;

- a requirement that the amount of the loan must be paid back immediately;

- national legislation which provides for the obligation of the consumer, in the event of cancellation of a secured credit agreement, not only to repay the amounts received under the agreement but also to pay to the lender interest at the market rate.

Thus, the differences between the member-states are remarkable. For instance, AUSTRIA, the CZECH REPUBLIC, GERMANY, GREECE, LUXEMBOURG and SLOVENIA apply their general principles of the right to withdraw from a contract. The effects are – especially in AUSTRIA, the CZECH REPUBLIC\(^{149}\), GERMANY and GREECE – the bilateral return of each party’s performances as well as the reimbursement of profits or compensation of obsolescence. In Greece the trader may not receive any payments as long as the period of withdrawal has not expired. In the case that a contract on the provision of a service which has already been performed by the trader, it is controversial in Greek literature if the consumer must pay a refund which is customary in the market, in accordance to the costs he has saved, or if the right of withdrawal cannot be exercised anymore.

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\(^{148}\) ECJ, *Schulte*, C-350/03, no. 69.

\(^{149}\) In addition the contract is void from the beginning (CC Sec. 48 para. 2) with the consequence of unjustified enrichment (CC Sec. 457).
In BELGIUM doorstep selling contracts are not considered as concluded so long as the withdrawal period has not expired. In FRANCE\textsuperscript{150} no payments as well as no delivery of goods or services shall be made before the withdrawal period of seven days has expired. According to LITHUANIAN\textsuperscript{151} law the consumer is released from the contract and the trader is obliged to take back the goods delivered and to reimburse the sums paid by the consumer. In DENMARK, MALTA, PORTUGAL, POLAND and SLOVAKIA\textsuperscript{152} the consumer is released from the contract in the case of withdrawal, too. The consumer has to return received goods and the payments have to be reimbursed. In SLOVAKIA the goods must be returned within 7 days. The trader must take back the goods and refund the sums paid within 15 days. In POLAND the return should take place as soon as possible, but not later than 14 days. The goods have to be returned unaltered unless an alteration or change was necessary. The trader has to pay statutory interest on the payments of the consumer which have to be reimbursed. In PORTUGAL the time for devolution is 30 calendar days, starting with the delivery of the goods. Attention should be paid to the fact that in DENMARK the consumer is obliged to return the goods to the trader \textit{before} the cancellation period expires in order to benefit from the right of withdrawal. In order to fulfil this requirement, it is sufficient that the consumer has delivered the good to a carrier who undertakes the transportation back to the trader\textsuperscript{153}. Danish law imposes the costs of reshipping upon the consumer. ITALIAN law releases the consumer from the contract. However, the consumer has to return the goods within 7 days (at his own cost) while the trader has to reimburse the purchase price within 30 days. Consequently only the trader may exercise the \textit{exceptio inadimpleti} (Art. 1460 Italian Civil Code \textit{c.c.}), while the consumer bears the risk of deterioration after the exercise of the withdrawal-right until the reimbursement of the purchase price (Art. 1177 \textit{c.c.}).\textsuperscript{154} According to ESTONIAN law, the trader shall reimburse the purchase price to the consumer immediately after the withdrawal but in no case not later than thirty days thereafter. In contrast to SWEDEN, where the trader is obliged to collect the goods from where they have been delivered and the consumer is entitled to the reimbursement of his money within a period of 30 days. In FINLAND the consumer is released from any contractual obligation and the trader has to reimburse the purchase price. The consumer has to make the goods or other returnable performances received from the

\textsuperscript{150} CC Art. L.121-26.
\textsuperscript{151} Law on Consumer Protection, Art. 15(4); CC, Art 6.357(9).
\textsuperscript{152} The contract is void from the beginning.
\textsuperscript{153} Art. 19(2) of the Act 451 of 9 June 2004 on certain consumer contracts.
trader available for the trader at the place to which they have been delivered. If the trader does not retract the goods, the duty of the consumer to keep the goods on behalf of the trader expires two months after his withdrawal. Nevertheless, the trader and the consumer may stipulate in the contract terms that goods delivered by mail have to be returned by the consumer. In Latvia the consumer shall return the goods to the seller at the location where the goods were received. The consumer may also return the goods to another location specified by him, if this does not cause inconvenience to the trader. The trader has to reimburse all the payments made by the consumer.

Under German law the consumer has to compensate any decrease in value if he is not able to return the goods or services supplied to him or if the goods are in a declined condition\footnote{CC, § 346(2).}. The consumer has to compensate decreases in value even if the deterioration has only been caused by the contractual use of the goods, provided that the consumer has been advised about this duty by the trader\footnote{CC, § 357(3), sent. 1.}. The costs of reshipping can be imposed on the consumer by contract if the value of the goods does not exceed EUR 40. Under Lithuanian law the consumer may exercise his right of withdrawal only if the goods received from the trader have not been damaged or their appearance has not been subject to major change. This provision might inhibit the consumer in exercising his right of withdrawal. Hungarian law states that after the withdrawal the parties have to return received performances. The consumer has to compensate depreciation only in case of default. If the consumer is not able to return received goods completely or if services have already been performed completely, there is no possibility to withdraw from the contract. In contrast to these rather restricting provisions the consumer is entitled to keep the received goods in Cyprus and Sweden even if he has exercised his right of withdrawal provided that the trader does not request the goods within a period of 21 days (Cyprus) and accordingly 3 months (Sweden). In Cyprus the consumer can treat the goods as an unconditional gift after another period of 21 days has expired. The consumer is entitled to keep the goods and deal with them as he wishes if the trader has not requested their return within a total of 42 days from the day of the exercise of the right of withdrawal. Under Spanish law, the consumer does not have to compensate any decrease in value if the goods have only been used contractually\footnote{Art. 2(1), subpara. (7) lit. (c) of the Law 26/1991, of November 21, on consumers’ protection in case of contracts executed outside commercial premises.}.
In Ireland the contract is rendered void on cancellation, so that any sum paid by the consumer to the trader is subject to unjustified enrichment. The trader has the obligation to collect the goods at such reasonable time and place as specified by the consumer. In the Netherlands the consumer is released from all obligations. As effect thereof the respective performances have to be returned. In the United Kingdom and Ireland the reimbursement of the purchase price is secured by a lien, which the consumer has on the goods that have been supplied under the contract. The consumer is obliged to hold the goods available for collection from his home and to take reasonable care of those goods. In Ireland\textsuperscript{158} the title in the goods shall pass to the consumer three months after the date on which the consumer has delivered or posted the cancellation notice, if the trader has not returned all monies due.

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

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

As the right of withdrawal is the only consumer protection instrument Directive 85/577 provides for, many if not all member states have enacted other protection instruments applicable in the field of doorstep selling. A few examples may illustrate this. SLOVAKIA, for instance, has introduced a time limit for doorstep selling activities (working days: from 8 A.M. to 7 P.M.; non-working days: from 10 A.M. to 3 P.M.)\textsuperscript{159}, and additionally requires the trader to be licensed. In MALTA a licence is necessary, too. Acting as a door-to-door salesman without a licence is an offence and liable on conviction to a fine and/or imprisonment. Furthermore, a person who calls at the home or place of work of a consumer to negotiate a doorstep contract and refuses to leave when so requested is guilty of an offence and on conviction liable to a fine. In FRENCH law a prohibition of doorstep selling is enacted for contracts related to legal consultation, composition of legal documents as well as to distance

\textsuperscript{158} Art. 6(4) European Communities (Cancellation of Contracts negotiated away from business premises) Regulations, 1989.
\textsuperscript{159} Art. 5(1) of the Act 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling.
learning. **HUNGARIAN** law prohibits the following goods to be sold in doorstep selling situations: products which are subject to consumption tax, seeds, drugs and medication, pesticides, flammable products, dangerous waste, precious metal and stones (also jewellery), food except for vegetables and fruits, and goods prohibited by other legislative acts\(^{160}\). The ECJ has frequently ruled in the course of its *Keck* jurisprudence that such provisions concerning pure selling arrangements do not infringe on Art. 28 EC Treaty, as long as the provisions do not affect products from other member states more than they affect domestic products\(^{161}\). But the recent example of the ECJ case *A-Punkt-Schmuckhandel*, C-441/04, shows that such provisions may, practically, hinder cross-border business. In this case, a trader sold jewellery in a private home in Austria and thereby infringed on an Austrian provision which prohibits the sale of silver jewellery on the doorstep. The seller, an enterprise with headquarters in Germany, carried out itinerant selling of jewellery in different EU countries and relied on the fact that the sale of silver jewellery in private homes proved to be legal in, for example, **GERMANY**, **ITALY** or the **UNITED KINGDOM**. The result of this situation is that a trader cannot expand his business model throughout Europe.

In **BELGIUM** next to section 11 (Doorstep Selling) of the Trade Practices Act, there are two other Acts\(^{162}\) containing consumer protection measures in the field of doorstep selling. The scope is mainly (but not exclusively) focused on market fairs and fairground activities. The trader and his representatives need to be licensed\(^ {163}\). Furthermore, the ambulatory sale of certain goods is prohibited (medicines, medical and orthopedical machines, products normally sold by an optician, precious metal and stones (also jewellery), weapons and ammunition)\(^{164}\) and there is a limit for the doorstep selling activity from 8 a.m. to 8 p.m.\(^{165}\).

Further consumer protection instruments may become applicable because of other EC measures. Contracts concluded in doorstep situations may also fall under other consumer protection directives which contain information duties (e.g. Consumer Credit) or a right of withdrawal (e.g. Timeshare). The ECJ has ruled in its judgment *Travel VAC*, C-423/97, N°

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\(^{160}\) Art. 1(1) of Government Decree 370/2004 (XII.26.) on Doorstep Selling.

\(^{161}\) See, as a recent example, the case *A-Punkt-Schmuckhandel*, C-441/04.


\(^{163}\) Itinerant Trade Act, Art. 3 and Royal Decree on Ambulatory Activities, Art. 20-22.

\(^{164}\) Royal Decree on Ambulatory Activities, Art. 5.

\(^{165}\) Royal Decree on Ambulatory Activities, Art. 19.
23, that – in general – such directives are applicable in parallel, unless there is a provision which rules out the application of other directives. An example for such a provision can be found in Art. 13 of the Distance Selling Directive. Like most of the other directives, Directive 85/577 does not contain such a provision. Therefore it is unclear to what extent the different information obligations regulated in the applicable directives, and different particulars of the withdrawal rights, (if any) interfere.
Executive Summary

1. Transposition Deficiencies

Although the Directive has been transposed in all member states, the analysis has revealed many transposition deficiencies with regard to details. The following examples could constitute a transposition deficiency of at least some importance:

- No duty to include in the brochure the deadline for informing the consumer in the event of cancellation because of not reaching the minimum number of participants in Sweden (Art. 3(2)(g)).
- Duty to inform about passport and visa requirements only for own citizens (Czech Republic), citizens or residents (Cyprus), citizens of the member state where the package is offered (Austria, Germany), in contrary to Art. 4(1)(a) of the Directive, which requires this information with regard to all nationals of the member state(s) concerned.
- No form requirement regarding the information to be given before the start of the journey (Art. 4(1)(b)) in Estonia and Germany.
- No requirement of information on details of the place to be occupied by the traveller (Art. 4(1)(b) no. i) in Czech and Italian law.
- Suspension of the moment to communicate the necessary elements of the contract in Austrian and German law (instead of “before conclusion of the contract” as stated in Art. 4(2)(b), the confirmation document including certain elements shall be handed over to the traveller “at or immediately after conclusion of the contract”).
- In several member states still exist limitations of the insurance sum despite the ECJ ruling Rechberger.
2. Enhancement of Protection

a. Extension of scope

Some national legislations provide a wider scope of application in the field of package travel, for example by broadening the:

- Notion of ‘organiser’ (Art. 2 no. 2); e.g. inclusion of occasionally operating persons.
- Notion of ‘package’ (Art. 2 no. 1); e.g. extension to travel contracts containing only one service, extension to combined trips of a duration less than 24 hours or without overnight accommodation.

b. Use of minimum clause

Most member states made use of the minimum clause. Major examples of such findings are listed below:

- Art. 3(2): additional requirements concerning the brochure (e.g. manifold additional information to be included, compulsory provision of a brochure).
- Art. 4(1)(a): additional information obligations before conclusion of the contract (e.g. optional insurance, price of the package, security for money paid over in the event of insolvency).
- Art. 4(1)(b): increase of information obligations before start of the journey
  - Additional information requirements (e.g. details of the package).
  - Fixation of a time limit, when this information must be given at the latest (e.g. 7 calendar days before departure).
- Art. 4(2): additional elements to be included in the contract (e.g. conditions for cancellation by the traveller or organiser and/or retailer, maximum amounts of possible claims of the agency); stricter formal requirements for the contract (e.g. only “in writing” instead of also “such other form as is comprehensible and accessible to the consumer”).
- Art. 4(3): extension of right to transfer the package (no limitation to any obstacle in the performance).
- Art. 5: liability (e.g. extension of the compulsory coverage of the organiser/retailer, direct insurance claim of the consumer against the insurer because of failure in the performance or non-performance despite lacking insolvency of the organiser/retailer).
• Art. 5(4): no transposition of consumer duty to communicate any failure in the performance.
• Art. 7: additional refund (e.g. other needs arising out of non-performance).

3. Use of options

The majority of the member states made use of the options provided in the Directive:
• Art. 5(2) sent. 4 (allowance of compensation to be limited in accordance with international conventions) has been transposed by the vast majority of 21 member states.
• Art. 5(2) sent. 4 (allowance of compensation to be limited under the contract in the matter of damage other than personal injury) has also been transposed by a majority of 18 member states, but with great variations in detail.

4. Inconsistencies or Ambiguities

Inconsistencies or ambiguities of the Directive with at least some importance are:
• The use of the term ‘pre-arranged’ in the definition of ‘package’ (Art. 2 no. 1) is misleading because the ECJ (Club Tour) has clarified that also combinations of tourist services tailored by a travel agency on the specific request of the consumer are covered.
• The notion of ‘organiser’ (Art. 2 no. 2) does not resort to the commonly used elements “acting professionally in the course of his business” and also includes private persons and non-profit organisations; the exact meaning of acting “occasionally” is unclear.
• The notion of ‘consumer’ (Art. 2 no. 4) substantively deviates from the definition in the other consumer protection Directives.
• By using the formula “organiser and/or retailer” the Directive did not clearly decide whether the organiser, the retailer or both shall be obliged towards the consumer. This decision is left to the member states’ discretion. They have to ensure that at least one of the two is liable in any case. The transpositions laws of the member states do not only show great differences, but have also created many uncertainties. Especially in those member states which have made provision for a different and separate liability
of the organiser and the retailer, with each of them being liable for problems occurred in their respective spheres, it may be rather unclear who is liable for what.

- Unclear formal requirements for the information due under Art. 4(1)(a) and (b) (“in writing or any other appropriate form”).
- Unclear formal requirements for the contract in Art. 4(2) (“in writing or such other form as is comprehensible and accessible to the consumer”; “copy of these terms”).
- It is unclear whether the exceptions from information duties in case of last minute contracts are applicable only with regard to Art 4(2)(b), or also with regard to other information duties (in particular Art. 4(1)).
- The wording of Art. 4(3) (“having given the organiser ‘or’ the retailer reasonable notice”) leaves unclear, whether the member states or the consumer shall have the choice of addressee. Moreover, it is unclear whether “reasonable notice” just refers to a reasonable period of time and how long such a period should be.
- It is unclear, whether Art. 4(4) (“upward ‘or’ downward revision”) requires a transposition of which only deals with both possibilities (and not only with the possibility to increase [and not to decrease] the price.
- The use of the term “withdrawal” in Art. 4(5) and (6) may be confused with the ‘cooling off periods’ provided for in other Directives, which are commonly called withdrawal rights.
- In Art. 4(7) it is unclear whether the duty to compensate the consumer “where appropriate” constitutes an independent specific liability rule or just refers to the general rule of Art 5(2) of the Directive.
- Article 5 does not expressly state that – according to the ruling of the ECJ in the case Simone Leitner - the consumer must also have a right to compensation for non-material damage, in particular, that such compensation can arise from the loss of enjoyment the consumer has suffered because of the improper performance of the travel contract.

5. Gaps in the Directive

The analysis of the transposition of the Directive in the member states did not reveal substantial gaps. Although some member states broadened the scope of application of their
travel laws in different respect, these findings do not allow the conclusion that there is an urgent need to extend the scope of the Directive. However, some contributors suggested some extensions of the scope (e.g. one day trips, conferences, flights) or new protection instruments (e.g. the insertion of general rules on cancellation fees, if the consumer cancels without a justified reason).

6. Potential Barriers to (Cross Border) Trade

The following examples could likely cause barriers to trade in the European market:

- Additional elements to be included in the brochure (Art. 3(2)) or the contract (Art. 4(2)) diverging within the different member states.
- Additional information to be provided before the contract is concluded (Art. 4(1)(a)) and before the start of the journey (Art. 4(1)(b)).
- Stricter formal requirements in the member states with regard to the information due under Art. 4(1) (e.g. information must solely be “in writing”).
- Stricter formal requirements in the member states with regard to the contract in the sense of Art. 4(2)(b) (e.g. contract must solely be set out “in writing”).
- Substantial differences of member states’ laws concerning the possibility to limit compensation in case of damages resulting from the non-performance or improper performance of services involved in the package, leaving organisers and retailers who want to market package tours in several member states practically no other choice than to refrain from agreeing any limitation of compensation.
- Substantial differences of the duties of retailers in the member states, causing on the one hand that in some member states all the duties of organisers are imposed upon retailers who sell packages of foreign organisers, and on the other hand that a consumer who purchases in his home country a package organised by a foreign organiser, might only have rights against the foreign organiser (although under Art. 5 of the Rome Convention in most cases governed by the law of the country in which the consumer has his habitual residence).
7. Conclusions and Recommendations

In order to remove ambiguities, incoherencies or barriers to trade, the following issues could be considered

- Definition of ‘package’: inclusion of tailor-made packages offered by travel agencies according to the ECJ ruling *Club Tour*; thereby deletion of the misleading term “pre-arranged”; in case that the political decision is taken to extend the scope, in particular the inclusion of packages with a duration of less than 24 hours or without overnight accommodation.
- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law.
- Definition of ‘organiser’: adaptation to a coherent definition of the professional supplier in EC contract law, thereby also deletion of “other than occasionally”.
- Clarification that the organiser is obliged and liable in any case and that it is left to the member states whether also the retailer shall be jointly liable.
- Definition of the terms “in writing” or “any other appropriate form” in Art. 4(1)(a) and (b), moreover also of “in writing or such other form as is comprehensible and accessible to the consumer” and “copy of these terms” in Art. 4(2); thereby possibly making use of the definition of “another durable medium” along Art. 2(f) of Directive 2002/65. This would also adapt the Directive to the requirements of e-commerce.
- Clarification whether in case of last minute contracts exceptions from information duties shall also be allowed with regard to Art. 3(2) (brochure) and Art. 4(1)(a) (information to be provided before conclusion of contract).
- Clarification that the wording of Art. 4(3) (“having given the organiser ‘or’ the retailer reasonable notice”) leaves the choice of addressee to the consumer (and not to the member states); moreover, clarification whether “reasonable notice” just refers to a reasonable period for giving the notice, and how long such a period should be; finally a clarification that the member states must not introduce a formal requirement (e.g. in writing) for the notice.
- Clarification that Art. 4(4) (“upward ‘or’ downward revision”) requires a transposition of which deals with both possibilities (replacement of ‘or’ by ‘and’).
- Clarification whether in Art. 4(7) the duty to compensate the consumer “where appropriate” constitutes an independent specific liability rule or just refers to the general rule of Art. 5(2) of the Directive.
- Clarification that Art. 5 also grants a right to compensation for non-material damage, in particular, that such compensation can arise from the loss of enjoyment (*Simone Leitner*).

- Regulation of the possibility to contractually limit compensation in case of damages resulting from the non-performance or improper performance of services involved in the package in Art. 5(2).

- Insertion of a general provision obliging the member states to ensure that adequate and effective means exist to ensure compliance with the Directive in the interests of consumers.

In order to ensure that the member states cannot any more introduce or maintain additional protection instruments and thereby create barriers to trade, it could be considered to envisage full harmonisation in the most sensitive areas like pre-contractual information duties, brochures, formal requirements for information duties; possibly also with regard to the possibilities for contractual exclusion clauses.
I. Member state legislation prior to the adoption of the Package Travel Directive

Prior to the adoption of Directive 90/314, only a few European countries had directly intervened in the field of travel contracts. Of course, general rules and principles of contract law (e.g. with regard to the quality of the provided goods or services, information duties, doctrine of misrepresentation) were applicable to package travel agreements, among others, in Austria, Denmark, Finland, Ireland, Latvia\textsuperscript{166}, Malta\textsuperscript{167}, the Netherlands, Poland, Slovakia and the United Kingdom.

Some member states had singular acts regulating travel contracts. However, the national rules in this ambit deviated substantively in density and detail. Italy ratified in 1973 and 1977 the International Convention on Travel Contracts (CCV). This convention provided comparable consumer protection to the one in the Directive with regard to the travel organiser’s liability\textsuperscript{168}. In Belgium, travel contracts were also regulated by the CCV and, in certain fields, followed the adoption of the Act on Trade Practices\textsuperscript{169}. The latter interdicted misleading information and listed in detail the information the consumer had to be provided with. In France, some regulations comparable to the ones in the Directive 90/314 existed concerning information duties, price adoption, reimbursement duties, liability of the organiser and the travel guarantee fund.

Before the transposition of the Directive, Slovenian law was in general similar to the present one. The current “Code of Obligations” is based on the former Law of Obligations and only minor insertions were needed in order to achieve compliance with the Directive. Whereas Greek legislation obliged the travel agencies to provide the consumer with a minimum of information which had to be signed by both contractual parties, Hungarian law only regulated the economic aspects of package travel in two decrees including a coverage in case of the organiser’s insolvency by effecting insurance or depositing money.

\textsuperscript{166} Until the adoption of the ‘Tourism Law’ on 17 September 1998, no special regulation existed regarding contracts related to the tourism and package travel. Thus, Civil Law - Law of Obligations was applied as general legal norms for the particular contractual relationships.

\textsuperscript{167} Prior to the Package Travel Regulations which were enacted in 2000 in order to transpose the Directive 90/314, no specific rules existed and the primary rules of contract law in the Maltese CC were applicable.

\textsuperscript{168} The Directive 90/314 was initially implemented by Decree 111 of 17 March 1995 concerning “all-inclusive” travel packages, holidays and excursions. The field of package travel is now regulated in Art. 82 et seq. of the Consumer Code.

PORTUGUESE law already had specific rules for some time dealing with travel organised within its borders\textsuperscript{170}, although not giving any definition of ‘consumer’ but using the wording “client” instead. In SPAIN, before the introduction of the Directive, administrative regulations governing package travel contracts were in place but no private law existed in this field. Nevertheless, the administrative regulations had some impact in private law, because they were included in the travel contracts concluded under the general rules for contracts of accommodation, transport or hire of services.

In 1979, GERMANY introduced a subchapter on package travel contracts in §§ 651a-k of the CC. But these provisions did not provide the same standard of consumer protection as the Directive because, for instance, they did not prescribe many information obligations and no effective security in case of insolvency of the tour organiser.

Non-binding guidelines in the field of package travel existed in AUSTRIA, DENMARK, FINLAND and SWEDEN. The Austrian “general travel conditions”, partially regulating the Directive’s content (e.g. information duties, conditions for a revision of price), received the status of “soft law” and could be voluntarily respected by the travel agencies and organisers. Moreover, a legal duty to indicate the acceptance of all or some of the conditions was imposed on the organiser. In Denmark, guidelines on travel advertisements were issued by a Consumer Ombudsman under the Marketing Practices Act while problems could be brought before the Travel Arbitration Court, a private complaint board. The Finnish Consumer Agency enacted non-binding guidelines concerning the marketing of package travel including especially detailed provisions concerning information brochures and pre-contractual information. Despite its non-binding character, any marketing contradicting the guidelines could be deemed as an unfair commercial practice as defined in Chapter 2 of the Consumer Protection Act\textsuperscript{171}. Moreover, the Consumer Protection Act was also applicable to travel packages, thus applying the General Marketing provisions, regulation and adjustment of contract terms. The institution of a “Travel Guarantee Fund” was known in Austria, where such a fund was created in 1986, which could be joined on a voluntary basis. In Denmark, a

\textsuperscript{170} Rules modified by the time of the accession by Decree-Law 264/86.
\textsuperscript{171} Consumer Protection Act of 20 January 1978/38.
comparable Fund was established by an Act of Parliament in 1979, and in Finland, the agencies were obliged to pledge a collateral by the Travel Agency Regulation in order to pay back customers in case of insolvency. Sweden indirectly gave protection to consumers by general agreements on package travel which were negotiated by the Swedish Consumer Agency with the major Swedish organisations. Any violation of these agreements by a professional was estimated as unfair. Consequently, the provisions on unfair consumer contracts were applicable.
II. Scope of application

1. Consumer

The ‘consumer’ definition in Directive 90/314 substantively deviates from the definition commonly used in the field of other Consumer Protection Directives. The consumer is usually characterized as a “natural person acting for purposes outside his/her professional activity”. The definition of ‘consumer’ used in Art. 2 no. 4 of the Directive is however divided into three parts, including next to each “person who takes or agrees to take the package (‘the principal contractor’) (...) 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’)”.

As a particularity, the notion of ‘consumer’ is not explicitly limited to “natural” persons but includes every person taking the package. Thus, the Directive’s text seems to include legal persons and also tradesmen concluding a contract for business purposes into its concept of consumer.

a. Transposition in general

The very most of the member states having transposed the Directive integrated the definition into a special Act. Only some countries included the definition in existing codes, namely Germany and the Netherlands in their Civil Codes and Italy in its Consumer Code.

The majority of the member states adopted the structure of the Directive’s definition. About one fourth of the member states has however not implemented any definition but only mentions the main contracting party.

Table: Use of the definition’s elements

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172 For more detail, see Part 4.A.
The term ‘consumer’ has only been used in some member states (e.g. CYPRUS, GREECE, IRELAND, MALTA, SPAIN and the UNITED KINGDOM). Two thirds of the member states have made use of a different term while implementing the Directive. The terms used instead vary between ‘traveller’ (e.g. AUSTRIA, ESTONIA, GERMANY, the NETHERLANDS, SWEDEN), ‘purchaser’ (FRANCE, LUXEMBOURG, SLOVAKIA), ‘customer’ (the CZECH REPUBLIC, DENMARK, POLAND), ‘client’ (LATVIA, PORTUGAL) and ‘tourist’ (LITHUANIA).

It is evident that many member states have tried to avoid the term ‘consumer’ in the field of Package Travel in order not to contradict a general notion of consumer. EC law apparently uses the notion of ‘consumer’ in an incoherent way and leaves it up to the member states to find a solution for transposing its different content. Sometimes, the national legislation therefore makes also inconsistent use of the ‘consumer’ definition. Therefore, it is not easy to identify a general scheme or principle throughout the European countries as to who is actually protected in the field of Package Travel.

### Table: Use of terms

<table>
<thead>
<tr>
<th>Term</th>
<th>AT, CY, ES, FI, IE, IT, MT, NL, PL, SE, SK, UK (15)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tripartite Definition</td>
<td>AT, CY, CZ(^{173}), DK, EL, ES, FI, IE, IT, MT, NL, PL, SE, SK, UK (15)</td>
</tr>
<tr>
<td>Bipartite Definition</td>
<td>BE, LV (2)</td>
</tr>
<tr>
<td>Single Definition</td>
<td>HU, LT (2)</td>
</tr>
<tr>
<td>No legal definition at all</td>
<td>EE, FR, DE, LU, PT, SL (6)</td>
</tr>
</tbody>
</table>

\(^{173}\) Seemingly, some changes in regulation of package travel have taken place. This may lead to some amendments with regard to the information about the Czech Republic.

\(^{174}\) Reg. 2(2) of the Package Travel, Package Holidays and Package Tour Regulations 1992 modifies the meaning of ‘consumer’ (i.e. different for the definition of ‘contract’) and is also used as shorthand (“as the context requires”).

\(^{175}\) In the latest version of the Act on Tourist Services of 29 August 1997, being in force since 1 January 2006, there still is no definition of ‘consumer’. Instead, the Act uses three notions: ‘tourist’, ‘visitor’ and ‘customer’, the latter being defined as a person who makes a contract which is not subject to his economic activity (Art. 3 no. 11: a person who, acting outside the scope of his business, is willing to or has concluded a contract for tourist services in his own name or on behalf of another, a person for whom such contract was concluded or a person onto whom the rights to use the tourist services under the contract concluded before were ceded.)
b. Transposition in particular

Despite variations in the wording, the majority of the national legislations seems to substantively mirror the content of the Directive’s definition, especially including its second and third part. About one third of the member states have not legally defined the notion of consumer but rather only mention the contracting party (‘traveller’, ‘purchaser’ or ‘passenger’) without further clarification (e.g. Germany, France, Luxembourg, Slovenia).

<table>
<thead>
<tr>
<th>Customer</th>
<th>CZ, DK, PL (3)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client</td>
<td>LV, PT (2)</td>
</tr>
<tr>
<td>Tourist</td>
<td>LT (1)</td>
</tr>
</tbody>
</table>

### Table: Transposition method

<table>
<thead>
<tr>
<th>Substantively equivalent as in the Directive</th>
<th>The principal contractor</th>
<th>The other beneficiaries</th>
<th>The transferee</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT, BE, CY, CZ, DK, EL, ES, FI, HU, IE, IT, LV, MT, NL, SE, SK, UK (17)</td>
<td>AT, BE, CY, CZ, DK, EL, FI, IE, IT, MT, NL, SK, SE, UK (14)</td>
<td>AT, BE, CY, CZ, DK, EL, FI, IE, IT, MT, NL, SK, UK (13)</td>
<td></td>
</tr>
<tr>
<td>LT, PL (2)</td>
<td>ES, PL (2)</td>
<td>ES, PL (2)</td>
<td></td>
</tr>
<tr>
<td>Not explicitly transposed</td>
<td>HU, LT, LV (3)</td>
<td>HU, LT, LV, SE (4)</td>
<td></td>
</tr>
<tr>
<td>No legal definition at all</td>
<td>EE, FR, DE, LU, PT, SL (6)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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176 Consumer Protection Act, § 31b(2) no. 3. Furthermore, § 2 no .4, 5 of the Regulation on travel agencies implementing Art. 7 of the Directive 90/314 explicitly limits the notion of traveller to persons who make the booking.

177 According to the Preparatory Works, the definition of ‘traveller’ covers all three parts of the definition.

178 Portuguese law entirely relies on the concept of ‘client’.

179 In Slovenian law, no explicit definition of a ‘consumer’ is given; it only mentions the rights and obligations of the “passenger, traveller” without further explanation. It is accepted, that the traveller under the Code of
aa. The principal contractor

In opposition to the Directive, POLAND excludes professionals from the definition. Thus, it possibly contradicts the content of the definition in the Directive. GERMAN law\(^{180}\) only mentions the ‘traveller’ as one of the contracting parties being understood as a person concluding a travel contract in his/her own name, even though he/she does not make use of the travel service his/herself. This is substantially the same in the CZECH REPUBLIC and the NETHERLANDS\(^{181}\), were the ‘traveller’ is simply the other party to the contract. In FRANCE\(^{182}\) and LUXEMBOURG\(^{183}\), the law only mentions the notion of ‘purchaser’ whereas HUNGARIAN\(^{184}\) and ESTONIAN\(^{185}\) law resort to the term ‘traveller’. In SLOVAKIA, the ‘purchaser’ is a person who concludes a contract with the travel bureau. LITHUANIA introduces a definition which totally deviates from the ‘consumer’ definition in the Directive. Lithuanian law\(^{186}\) knows the term ‘tourist’ being defined as “a natural person who for familiarisation, professional, business, ethnic, cultural, recreational, wellness, religious or special reasons travels within a country or other countries and remains for at least one night but no longer than one year outside the limits of his permanent place of residence if this is not because of his studies or paid work”.

<table>
<thead>
<tr>
<th>Table: National transposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantively equivalent as in the Directive</td>
</tr>
<tr>
<td>Variations: exclusion of professionals</td>
</tr>
<tr>
<td>Variations: concept of tourist</td>
</tr>
<tr>
<td>No legal definition at all</td>
</tr>
</tbody>
</table>

Obligations might be any person (therefore the relationship traveller-organizer is not limited to the consumer-professional relationship).

\(^{180}\) CC, § 651a(1).

\(^{181}\) CC Book 7 Art. 500(1)(a).

\(^{182}\) Tourism Code, Art. L 211-11.

\(^{183}\) Package Travel Act , Art. 8.

\(^{184}\) In Hungarian legislation, the principal contractor is referred to as ‘traveller’.

\(^{185}\) Law of Obligations Act , Art. 866(1).

\(^{186}\) Law on Tourism, Art. 2 no. 14.

\(^{187}\) In Belgian law, no explicit mention of “agrees to take the package” as in the Directive exists.

\(^{188}\) The legal text explicitly mentions natural and legal persons.
bb. The other beneficiaries

About half of the member states have introduced a similar notion of ‘the other beneficiaries’ into their concept of consumer. Again, POLISH law explicitly excludes professionals whereas SPANISH law deliberately omitted to include legal persons in the definition. LATVIAN law uses a different expression than in the Directive: anyone who purchases a package tourism service on behalf of a third person is protected instead of “on whose behalf the principal contractor agrees to purchase the package” like in the Directive’s definition. In a various number of member states, no legal transposition of this definition’s part exist (namely ESTONIA, FRANCE, GERMANY, LUXEMBOURG, PORTUGAL, SLOVENIA). In Germany, only persons having an own claim are explicitly mentioned. Nevertheless, by applying the concept of contract in favour of third parties, also the ones without own rights, for example travelling relatives, are protected. SWEDISH law defines “anyone who purchases a package tour, either directly or through a third party” as a ‘traveller’. Thus, indirectly also the persons on whose behalf the traveller purchases a package tour, are included in the definition. In SLOVAKIA, a person to whose advantage the contract about the tour was made, is also included in the definition.

Table: National transposition

| Substantively equivalent as in the Directive | AT, BE, CY, CZ, DK, EL, FI, IE, IT, MT, NL, SK, SE, UK (14) |
| Variations: exclusion of legal persons | ES (1) |
| Variations: exclusion of professionals | PL (1) |
| Not explicitly transposed | HU, LT, LV (3) |
| No legal definition at all | EE, FR, DE, LU, PT, SL (6) |

189 Only the term ‘traveller’ is mentioned in Slovenian law (indirectly defining it as the one to whom the organizer is obliged to supply a package) whereas principal contractor, transferee and beneficiaries are not mentioned.

190 It is unclear whether this definition also covers the beneficiary of the travel package purchased by a third person.

The notion of the ‘transferee’ has been introduced in the national legislation by the vast majority of the member states, however by use of different methods. In those member states, which have not expressly transposed this notion, it is possible that the transferee is indirectly covered according to general rules of contract law. For instance, under GERMAN and SLOVAKIAN law, the rules on assignment or on transfer of contract lead to the result that the transferee is considered as the traveller and therefore protected as such. BELGIAN law indirectly covers the transferee by including “everyone who benefits from the contracts (…) whether or not he concluded the contract himself”\textsuperscript{192}. In an indirect way, FINNISH law\textsuperscript{193} also includes this third part of the Directive’s definition by characterising the ‘traveller’ as a person “who has the right to participate in a holiday on the basis of a contract that some other person or corporate body has made”. Again, the SPANISH legislator has opted for the omission to embrace legal persons in the definition. The SLOVAKIAN definition of ‘purchaser’ includes the person, to which the tour was ceded according to the terms of the CC. In CZECH law, the ‘transferee’ is a person who takes the package instead of the primary customer becoming ‘customer’ himself from the day when the travel agency received the notification of the transfer\textsuperscript{194}.

\textbf{Table: National transposition}

| Substantively equivalent as in the Directive | AT, BE, CY, CZ, DK, EL, FI, IE, IT, MT, NL, SK, UK (13) |
| Variations: exclusion of legal persons | ES (1) |
| Variations: exclusion of professionals | PL (1) |
| Not explicitly transposed | HU, LT, LV\textsuperscript{195}, SE\textsuperscript{196} (4) |
| No legal definition at all | EE, FR, DE, LU, PT, SL (6) |

\textsuperscript{192} Art. 1, sent. 1 no. 5 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.

\textsuperscript{193} § 3(2) Package Travel Act of 28 November 1994/1079.

\textsuperscript{194} CC, Sec. 852f(1).

\textsuperscript{195} It is unclear whether the definition of ‘client’ also covers the transferee of the travel package purchased by a third person.

\textsuperscript{196} It is unclear whether the definition of ‘traveller’ also covers the transferee of the package tour purchased by a third person.
2. Organiser

According to Art. 2 no. 2 of the Package Travel Directive, “‘organiser’ means a person who, other than occasionally, organises packages and sells or offers them for sale, whether directly or through a retailer”.

It should be noted that this definition refers to the definition of ‘package’ and that the ECJ has held in its decision Club Tour, C-400/00, with regard to this definition, that the term must be interpreted so as to include holidays organised by travel agents, at the request of and in accordance with the specifications of a consumer. This decision expressly includes combinations of tourist services put together at the moment when the contract is concluded between the travel agency and the consumer. Therefore the term ‘organiser’ does not only cover the typical tour organisers, which sell pre-arranged packages via travel agencies and other retailers. Also travel agencies or internet platforms which spontaneously combine, on the specific request of the consumer, several tourist services like flights and hotel accommodation offered by different service providers, and thereby fulfil the definition of ‘package’, are covered by the notion of ‘organiser’.

Deviating from other Consumer Protection Directives, where the term “trader” (or similar) is used, being further defined as the person acting within his/her professional activity, the definition of ‘organiser’ in the Package Travel Directive comprises all persons not acting ‘occasionally’. Thus, its scope of application on the one hand covers both natural and legal persons. On the other hand, not only tradesmen, but also individuals or non-commercial organisations not acting on occasion meet the requirements of the definition. This interpretation has been confirmed by the ECJ in the case Afs intercultural, C-237/97, in which a non-commercial person, the ‘AFS Intercultural Programs Finland ry’, has been seen as an ‘organiser’ in the sense of the Directive 90/314. The Directive itself does not offer any explanation as to the content of the term ‘occasionally’ and could thus be considered imprecise. In the course of a review of the Consumer Directives, it may also be worth to consider whether the term ‘organiser’ should be harmonised with the definitions of ‘trader’ (etc.) in the other Consumer Directives.
**a. Transposition in general**

The majority of the member states implemented the term ‘organiser’ with slight variations of the wording, such as ‘travel’ or ‘tour organiser’. ESTONIA and LATVIA introduced the notion of ‘tour/tourism operator’; Latvian law uses moreover the generic term of ‘undertaking (company)’ in its two transposition laws when mentioning the counterparty of the consumer. According to the Regulations on Package Tourism Services, the “services are prepared by the tourism operator or the package tourism undertaking”. The Latvian Tourism Law defines the ‘package tourism undertaking’ as “an undertaking (company) that carries out the functions of both a tourism operator and a tourism agency”, whereas the ‘tourism agency’ shall have the function of an intermediary. Thus, the different terms, not only the one of ‘tourism agency’ as part of the definition of ‘organiser’ and being itself defined as intermediary, are used incoherently in the legislative texts and are likely to cause confusion.

POLISH law contains three main categories of traders, ‘organiser of tourism’, ‘tourism intermediary’ and ‘tourist agent’. The ‘organiser of tourism’ being defined as a trader organising tourist events transposes the Directive’s definition. Although it is not explicitly stated in Polish law that the organiser sells packages, it is likely to draw the conclusion that, in interpreting the rule according to Community law, this is also included in the field of activity of the organiser.

IRELAND uses the Directive’s definition of ‘organiser’ but also the term ‘package provider’ as catchall element for the organiser or both the organiser and retailer, if the retailer is also party to the contract. FRENCH and LUXEMBOURG law does not state any term of the consumer’s counterparty but only mentions a “natural or legal person”.

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197 Tourism Law, Cabinet Regulation 163.
198 Cabinet Regulation 163, Art. 2.
199 Tourism Law, § 1(1) no. 6.
200 Tourism Law, § 1(1) no. 19.
201 Being a trader who, at a request of a customer, conducts any legal or factual acts concerning the conclusion of contracts for tourist services.
202 Closest definition to the one of ‘retailer’ in the Directive. ‘Tourist agent’ is a trader who permanently acts as a go-between in concluding contracts for tourist services in the name of the organisers of tourism.
203 Art. 3 no. 5 of the Act on Tourist Services.
204 S. 2(1), 11th indent, sent. 3 of the Package Holidays and Travel Trade Act, 1995.
207 Package Travel Act, Art. 1.
Terms related to the business of travel agencies are used in the Czech Republic, Portugal, and Slovakia. Portuguese law uses the notion of ‘travel or tourism agency’ (agência de viagens e de turismo) being defined as an enterprise exercising activities listed in the transposition law which are typically associated with travel bureaus. Czech law generally ties up to the ‘operator of a travel agency’ who shall be a licensed entrepreneur. Slovakian law “applies to services provided by travel bureau operators (…)”. The travel bureau is considered a businessman being qualified by trade license to conclude the package travel contract in contrast to the ‘travel agency’ (retailer). But it remains somewhat unclear whether – besides the term ‘travel bureau’ – also the term ‘travel agency’ shall define the organiser.

Thus, many national transposition laws do not distinguish as clear as the Directive between ‘organiser’ and ‘retailer’. This seems to be due to the fact that travel agencies/bureaus may carry out different roles, the one of an organiser and of a retailer (cf. also ECJ Club Tour, C-400/00). The Directive’s definition shows that the function of the acting party shall predominate and not the general characteristic as ‘travel agency’. A travel agency may either act as an ‘organiser’ combining independently different elements of a trip or as an agent (being then a ‘retailer’) selling packages combined by other organisers. The Directive itself could make clearer who bears the duties imposed by the Directive and that a travel agency has to be considered as an ‘organiser’ if it fulfils the definition. The ECJ has given some guidance for this distinction in its cases Club Tour, C-400/00, and AFS Intercultural, C-237/97.

Table: Use of terms

<table>
<thead>
<tr>
<th>Organiser</th>
<th>AT, BE, CY, DE, DK, EL, ES, FI, IE, IT, LT, MT, NL, PL, SE, UK (16)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operator</td>
<td>EE, LV* (2)</td>
</tr>
<tr>
<td>Undertaking</td>
<td>LV* (1)</td>
</tr>
<tr>
<td>Package provider</td>
<td>IE (1)</td>
</tr>
<tr>
<td>Travel organiser</td>
<td>SL (1)</td>
</tr>
</tbody>
</table>

208 Art. 1(1) of the Decree-Law 209/97.
209 Arts. 1(2), 2 (1) of the Decree-Law 209/97. According to Portuguese legislation, the concept of enterprise (company, undertaking) includes in this regard, among others, limited liability unipersonal establishments (e.g. European Groupments of Economic Interest), cooperatives or commercial corporations – c.f. Art. 1(2) of Decree-Law 209/97. Before the modifying Decree-Law 12/99, individuals with unlimited liability could also be considered as an enterprise.
210 § 1 of the Package Travel Act 281/2001.
b. Transposition in particular

aa. Overview

About one third of the member states have transposed the content of the Directive’s definition of ‘organiser’. The vast majority of the European countries has, however, introduced variations implementing the definition (for more details see under point bb). The GERMAN law does not offer an explicit definition of who should be considered an organiser. The relevant provisions simply use the term ‘organiser’ when addressing the person obliged to provide the package to the traveller. It is commonly recognized, that, in principle, any individual or legal entity who/which is responsible for organising and offering a trip can be an organiser\(^{213}\).

Table: National Transposition

| No substantive deviation | AT, DK, IE\(^{214}\), MT, SE, UK (6) |
| Variations               | BE, CY, CZ, FI, EE, EL, ES\(^{215}\), HU, IT, LV, LT, NL, PL, PT, SK, SL\(^{216}\) (16) |
| No legal definition      | DE (1) |

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\(^{211}\) The Government Decree 213/1996 makes use of the term ‘travel enterprise’ which covers ‘organisers’ and ‘retailers’ of travels according to the relevant other decree to which it refers in the definition.

\(^{212}\) Art. L 211-1 of the Tourism Code mentions nevertheless the application to “any natural or legal person involved in the organisation or selling of travels”.

\(^{213}\) E.g. BGH judgment of 24 November 1999, I ZR 171/97.

\(^{214}\) However, legal interpretation as to when a person does not act “occasionally”.

\(^{215}\) A slight variation in the wording exists as “natural and legal person” are explicitly mentioned in the Law 21/1995 which regulates package travels. Cf. No. 2 of the Additional Disposition of the same law regulating that the organiser must be a ‘travel agent’ according to the administrative legislation.

\(^{216}\) It should be noted that the Code of Obligations does not define the notion of ‘organiser’ but only explains that the seller of a package travel being arranged by an organiser whose seat is in another state, is deemed to be an organiser as well. A definition of organiser/tourist agent is contained in the Promotion of Tourism Development Act: a sole trader or a juristic person.
bb. Variations

Variations exist in several aspects of the definition. About two thirds of the member states have omitted to demand that the person has to act “other than occasionally”. Thus, one could draw the conclusion that also persons acting on occasion as a travel organiser have to respect the provisions of the national law on Package Travel. But many of these member states restrict the definition to persons acting professionally, which should also exclude the most occasional activities. However, CYPRIOT and ITALIAN laws seem to include occasionally operating organisers into the definition. GERMAN legislation excludes the provisions concerning duties to provide security funds in case of insolvency and the regulations concerning the information duties from the application to occasional organisers.217

Usually, no further explanation can be found in the national laws as to what is meant by ‘occasionally’. IRELAND however provides interpretation guidelines by classifying groups whose members may be regarded as acting ‘occasionally’ (e.g. school and educational institutions, religious groups)218. Moreover, in the GERMAN legal reasoning it is stated that a person not organising trips more than twice shall be regarded as acting on occasion219.

According to CZECH law, ‘travel agency’ means the provider of a travel agency220, thus restricting it to its business. In SPAIN, the organizer must be a ‘travel agent’ according to the corresponding administrative legislation221.

In HUNGARIAN law, the scope of application of the transposing Decree No. 213/1996 only extends to economic organisations established in Hungary, which normally undertake

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217 § 11 of the Regulation on duties to supply information in civil law, CC § 651k(6) no. 1.
218 S. 3(2) of the Package Holidays and Travel Trade Act, 1995.
219 In the legal reasoning, the German legislator stipulated that 1 or 2 events per year do not exceed occasional actions, Bundestag Printed Paper 12/5354, pg. 13.
220 CC, sec.852a(1).
221 No. 2 of the Additional Disposition of the Law 21/1995 which regulates package travels.
activities as domestic and international tour operators and agencies, and to Hungarian branch offices of foreign registered companies. The Hungarian Decree furthermore states its non-application to travel arrangements of educational institutes for students in the form of a scholarship (including accompanying guides), and, as the only legislation, to travel arrangements of not professionally organised associations and non-profit organisations which have been arranged for the members at cost price without producing any profits.

LITHUANIAN law states in its Law on Tourism that ‘organiser’ only means “a legal person who is regularly engaged in the business of tourism...”. However, the Lithuanian Civil Code does not limit the definition of organiser to only legal persons but only speaks of ‘person’ and does not include the requirement of ‘regularly’ or ‘other than occasionally’.

**Table: Variations**

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>No (express) requirement of acting other than occasionally</td>
<td>BE, CY, CZ, DE, EE, EL, FI, HU, IT, NL, PL, PT, SK, SL</td>
</tr>
<tr>
<td>Classification guidelines as to the term ‘occasionally’</td>
<td>IE, DE</td>
</tr>
<tr>
<td>Restriction to commercial persons</td>
<td>BE, CZ, EE, EL, ES, FI, FR, HU, LT, NL, PL, PT, SK, SL</td>
</tr>
<tr>
<td>Explicit mention of natural and legal persons</td>
<td>EL, ES, FR, LU</td>
</tr>
<tr>
<td>Qualified exclusion of non-profit organisations</td>
<td>HU</td>
</tr>
</tbody>
</table>

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222 § 1(2)(a), (c), (d), (g) of the Government Decree No. 213/1996.
223 Art. 2(5) of the Law on Tourism.
224 Civil Code, Art. 6.747(3).
225 Some specific provisions exist for natural or legal persons who occasionally and with a non-lucrative goal exercise tours.
226 The Code of Obligations does not define who an organizer is. But the Promotion of Tourism Development Act defines who may be an organizer/seller of tourist arrangements: a sole trader or a juristic person.
227 According to Belgian law commercial persons are defined as persons engaged in an economic activity which constitutes an act of commerce referred to in Art. 2 and 3 of the CommC (Art. 1, 2° of the Trade Practices Act).
228 § 1 of the Package Travel Act illustrates that the scope of application shall comprehend packages which are offered for consideration “by a trader who organizes or procures tourist services other than occasionally”.
229 Art. L.212-1 of the Tourism Code precises that the activities referred to in Art. L 211-1 of the same Code can only be exercised by natural or legal persons who are ‘traders’ possessing a ‘travel agent license’. According to Art. 212-3 of the Tourism Code, the owner of such a ‘travel agent license’ established in France may not exercise other activities.
226 Some provisions exist with respect to social solidarity institutions or public administrative institutions.
cc. Requirement of a trade license

In addition to the requirements of Directive 90/314, some member states require that the organiser must have a license or authorisation for his activity. For instance, the CZECH regulations\(^{232}\) require an authorization of the travel agency by a trade license for concessionary trade, for which the existence of a security is mandatory condition. In the recently adopted ITALIAN Consumer Code, the requirement of a license has not been perpetuated in the definition of organiser, but is listed in Art. 86(1)(b) of the Consumer Code according to which, among others, the terms and the license of the organiser (or retailer) signing the contract become mandatory content of the contract. The main competences for the licence and authorisation procedure however have been transferred to the Italian Regions\(^{233}\). In HUNGARY\(^{234}\), the travel enterprises have to be registered in the statutory public register maintained by the Hungarian Trade Licensing Office. Individual entrepreneurs may pursue their activities as individual companies. According to ESTONIAN law, an „undertaking“ has to be listed in the commercial register. Further examples for license requirements could be found in FRANCE, PORTUGAL and SLOVAKIA. In the UNITED KINGDOM, a licensing system exists in the field of packages involving flights\(^{235}\) requiring persons (not acting as ‘retailer’) to hold an Air Travel Organiser’s licence (ATOL) issued by the Civil Aviation Authority (CCA). In POLISH law, organisers are required to enrol in the register for organisers of tourism and tourism intermediaries\(^{236}\). Whilst the MALTESE Package Travel Regulations do not expressly require a licence of the organisers or retailers, the Malta Travel and Tourism Services Act states that a ‘travel agent’ needs to be licensed by the Malta Tourism Authority\(^{237}\). Accordingly, ‘organisers’ are also required to be licensed as ‘travel agents’ under the...

\(^{232}\) Sec. 2(1) of the Act No. 159/1999 concerning conditions of entrepreneurs in the area of tourism and travel agencies, the travel agency must have a licence as prerequisite of doing business of package travels (excursions). The conditions for such a licence are stated in sec. 5 of the same Act.

\(^{233}\) Art. 11(6) of Law No. 135 of 29 March 2001 on the reform of national tourist law.

\(^{234}\) Art. 2 – 6 of the Government Decree No. 213/1996.

\(^{235}\) The Civil Aviation Regulations 1995.

\(^{236}\) Art. 4 no. 1 of the Act on Tourist Services.

\(^{237}\) Art. 27 of the Malta Travel and Tourism Services Act. Under Art.2 of this Act, a ‘travel agent’ means any person who advises or undertakes to provide travel arrangements including accommodation for outgoing travel.
aforesaid Act. In SLOVENIA, organisers and sellers of a tourist arrangement have to obtain a license issued by the Chamber of Commerce\textsuperscript{238}.

SPANISH law prescribes that the organiser (and retailer) shall have the qualification as ‘travel agents’ according to the corresponding administrative legislation\textsuperscript{239}. According to LITHUANIAN legislation, the organiser must be engaged in the business of tourism in accordance with the procedure and terms prescribed by laws.

3. Retailer

Article 2 no. 3 of Directive 90/314 defines ‘retailer’ as “the person who sells or offers for sale the package put together by the organiser”. It should be noted that the Directive nearly always makes use of the term retailer in a formula like “the organiser and/or retailer”. This legislative technique gives discretion to the member states whether the organiser or the retailer (or both) shall be obliged to fulfil the duties imposed by the Directive. Thus, if a member state decides that only the organiser shall bear the obligations towards the consumer, this member state does not really need the definition. It should also be borne in mind, that because of the broad definitions of ‘organiser’ and ‘package’ by the ECJ in the Club Tour judgement, C-400/00, travel agents, which organise holidays at the request of and in accordance with the specifications of a consumer and thereby combine tourist services in the sense of the definition of ‘package’, in many cases will be considered as ‘organiser’ and not just as ‘retailer’.

a. Overview

Most member states have transposed the definition of ‘retailer’ in their special act on package travel, some – like HUNGARY and SLOVENIA – have further definitions in other laws or decrees. By contrast, FINLAND, FRANCE, GERMANY, LUXEMBOURG and PORTUGAL do not provide any definition of ‘retailer’ in their laws.

\textsuperscript{238} Art. 35 of the Promotion of Tourism Development Act.
\textsuperscript{239} Second Additional Disposition of the Law 21/1995 which regulates package travels.
Whereas most of the member states which have a definition, employ the term ‘retailer’, some also use terms like ‘agent’ (DENMARK), ‘travel agent’ (LITHUANIA, POLAND and SLOVENIA) or ‘travel arranger’ (BELGIUM). As the definitions are close to the Directive, such variations do not seem to be problematic.

**Table: Use of terms**

<table>
<thead>
<tr>
<th>Description</th>
<th>AT(^{249}), CY, EE, DE, EL, HU, IE, IT, LV, MT, ES, UK (12)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retailer</td>
<td>DT(^{246})</td>
</tr>
<tr>
<td>Agent</td>
<td>DK (1)</td>
</tr>
<tr>
<td>Travel agent</td>
<td>LT, SL (2)</td>
</tr>
<tr>
<td>Travel agency</td>
<td>CZ, SK (2)</td>
</tr>
<tr>
<td>Tourist agent</td>
<td>PL (1)</td>
</tr>
</tbody>
</table>

\(^{240}\) Art. 1 no. 4 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.

\(^{241}\) Art. 2 of the Package Travel, Holidays and Tours Law of 1998.

\(^{242}\) § 3 subs. 2 of the Act No. 472/1993 on Package Travels; § 3 subs. 2 of the Act no. 315/1997 on the Travel Guarantee Fund.

\(^{243}\) Art. 2(1) no. 3 Decree No. 339/96 on package travel.

\(^{244}\) Art. 3 no. 7 of the Act on Tourist Services.

\(^{245}\) § 2 no. 3 of the Regulation on travel agencies implementing Art. 7 Package Travel Directive.


\(^{247}\) Even though there is no specific definition of the term ‘retailer’, the distinction between the latter and the organiser exists. E.g. Art. L 211-11 of the Tourism Code mentions the ‘organiser’ and the ‘vendor’; with respect to responsibility, Art. 211-17 of the same Code prescribes a joint liability of all persons having participated in the organisation or the selling of a package travel.

\(^{248}\) In Art. 1 of the Package Travel Act, the obligations of an organiser are extended to retailers.

\(^{249}\) Only the two implementing Decrees (Regulation on travel agencies, Regulation on travel agencies implementing Art. 7 Package Travel Directive) resort to the term “retailer”; it is not mentioned in the Consumer Protection Act.
b. Transposition in particular

The Directive’s definition can also be found in CYPRUS, ESTONIA, GREECE, IRELAND, LATVIA, MALTA, SPAIN and the UNITED KINGDOM. DENMARK\(^{251}\) and POLAND\(^{252}\) use a seemingly similar definition by not requiring a package „put together by the organiser“ but a sale „on behalf of the organiser“.

In LITHUANIA, the definition is slightly different, a travel agent shall act as an intermediary in selling organised tourist journeys and/or various tourist services\(^{253}\).

In AUSTRIA\(^{254}\) and BELGIUM\(^{255}\), only persons who act commercially\(^{256}\) can be a retailer. Similarly, in SPANISH law, the retailer shall have the qualification as ‘travel agent’ according to the corresponding administrative regulation\(^{257}\).

Under HUNGARIAN\(^{258}\) law, only those retailers fall in the scope of the transposition law that act for a Hungarian tour organiser. This restriction results from an amendment on May 13, 2005. Because of a possible infringement of Art. 49 EG Treaty, persons acting as commission agent of foreign tour organisers are not considered as ‘retailers’ any more. DUTCH law, however, contains no definition but a provision saying that a retailer (who is called ‘intermediate person’) acting on behalf of a foreign organiser is to be considered as the organiser. Member states like FINLAND, GERMANY and PORTUGAL do not provide a definition

\(^{250}\) The law sometimes uses indistinctively the term of ‘travel agent’. Portuguese law seems to have merged in a way the concepts of ‘organiser’ and ‘retailer’.

\(^{251}\) § 3(2) of the Act No. 472/1993 on Package Travels; § 3(2) Act No. 315/1997 on the Travel Guarantee Fund.

\(^{252}\) Art. 3 no. 7 of the Act on Tourist Services.

\(^{253}\) Art. 2(7) of the Law on Tourism.

\(^{254}\) § 2 no. 3 of the Regulation on travel agencies implementing Art. 7 Package Travel Directive.

\(^{255}\) Art. 1 no. 4 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.

\(^{256}\) In Belgium, commercial persons are characterised as being engaged in an economic activity which constitutes an act of commerce referred to in Art. 2 and 3 of the Commercial Code (Art. 1, 2° of the Trade Practices Act).

\(^{257}\) No. 2 of the Additional Disposition of the Law 21/1995 which regulates package travels.

\(^{258}\) Art. 1(2) lit. b of the Government Decree No. 213/1996.
at all. Nonetheless, the term is mentioned in German law with respect to the regulations concerning the refund of money in case of insolvency. The implementing provisions of the German Civil Code generally focus on the contractual relationship between the organiser and the traveller. The relation between the traveller and the retailer is not regulated expressly. According to the rules of general contract law, this relation is usually covered by an agency agreement. Thus, the traveller can make the retailer liable only in exceptional cases (e.g. wrongful advice).

The transposition laws of France and Luxembourg do not – as already mentioned above – use a specific term for retailers but provide uniform regulations for organisers and persons which Art. 2 no. 3 of the Directive defines as retailers.

Several member states have supplemented their provisions on retailers by administrative requirements. For instance, Slovakian transposition laws stipulate certain qualification from the retailer (e.g. a special education or skills in foreign languages). It should also be noted that some member states require a trade license in order to become a package tour retailer.

![Table: National transposition](image)

<table>
<thead>
<tr>
<th>No substantive deviation</th>
<th>CY, EE, EL, IE, IT, LV, LT, MT, UK (9)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No legal definition</td>
<td>DE, FI, NL, PT (4)</td>
</tr>
<tr>
<td>Restriction to commercial persons</td>
<td>AT, BE, ES, SK (4)</td>
</tr>
<tr>
<td>Agent of domestic tour organiser</td>
<td>HU (1)</td>
</tr>
<tr>
<td>Offer or sale of a package tour on behalf of an operator</td>
<td>DK, PL (2)</td>
</tr>
<tr>
<td>Uniform rules for organisers and retailers</td>
<td>FR, LU (2)</td>
</tr>
<tr>
<td>Qualified to provide services</td>
<td>SL (2)</td>
</tr>
</tbody>
</table>

259 CC, § 651k (3), sent. 4, (4).
260 In Art. L 211-1 of the Tourism Code, the obligations of an organiser are extended to retailers.
261 In Art. 1 of the Package Travel Act of 14 June 1994, the obligations of an organiser are extended to retailers.
263 This has not been systematically scrutinised; an example, of several, would be Italy: Art. 83(1)(b) of the Consumer Code.
264 Art. 37 of the Promotion of Tourism Development Act regulates conditions for travel agents, in order to obtain a licence. The travel agents must e.g. provide documentary proof that their activity is registered in the
4. Package

According to Article 2 no. 1 of Directive 90/314, “‘package’ means the pre-arranged combination of no fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

(a) transport;
(b) accommodation;
(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package

The separate billing of various components of the same package shall not absolve the organiser or retailer from the obligations under this Directive”.

The ECJ has held in its decision Club Tour, C-400/00, with regard to the notion of package, that the term must be interpreted so as to include holidays organised by travel agents, at the request of and in accordance with the specifications of a consumer. According to the same decision the requirement that the package must be ‘pre-arranged’ also includes combinations of tourist services put together at the moment when the contract is concluded between the travel agency and the consumer.

a. Transposition in general

Some member states have created a special law on package travel in which the definition of package can be found. Others have included the definition of package into an existing more general law, for example the Civil Code (NETHERLANDS, as one of the two transposing definitions in LITHUANIA), a Consumer Protection Act or Consumer Code (AUSTRIA, ITALY)
or a Tourism Act (ESTONIA, FRANCE, LATVIA, LITHUANIA). The GERMAN legislator has kept an existing definition of travel contract which can be found in the Civil Code. In POLAND, there is no specific legislative transposition of the definition of package. In Austria, the Directive’s definition is transposed in three different legislative acts, each with varying content. Similarly, in SLOVENIA, different expressions are used in the Code of Obligations and the Promotion of Tourism Development Act.

Table: Transposition Method

<table>
<thead>
<tr>
<th>In a special act on package travel</th>
<th>BE, CY, CZ 265, DK, FI, EL, HU 266, IE, LU, MT 267, PT, SK, ES, SE, UK (15)</th>
</tr>
</thead>
<tbody>
<tr>
<td>In a general regulation</td>
<td>Civil Code</td>
</tr>
<tr>
<td></td>
<td>DE 268, HU 269, NL, LT (4)</td>
</tr>
<tr>
<td></td>
<td>Consumer Protection Act / Consumer Code</td>
</tr>
<tr>
<td></td>
<td>AT, IT (2)</td>
</tr>
<tr>
<td></td>
<td>Tourism Act</td>
</tr>
<tr>
<td></td>
<td>EE, FR, LV, LT (4)</td>
</tr>
<tr>
<td>Other</td>
<td>AT 270, EE 271, SL 272 (3)</td>
</tr>
<tr>
<td>No specific legislative transposition</td>
<td>PL (1)</td>
</tr>
</tbody>
</table>

The majority of the member states seem to use the term ‘package’ (partly with slight amendments, e.g. package travel) as proposed in the Directive. FRENCH law knows, for example, the term ‘tourist package’ 273. On the contrary, GERMAN and DUTCH laws simply employ ‘travel contracts’. The BELGIAN legislator made use of the term ‘travel organisation contract’ and the LITHUANIAN legislator uses the term ‘contract for the provision of tourist services’. In the POLISH regulation, the term ‘tourist event’ is used. The AUSTRIAN legislator

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265 Definition of package; further regulations on package travel can be found in the Civil Code.
267 Art. 2 of the Travel and Tourism Services Act.
268 There are two slightly different definitions used in the German CC. The wording is identical but the scope is different: CC, § 651a(1) (concerning the rights of the traveller) is also applicable for trips without a duration of at least 24 hours or overnight accommodation, whereas in § 651k(6) (concerning security in case of insolvency) only services with a duration of at least 24 hours or with an overnight stay are included.
269 CC, § 415.
270 § 2(1) of the Regulation on travel agencies implementing Art. 7 Package Travel Directive, § 2(1) of the Regulation on travel agencies.
271 § 866(2), (3) of the Law of Obligations Act.
272 Art. 33 of the Promotion of Tourism Development Act, Art. 883(1) of the Code of Obligations.
made use of the term ‘package’ in the Consumer Protection Code whereas the term ‘travel event’ is used in the Decree on travel insurance274.

Table: Use of terms

<table>
<thead>
<tr>
<th>Package</th>
<th>AT, CY, DK, EE, EL, ES, FI, FR, HU*, IE, IT, LT, LU, LV, MT, PT, SE, SL275, UK (19)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Travel event</td>
<td>AT (1)</td>
</tr>
<tr>
<td>Tourist event</td>
<td>PL (1)</td>
</tr>
<tr>
<td>Travel contract</td>
<td>BE, DE, NL, HU276*, LT (5)</td>
</tr>
<tr>
<td>Excursion</td>
<td>CZ, SK (2)</td>
</tr>
</tbody>
</table>

* more than once

b. Transposition in particular

About half of the member states have transposed the definition of ‘package’ as stated in the Directive, whereas the other member states’ definitions deviate from the Directive. Deviations in the transposition mainly concern the need for overnight accommodation and duration of at least 24 hours on the one hand and the significant proportion of other travel services on the other. In AUSTRIA, the definitions of ‘package’ are different in the several legislative acts. In the two legislative decrees277 the original text of the Directive is used. On the contrary, in the Consumer Protection Act, the definition is wider, not stipulating the need for a duration of at least 24 hours or overnight accommodation. Moreover, the other services do not need to be a significant proportion of the package. The GERMAN legislator has not specifically transposed the definition, but decided to keep the existing definition of the travel contract in the Civil Code considering that it should be wider than the Directive. The definition does not speak of a combination of certain elements. However, it is considered that the term used ‘entirety of travel services’ means the combination of at least two services. Concerning the duration of at least 24 hours and overnight accommodation, different provisions exist. § 651a(1) CC

274 Regulation on travel agencies implementing Art. 7 Package Travel Directive.
275 The Promotion of Tourism Development Act makes use of the term ‘tourist arrangement’ whereas the Code of Obligations uses a descriptive term ‘package of services comprising transport, accommodation and other services thereto connected’.
276 Government Decree No. 214/1996 makes use of the term ‘travel contract’ when transposing the definition of ‘package’ in contrast to the definition in Decree No. 213/1996.
277 Regulation on travel agencies implementing Art. 7 Package Travel Directive, Regulation on travel agencies.
(concerning the rights of the traveller) is also applicable to trips without a duration of at least 24 hours or overnight accommodation, whereas in § 651k(6) CC (concerning security in case of insolvency) only services with a duration of at least 24 hours or with an overnight stay shall be included. On the whole, consumer protection shall be provided to the extent as prescribed by the Directive.

In PORTUGAL, the definition was transposed as stated in the Directive. Additionally there are examples given for ‘other services’. These are “in particular those connected with sporting, religious or cultural events, as long as they represent a significant part of the trip”. SLOVAKIAN law makes use of the term ‘excursion’. This is also a previously prepared stay only including accommodation, if the duration is at least three nights and the accommodation takes place in a single lodging establishment including tents, caravans or private lodging\(^{278}\). According to the new amendment, it is sufficient for the qualification of ‘previously’ prepared combination of services that they are prepared in the moment of contractual conclusion\(^{279}\). Furthermore, the notion will also include the combination of services based on individual requirements. On the contrary, the insurance of package participants is expressly excluded from being a service in that sense.

In the UNITED KINGDOM, the scope is wider than prescribed by the Directive as the regulation expressly states that the fact that a combination is arranged at the request of the consumer and in accordance with his specific instructions (whether modified or not) shall not of itself cause it to be treated as other than pre-arranged. On the contrary, e.g. in the CZECH REPUBLIC and in GERMANY, an arranged combination at the request of the consumer used to not be regarded as being a package. This might change under the influence of the ECJ case Club Tour, C-400/00. According to the HUNGARIAN definition, a package requires a combination of transport, accommodation or other services. Examples for other services (meals, guided tours, cultural programs) are given in the CC, as well in the Government Decree. The other services do not need to be a significant proportion of the package\(^{280}\). In the CZECH Republic, the definition is very similar to the one in the Directive. Only with regard to threshold of price share of the other tourist services, it is stated that they need to be a significant part of the travel or that


\(^{280}\) Examples for other services contained in Government Decree 214/1996.
their price must at least be 20% of the whole price of the package. In the following paragraph certain contracts are expressly excluded from being a package, for example combinations completed on individual request\(^{281}\). The POLISH Law on Tourism refers to tourist services, defined as services like tour guiding, accommodation and all other services offered to tourists or visitors. Tourist events\(^{282}\) are characterised as a combination of at least two tourist services to create one programme and covered by an inclusive price, if these services include a sleeping arrangement or have a duration of at least 24 hours or if the programme contains a change of place. Thus, as a deviation from the Directive, the duration of at least 24 hours or the overnight stay are not necessary, if the package includes a change of place.

Table: Content of the definition

| Substantively equivalent as in the Directive | AT\(^{283}\), BE\(^{284}\), CY, DK, EE\(^{285}\), EL, ES, FR, IE, LT, LU, MT, NL, UK (14) |
| No expressive transposition of which tourist services need to be combined | DE, LV (2) |
| No need to cover a period of more than 24 hours or to include overnight accommodation | AT\(^{286}\), FI, DE, PL\(^{287}\) (4) |
| ‘Other tourist service’ do not need to be a significant proportion of the package | PL, DE, HU, LV (4) |
| No definition except of ‘package of travel services’ | DE\(^{288}\) (1) |

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\(^{281}\) § 1(2) of the Act 159/1999 on some conditions of business operation in the tourism industry.

\(^{282}\) Art. 3(2) of the Act on Tourist Services.

\(^{283}\) Only in § 2(1) of the Regulation on travel agencies implementing Art. 7 Package Travel Directive and in the Regulation on travel agencies; not in § 31b(2) of the Consumer Protection Act.

\(^{284}\) Art. 1 no. 1, 1\(^{st}\) sent. (c) of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.

\(^{285}\) The only deviation is the use of „passenger service” instead of „transport” in Art. 7(1), (2) of the Tourism Act.

\(^{286}\) Only in § 31b(2) of the Consumer Protection Act; not in § 2(1) Regulation on travel agencies implementing Art. 7 Package Travel Directive and in the Regulation on travel agencies.

\(^{287}\) It is sufficient that the package contains one change of place; Art 3(2) of the Act on Tourist Services.

\(^{288}\) CC, § 651a (1), sent. 1.
B. Package Travel Directive (90/314)

### Additional examples for other services
- HU, IT, PT (5)
- SK, SL (5)

### Further regulations
- CZ (4)
- SK, SL, UK (4)

### Transposition not entirely clear
- SE (I)

### Table: Separate Billing

<table>
<thead>
<tr>
<th>No transposition of regulation on separate billing</th>
<th>AT, EE, FI, FR, DE, IE, LV, NL, PL (9)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regulation on separate billing expressly transposed</td>
<td>AT, BE, CZ, CY, DK, EL, ES, HU, IT, LT, LU, MT, PT, SE, SK, SL, UK (17)</td>
</tr>
</tbody>
</table>

#### 5. Contract

According to Art. 2 no. 5 of Directive 90/314 “‘contract’ means the agreement linking the consumer to the organiser and/or the retailer”.

#### a. Transposition in general

Ten member states have transposed the definition of contract in a special act on package travel whereas, in six member states, the definition can be found in an existing more general act. In the SLOVAKIAN transposition law, reference is made to the definition of travel contract in the Consumer Code. GERMANY continues to use an already existing definition of

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289 Art. 17(2) of the Decree-Law No. 198/93.
290 Art. 33(2) of the Promotion of Tourism Development Act states that a trip which includes a pre-arranged combination of two or more services (transfer and other tourist services) when sold or offered for sale at an inclusive price and to which all provisions of this act apply is deemed to be a travel arrangement.
291 § 1(1) of the Act No.159/1999 on some conditions of business operation in the tourism industry.
292 Reg. 2(1) of the Package Travel, Package Holidays and Package Tour Regulations 1992.
293 Not mentioned only in § 2(1) of the Regulation on travel agencies implementing Art. 7 Package Travel Directive; on the contrary mentioned in § 31b(2) of the Consumer Protection Act.
294 Only in § 31b(2) of the Consumer Protection Act; not mentioned in § 2(1) of the Regulation on travel agencies implementing Art. 7 Package Travel Directive.
295 Art. 1 no. 1, 2nd sentence of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.
296 § 1(5) of the Government Decree No. 213/1996.
297 Art. 6 of the Act No. 281/2001 on Package Travel.
travel contract. Eight member states have not specifically transposed the definition of contract. This seems to be due to the fact that the general definition of contract of many national laws is considered to be sufficient.

**Table: Transposition Method**

<table>
<thead>
<tr>
<th>In a special act on package travel</th>
<th>BE, CY, EL(^{298}), HU, IE(^{299}), LT(^{300}), LV(^{301}), LU, MT, ES(^{302}), SE, UK(^{303}) (12)</th>
</tr>
</thead>
<tbody>
<tr>
<td>In a general regulation</td>
<td>Civil Code, CZ, DE, LT, NL, SK(^{304}) (5)</td>
</tr>
<tr>
<td>Only general definition of ‘contract’ with no specific relation on travel contracts</td>
<td>Code of Obligations, SL (1)</td>
</tr>
<tr>
<td>No specific legislative transposition</td>
<td>AT, DK, FI, IT, PL (5)</td>
</tr>
</tbody>
</table>

Several member states, e.g. BELGIUM, HUNGARY, LITHUANIA, the NETHERLANDS, have combined the definition of ‘contract’ with the one of ‘package’, defining the contract in the sense of the transposition law with the definition of ‘package’ or, as LUXEMBOURG, SLOVENIA and SWEDEN, referring to the term of ‘package’ as content of the contract in consideration.

**Table: Contract/Package**

| Single definition for ‘contract’ | CY, CZ\(^{307}\), DE, EL, IE, LV, MT, ES, SK\(^{308}\), UK (10) |
| Combined definition of ‘contract’ and ‘package’ | BE, HU\(^{309}\), LT, NL (4) |

\(^{298}\) Art. 2(1) no. 5 of the Decree No. 339/96 on package travel...
\(^{299}\) Art. 2(1) of the Package Holidays and Travel Trade Act, 1995.
\(^{300}\) Art. 2(17) of the Law on Tourism.
\(^{301}\) Art. 1(1) of the Cabinet Regulation No. 163.
\(^{302}\) Art. 2 of the Law No. 21/1995 which regulates package travel.
\(^{303}\) Reg. 2(1) of the Package Travel, Package Holidays and Package Tour Regulations 1992.
\(^{304}\) The Package Travel Act 281/2001 cross-refers to the CC, §§ 52-60 (consumer contracts), 741a-741k (package travel contract).
\(^{305}\) Art. 8(1) of the Law of Obligations Act.
\(^{306}\) CC, Art. 1101.
\(^{307}\) CC, Arts. 852a – 852k regulates the travel contract. The CC refers to the definition of package in the Act 159/1999 on some conditions of business operation in the tourism industry.
\(^{308}\) Use of the notion of ‘package travel contract’. 
b. Transposition in particular

The CZECH and MALTESE legislators have made an adjustment to the definition in the sense of “depending on the circumstances”. These adjustments seem to have no greater impact on the content of the definitions.

Table: National transposition

| Substantively equivalent as in the directive | CZ, DE, EL, HU, IE, LV, LU, ES, SE, SK, UK (11) |
| “Except the circumstances otherwise require” or similar adjustment | CY312, IE313, MT314 (3) |
| Combination with definition of ‘package’ | BE, LT, NL, SL (4) |
| No special legislative transposition | AT, DK, EE, FR, IT, PL, PT (7) |

In GERMANY, LITHUANIA, LUXEMBOURG, the NETHERLANDS, SLOVAKIA315 and SLOVENIA, the definition only speaks of the ‘organiser’ as obliged party of the contract and leaves out the ‘retailer’. This is no infringement to EC-law as the wording of the Directive is ‘organiser and/or retailer’. In Germany, this is due to the fact that the definition of ‘travel contract’ in the German Civil Code already existed before the transposition of the Directive. The question against whom the rights can be exercised is sometimes solved by general contract law, e.g. in Germany, or by the regulations concerning the personal scope (see chapter on definition of ‘organiser/retailer’). In HUNGARY, the counterparty to the ‘consumer’ is termed ‘travel enterprise’ and LATVIAN law speaks of the ‘undertaking’ (company). Under CZECH law, the obligor is the ‘travel agency’.

310 Art. 8 of the Package Travel Act.
311 § 3(4) of the Package Tours Act 1992:1672.
312 Art. 2 of the Package Travel, Holidays and Tours Law of 1998.
313 Art. 2 (1) of the Package Holidays and Travel Trade Act, 1995.
315 CC, § 741a makes use of ‘organiser (travel bureau)’.
Table: Obliged persons

<table>
<thead>
<tr>
<th>Category</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organiser and Retailer</td>
<td>BE(^{316}), CY (or both), IE, EL, MT (or both), ES, SE, UK (8)</td>
</tr>
<tr>
<td>Organiser</td>
<td>DE, LT, NL(^{317}), SL, SK (5)</td>
</tr>
<tr>
<td>Travel agency</td>
<td>CZ (1)</td>
</tr>
<tr>
<td>‘Companies/enterprises’</td>
<td>HU, LV (2)</td>
</tr>
<tr>
<td>No special legislative transposition</td>
<td>AT, DK, EE, FR, IT, PL, PT (7)</td>
</tr>
<tr>
<td>Transposition not entirely clear</td>
<td>LU (1)</td>
</tr>
</tbody>
</table>

\(^{316}\) A separate definition of the contract of travel intermediary exists in Art. 1 no. 2 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.

\(^{317}\) ‘Organiser’ is also a ‘retailer’ of an ‘organiser’ outside the territory of the Netherlands, cf. Art. 500(2) of the Dutch CC.
III. Consumer protection instruments

1. Information Duties

a. Travel Brochure

Art. 3(2) sent. 1 of Directive 90/314 regulates the content of an information brochure when it is made available to the consumer. It shall indicate in a legible, comprehensible and accurate manner both the price and adequate information concerning details of the destination and transport, accommodation, the meal plan, the itinerary as well as general information on passport and visa requirements, payment aspects and the period for informing the consumer in case of not reaching a minimum number of participants.

aa. Transposition in general

Some countries seem to have considered a detailed list of information as unsuitable for a transposition in a legislative act. In consequence, the laws in several countries, e.g. AUSTRIA, GERMANY and DENMARK, refer to a list of information duties which can be found in a government decree.

Table: Transposition law of information list

| Special act on package travel | BE\(^{318}\), CY\(^{319}\) (annex), CZ\(^{320}\), EL\(^{321}\), ES\(^{322}\), IE\(^{323}\), LT, MT\(^{324}\), PL\(^{325}\), SK\(^{326}\), ES\(^{327}\), SE\(^{328}\), UK (schedule) (I3) |

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\(^{318}\) Art. 5 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.

\(^{319}\) Art. 5(1)-(2) of the Package Travel, Holidays and Tours Law of 1998.

\(^{320}\) The travel contract is part of CC, other aspects are regulated in Act 159/1999 on certain condition of doing business in tourism industry.

\(^{321}\) Art. 3(2) of the Decree No. 339/96 on package travel.

\(^{322}\) Law 21/1995 which regulates package travels.

\(^{323}\) Art. 10(1) and (2) of the Package Holidays and Travel Trade Act, 1995.

\(^{324}\) Art. 5(1) of the Package Travel, Package Holidays and Package Tours Regulations, 2000.

\(^{325}\) Art. 12 no.1, 1\(^{st}\) - 10\(^{th}\) indent of the Act on Tourist Services.

\(^{326}\) § 8(1)(a)- (j) of the Act No. 281/2001 on Package Travel.

\(^{327}\) Art. 3(1) of the Law 21/1995 which regulates package travels.

\(^{328}\) Art. 5 of the Package Tours Act 1992:1672.
In **SLOVENIAN** law, the content of a brochure (travel programme, travel itinerary) is not further defined. It is only stated that, before issuing the travel confirmation, the traveller shall be given a travel programme containing all data prescribed for the travel confirmation which itself may only refer to the programme

### Table: Use of terms

<table>
<thead>
<tr>
<th>Term</th>
<th>Country(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brochure</td>
<td>BE, DK, FI, DE, EL, IE, IT, MT, PL, UK (10)</td>
</tr>
<tr>
<td>Brochure or other written form</td>
<td>CZ (8), ES, HU, LT (9), NL, PL, SE, SK (8)</td>
</tr>
<tr>
<td>Package description</td>
<td>EE (1)</td>
</tr>
<tr>
<td>Programme of services</td>
<td>LV (1)</td>
</tr>
<tr>
<td>Advertising material</td>
<td>AT, CY (2)</td>
</tr>
</tbody>
</table>

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329 Art. 85(1) of the Consumer Code.
330 § 867(1)-(3) of the Law of Obligations Act.
331 § 2 of the Regulation on Travel Agencies.
333 § 4 of the Regulation on duties to supply information in civil law.
335 Art. 3 of the Cabinet Regulation No. 163.
336 Art. 2 of the Decree of 4 November 1997 on pre-contractual information for package travel.
337 Decree of 15 January 1993, containing rules concerning data that organisers of organised trips must state on behalf of travellers.
338 Art. 20(1) - (2), Art. 22 of the Decree-Law No. 198/93.
340 Art. 884(3) of the Code of Obligations.
341 Art. 10 of the Act 159/1999 on certain condition of doing business in tourism industry used the wording ‘brochure or some other demonstrable form’.
342 According to Art. 3(1) Law 21/1995 which regulates package travels “Programme or information brochure which contains in writing …”.
343 The Lithuanian law states “descriptive matter concerning the services offered and advertised by the tour organiser” in parentheses “travel brochures or other official information”, CC, Art. 6.748(1); “travel brochures, catalogues or other descriptive matter concerning tourist journey”, Art. 6(2) of the Law on Tourism.
344 In some cases, the term ‘informative material’ is used, e.g. Art. 4(1) of the Package Travel, Holidays and Tours Law of 1998.
Pre-contractual information | LU, PT (2)
---|---
Travel programme | SL (1)
Written information | FR (1)
Transposition not entirely clear | SE (1)

**bb. Transposition in particular**

(1) **Transposition of the Directive’s information requirements**

In **Austria, Denmark, Estonia, Germany, Greece, Latvia, Luxembourg** and **Sweden**, the national legislators have adopted the list of information as prescribed by the Directive.

In **Sweden**, the information duties do not go beyond the requirements stipulated in the Directive. The requirements are specified less detailed than in the Directive. For example, instead of ‘passport and visa requirements’ and ‘health formalities’, the Swedish legislator uses the term ‘immigration’. As the member states are obliged to interpret legislative acts in conformity with the European Directives, it can be supposed that this term covers the elements named in the text of the Directive. In deviation to the Directive, the Swedish regulation obliges the organiser to only mention the minimum number of participants required for the package to take place but not the deadline for informing the consumer in the event of cancellation.

The **Latvian** legislator has transposed the list of information as prescribed by the Directive. Furthermore, a general clause is added, stipulating that the organiser has to provide other information if it is necessary. Sometimes, the information duties are rendered in a shorter way than in the Directive. For example, the Latvian law speaks of payment procedures where the wording of the Directive expressly mentions the monetary amount or the percentage of the price which is to be paid on account.

**French law**\(^{345}\) refers to “written information” which shall describe the services relating to transport and residence issues, the price and the payment conditions, the possibilities of

\(^{345}\) Art. L 211-9 of the Tourism Code.
cancelling the contract and visa information. It shall, nevertheless, be only given to the interested persons “les intéressés” which implies that it is not obligatory in each situation.

In FINLAND, the provision of the brochure is not compulsory. If it is provided, it shall contain the general conditions applying to the package travel contract and the essential information in relation to the contract\textsuperscript{346}.

### Table: Transposition of the Directive’s information requirements

| Substantially equivalent as in the Directive | AT, DK, DE, EE, EL, LU (6) |
| Information exceeding the Directive’s content | BE, CY, ES, FI, HU, IE\textsuperscript{347}, IT, LT, MT, NL, PL, PT, SK, UK (14) |
| Deviations to the requirements of the directive | FR, SE (2) |
| Transposition not entirely clear | CZ, LV, SL (3) |

Some of the member states have made the provision of a brochure compulsory for the organizer/retailer, thus making use of the minimum clause in the Directive. These member states are SPAIN\textsuperscript{348} and partially GREECE\textsuperscript{349}.

#### (2) Additional information duties

The transposition laws of other member states stipulate additional information which shall be included in brochure.

Sometimes, supplements to the information duties listed in the Directive can be found. In CYPRUS, for example, exceeding the information on meals, an estimation is required how

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\textsuperscript{346} § 6 of the Package Travel Act of 28 November 1994/1079.  
\textsuperscript{347} Art. 10(1)(h) – (j) of the Package Holidays and Travel Trade Act, 1995.  
\textsuperscript{348} Art. 3(1) of the Law 21/1995 which regulates package travels.  
\textsuperscript{349} The presentation of a travel brochure is not compulsory for the organizer/retailer, but it is, on the contrary, compulsory for the travel agencies responsible for general and national tourism in the sense of the Law 393/1976 and for their intermediaries. Before, the latter have already had to give a detailed program of the journey or excursion which now has to be completed by the details of Art. 3(2) of the Decree 339/1996, e.g. general information concerning passport and visa requirements, health formalities being important for the trip and the stay.
many meals not included in the price may be necessary. Another deviation is that the total price may be given in an attached price-list which accompanies the brochure.

Mostly, there is an extension of the list of required information by adding further information duties. The organiser is obliged to give his name and address in Finland, Hungary, the Netherlands, Portugal and Spain. In the Netherlands, the telephone number and in Portugal, the license number must also be given. In Hungary, the organiser is also obliged to give information on his domicile, register and telephone number.

Information on the representative in the destination country is obligatory in Ireland, Malta, Spain (name, address) and in Hungary (name, address, telephone hotline). In Hungary, if there is no representative of the organiser in the destination country, the organiser has to give the number of a general telephone hotline in Hungarian language by which the traveller can get help and get in contact with the travel organiser.

Most of the member states, which have added information duties, also oblige the organiser to already inform the traveller about securities in the brochure. In Belgium, Hungary, Malta, the Netherlands and the United Kingdom, the organiser must give information concerning security in case of insolvency as well as information concerning the security for sums paid over. In Hungary, the information on the credit institution must also regard the possibility to get information on protection in case of insolvency directly from the security provider. Additionally, the organiser must inform about the possibility to turn to the insurance company or institution in case that the organiser does not provide the trip home or if he does not fulfil his duty to reimburse participation fees or fees paid in advance. Irish law states one information category with respect to the insolvency of the organiser concerning the arrangements for security for money paid over and, where applicable, for the repatriation of the consumer350. Moreover, in Belgium, the organiser must give information concerning the conclusion of a cancellation – and travel insurance.

In Portugal and in Slovakia, the national regulations also stipulate special information duties in connection with the liability of the organiser. In Slovakia, the brochure must contain information about the cases and the possible amount of contractual penalties of the traveller.

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In Portugal, it needs to contain the identity of the bodies which guarantee the liability of the organising agency. Furthermore, the organiser must inform the traveller about the maximum amounts of liability of the agency and the procedure for complaints of the traveller concerning the failure of performance.

In some member states, the brochure needs to contain information on the legal basis of the contract. In Spain, the brochure has to give information on clauses with respect to possible liability, cancellations and other terms of the package. In Poland, there must be information concerning the legal basis for the travel agreement and the legal consequences arising from it. In Hungary, the organiser has to display his general terms and conditions. On the contrary, he does not need to inform the traveller about the general contract conditions used by the retailer. In Lithuania, the procedure and terms for the execution of the tour contract have to be stated in the brochure, catalogues or other descriptive matter.

Another large field of information concerns the programme and the services comprised in the package, respectively those services which are not included in the package and which must be paid additionally. In six member states, namely Belgium, Hungary, the Netherlands, Poland, Portugal and Slovakia, the brochure must contain information on the programme and/or other services. In Poland, information is required concerning the sight-seeing programme and tourist attractions and in Slovakia, the organiser must provide information concerning the programme in the place of stay and concerning the scope and quality of all other performances which form the content of the package. In Portugal, visits, excursions or other services included in the price must be mentioned. In Hungary, the organiser is obliged to give information on the conditions for the participation in facultative programmes.

According to the Belgian regulation, the brochure must contain information on the nature of the trip and its target group. This information is likely to comprise information on the programme of the trip. In the Netherlands, there is a more general rule. According to the Dutch transposition law, the organiser is obliged to give information on other services which are a significant part of the travel.

Another sector of information concerns taxes and additional charges. In Ireland, Malta and Portugal, the organiser is obliged to inform about these. Hungarian law as well as optional law in Portugal require information on visits, excursions and other services which are not
included in the package price but need to be paid additionally. According to LITHUANIAN law, the terms and conditions for the currency exchange have to be stated.

In some member states, the legislative acts contain clauses stipulating that the organiser needs to provide other relevant information in the brochure. Such a general clause can also be found in SPAIN (concerning the nature of the package offered) and in LATVIA. Spanish law also envisages information on the “estimated price of the optional excursions” and “the financing conditions if offered”.

Finally, there are further special information duties in some member states. A peculiarity in HUNGARY is the need to give information on the weather conditions, local traditions and rules of the destination countries, which are different to Hungarian rules and traditions and are important for the travel. The brochure must moreover already contain information on health formalities and visa requirements. In SLOVAKIA, the organiser has to inform the traveller about the conditions for a substitution and the period of time in which the traveller must communicate that a substitute will go in for the package. In ITALY, one further information duty is added to the list of the Directive. The organiser is obliged to inform about deadlines, procedures and parties in relation to which the right of withdrawal may be exercised, where the contract was concluded away from business premises and in distance (negotiation). In the NETHERLANDS, the brochure must contain the period in which the traveller must inform the organiser that the trip does not correspond to his expectations. In the UNITED KINGDOM, the brochure must contain information on the arrangements (if any), which apply if the travellers are delayed at the outward or homeward points of departure. In PORTUGAL, the organiser must inform the traveller about the periods in which changes of the price are legally admissible.

It is self-evident that such additional requirements with regard to the content of the brochure may be useful for the consumer in many cases. But such additional requirements may also cause a barrier to trade because they force organisers to adapt their brochures to the respective national laws of the member states where they want to market their packages. The huge variety of national deviations make it rather difficult if not impossible to draft brochures which can be used throughout the EU. In any case, such an endeavour would be rather costly and could therefore deter organisers from making use of the internal market.

**Table: Additional information duties**

<table>
<thead>
<tr>
<th>Name, address</th>
<th>ES, FI, HU, NL, PT (5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Representative</td>
<td>ES, HU, IE, MT (4)</td>
</tr>
<tr>
<td>Security in case of insolvency</td>
<td>BE, HU, IE, MT, NL, PT, SK, UK (8)</td>
</tr>
<tr>
<td>Security for overpaid sums</td>
<td>HU, IE, MT, NL, UK (5)</td>
</tr>
<tr>
<td>Liability</td>
<td>PT, SK (2)</td>
</tr>
<tr>
<td>Cancellation- and travel insurance</td>
<td>BE (1)</td>
</tr>
<tr>
<td>Legal basis of the contract</td>
<td>ES, HU, LT, PL (4)</td>
</tr>
<tr>
<td>Programme and services</td>
<td>BE, HU, NL, PL, PT, SK (6)</td>
</tr>
<tr>
<td>Taxes and additional charges</td>
<td>FI, HU, IE, MT, PT (5)</td>
</tr>
<tr>
<td>Terms and procedures of currency exchange</td>
<td>LT (1)</td>
</tr>
<tr>
<td>“General clause”; other relevant information</td>
<td>ES, LV (2)</td>
</tr>
<tr>
<td>Other (special) information</td>
<td>CY, ES, FI, HU, IT, NL, SK, PT, UK (9)</td>
</tr>
<tr>
<td>No further going information duties</td>
<td>AT, DK, DE, EE, EL, FR, LV, LU, SE (9)</td>
</tr>
<tr>
<td>Transposition not entirely clear</td>
<td>CZ, SL (2)</td>
</tr>
</tbody>
</table>

**b. Pre-contractual information duties**

Article 4(1)(a) of Directive 90/314 determines some pre-contractual general information duties with regard to health formalities and to passport and visa requirements applicable to nationals of the member state(s) concerned, in particular on the periods for obtaining them.

**aa. Transposition in general**

Almost all member states have transposed these pre-contractual information duties with more or fewer variations. As the only country, Spain has not implemented the Directive provision as such. Reference to the consumer who shall be informed before conclusion of the contract by receiving a copy of the contractual terms is made in Art. 4(2) of the Law 21/1995 of 6th of

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352 Part of the one information category with respect to the insolvency of the organiser.
July regulating package travels. However, the required contractual terms do not mirror the content of the pre-contractual information duties but transpose the minimum elements listed in the Directive’s Annex to be contained in the contract. Information duties on passport and visa requirements or health documents are only mentioned in Art. 3(1) lit. e of the same law as part of the mandatory brochure, transposing Art. 3(2) of Directive 90/314. It is probable that the Spanish legislator, as the delivery of the brochure is mandatory, thought this Directive rule of pre-contractual information duties completely fulfilled.

**bb. Transposition in particular**

(1) The obligated party

At Community level, these duties are imposed on the organiser and/or retailer. Transposing this Directive provision, many member states have chosen to inflict the pre-contractual obligation on both, the organiser and the retailer, although named differently. By contrast, some member states opted for the organiser as the (only) obligated party. CYPRUS and the UNITED KINGDOM used general terminology (‘the other party to the contract’), which leaves it to the content of the contract whether the organiser, the retailer or both are obliged. This seems to be also the case in AUSTRIAN, FRENCH and LATVIAN law employing the terms ‘professional’, ‘vendor and ‘undertaking’, which can either be the organiser or the retailer according to the circumstances. In SWEDEN, no explicit party is listed to fulfil the pre-contractual information duties, it is only stated that “the traveller shall be informed”. This implies, that the contractual party, depending on the individual contract the organiser or the retailer, will have to inform the traveller. LUXEMBOURG, PORTUGAL and SLOVAKIA resort to the term ‘travel agency’ when determining the responsible person for performing the information duties. LITHUANIAN legislation has adopted two different legal texts regulating information duties before conclusion of the contract for the organiser and the retailer.

A particularity exists in FRANCE and LUXEMBOURG. The applicable law demand the information only if the counterpart is an interested person. Regarding this wording, one is

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353 Law 21/1995, of 6 July, which regulates the package travels.
354 Cf. Transposition of Art. 4(2)(a) on pages 60 et seq.
356 Duties for organiser are transposed in the CC (Art. 6.748(2)) and the Law on Tourism (Art. 6(4)).
357 Duties for the retailer only in the Law on Tourism (Art. 6(4)).
likely to draw the conclusion that in order to count as an interested person, the consumer would have to show in any way his concern. Such a requirement is not expressly made by the Directive. But it can be assumed that Art. 4(1) of Directive 90/314 also only obliges to inform a consumer who has expressed an interest in a certain package.

Table: Obligated party

<table>
<thead>
<tr>
<th>Obligated party</th>
<th>AT, BE, CY, EL, FI, FR&lt;sup&gt;358&lt;/sup&gt;, HU, IE, IT, LV, LT, LU, MT, PL, PT, SE, SK, UK&lt;sup&gt; (18) &lt;/sup&gt;</th>
<th>EE, DE, DK, NL, SL (5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organiser</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Travel agency</td>
<td>CZ&lt;sup&gt; (1)&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>Not transposed</td>
<td>ES&lt;sup&gt; (1)&lt;/sup&gt;</td>
<td></td>
</tr>
</tbody>
</table>

(2) Time of information

The majority of the national legislations requires that the pre-contractual information duties shall be provided before conclusion of the contract. Variations exist in AUSTRIA and GERMANY, where the information has to be provided before the declaration of intent, e.g. the booking. DUTCH law determines the moment of closing the travel agreement for the provision of the information. In ITALY, the consumer shall already be provided with information during negotiations, however in any event prior to the conclusion of the contract<sup>359</sup>. HUNGARIAN legislation prescribes that all the information being normally provided in a brochure have to be given in writing before concluding the contract if a brochure has not been made available<sup>360</sup>.

Table: Time of information

| Time of information                | BE, CY, CZ<sup>361</sup>, DE, DK, EE, EL, FI, FR, HU, IE, IT, LV, LT, MT, PL, PT, SE, SK, SL, UK (21) |
|-----------------------------------|----------------------------------------------------------------------------------------------------------|------------------------|

<sup>358</sup> Art. L 211-9 of the Tourism Code uses the general term “seller” which can as well be an organiser as a retailer.

<sup>359</sup> Art. 87(1) of the Consumer Code.

<sup>360</sup> § 4(1) of the Government Decree No. 214/1996.

<sup>361</sup> The Czech CC does not use the term „pre-contractual information“ and provides only for prerequisites of the travel contract (Sec.852b), i.e. a draft (offer) of the travel contract has to be presented by the travel agency.
(3) Method of information

About half of the member states have transposed the manner of giving the pre-contractual information as in the Directive (“in writing or in any other appropriate form”). Certain member states have opted to exclusively require written form, e.g. Finland, Poland\(^{362}\). Moreover, special form requirements do not exist in Germany or Denmark. Czech\(^{363}\) and Slovak\(^{364}\) law similarly demand a brochure or some other written (‘proved (established) form’ in the Czech Republic) form (“as the case may be” in the Slovak text), whereas Hungarian\(^{365}\) law states that the information shall be provided in writing if they are not included in any brochure.

<table>
<thead>
<tr>
<th>Method of information</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td>In writing or any other appropriate form</td>
<td>AT, CY, EL, IE, LV, LU, MT(^{366}), NL, PT, SL, UK (11)</td>
</tr>
<tr>
<td>Written form</td>
<td>BE, FI, FR, IT, LT, PL (6)</td>
</tr>
<tr>
<td>Format which can be reproduced in writing</td>
<td>EE (1)</td>
</tr>
<tr>
<td>In a brochure or in other written form</td>
<td>CZ, HU, SK (3)</td>
</tr>
<tr>
<td>In an appropriate manner</td>
<td>SE (1)</td>
</tr>
</tbody>
</table>

(Sec.852a(2)). However, the Act 159/1999 imposes on the travel agency the obligation to provide a set of information prior to the conclusion of travel contract in a brochure or some other demonstrable form (Sec.10). \(^{362}\) Art. 13 no. 3a of the Act on Tourist Services. \(^{363}\) § 10(1) of the Act No. 159/1999 concerning conditions of entrepreneurs in the area of tourism and travel agencies. \(^{364}\) § 8(1) of the Act No. 281/2001 on Package Travel. \(^{365}\) § 4(1) of the Government Decree No. 214/1996. \(^{366}\) Until now, there has been no interpretation of the courts as to what is meant by “some other appropriate form”. The duty to pass on the information to the consumer is ultimately on the organiser. If he fails to do so, it constitutes breach of the regulation.
It is highly probable that such differences of formal requirements hinder the marketing and the execution of travel contracts with consumers in different member states. The organiser has to carefully inquire which national law is applicable and, if it is foreign law, which formal requirements are relevant. Moreover, it must be admitted that the wording of the Directive is unclear with regard to the question what is meant by “any other appropriate form”. In the course of the review of the Directive, it should be considered to clarify this – possibly by referring to a definition of the “durable medium” along the lines of Art. 2 lit. f of Directive 2002/65.

(4) Content of the pre-contractual information

(a) Information requirements of the Directive

The transposition of the Directive’s pre-contractual information requirements is incoherent within the European countries. For example, FRANCE\(^{367}\) has implemented the information duty on passport and visa requirements, however neither the one on the period for obtaining the documents nor on health formalities. About one third of the member states having implemented the obligation to inform about passport and visa requirements, refrain from demanding further information on the period for obtaining them (e.g. DENMARK, LUXEMBOURG, SLOVENIA among others). BELGIAN legislation requires general information on passport and visa which does not necessarily include the time frames until their receipt. In HUNGARY, passport and visa requirements are generally described\(^{368}\). French law circumscribes the terminology of the passport and visa requirements by demanding information on conditions for passing the borders\(^{369}\). Slovenian law uses the term “border formalities”. Under DUTCH law the organiser has to provide the relevant general information on travel documents and health formalities necessary for travel and stay.\(^{370}\) Such wordings leave it to the national courts whether, for instance, the organiser has also to inform about the period for obtaining the necessary documents. Finally, the Danish and LATVIAN legislator

\(^{367}\) Art. L 211 – 9 of the Tourism Code.

\(^{368}\) § 3(1)(k) of the Government Decree 214/1996.


\(^{370}\) Art. 1(c) of the Decree of 15 January 1993, containing rules concerning data that organisers of organised trips must state on behalf of travellers.
chose to use different terminology when introducing the duty to inform about health formalities in their legislation. In SLOVAKIA and the CZECH REPUBLIC, information requirements exist concerning the period for obtaining details on health formalities.

Especially, with regard to the travel documents, the different national legislations have varied in one point: the citizen’s nationality depending on which the information on passport and visa may vary. The Directive stipulates that information on passport and visa requirements for nationals “of the Member State or States concerned” shall be available. This implies that travellers from all EU countries should be informed about the requirements applicable. ITALIAN, MALTESE and SWEDISH law explicitly mention the requirements for citizens of the EU (the two latter also for European Economic Area nationals). However, the CZECH REPUBLIC only includes the formalities for its own citizens, CYPRUS adds residents. GERMANY and AUSTRIA have adopted regulations only applying to nationals / citizens (Austria) of the country in which the trip is offered. One could consider that these regulations are too narrow and therefore infringe Community law.

In GERMANY, a recent case has been judged by the Federal Supreme Court reasoning that a travel agency was not liable for the damages resulting from the fact that the claimant had not been allowed to travel due to a lacking valid passport. The court held that it was not up to the travel agency to inform about the passport and visa requirements. In reverse, it is however possibly the organiser who has to inform the traveller in this respect. Another case took place before the Audiencia Provincial Barcelona on March 2001. The court reasoned that it was a duty of the consumer and not of the agency to care for a valid passport. The requirement of valid travel documents was seen as part of general knowledge. The information duty on passport, visa and health formalities is, however, a duty to comply with in the course of the mandatory brochure.

Table: Information requirements of the Directive

<table>
<thead>
<tr>
<th>Country</th>
<th>Relevant Legislation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Denmark</td>
<td>§ 6 of the Act no. 472/1993 on Package Travels: “information on requirements as regards (…) vaccination and similar prerequisites”; Latvia (Art. 5 of the Cabinet Regulation No 163): “other requirements (health insurance, vaccination and other issues related to medicine)”</td>
</tr>
</tbody>
</table>

371 Denmark (§ 6 of the Act no. 472/1993 on Package Travels): “information on requirements as regards (…) vaccination and similar prerequisites”; Latvia (Art. 5 of the Cabinet Regulation No 163): “other requirements (health insurance, vaccination and other issues related to medicine)”.
372 BGH judgment of 25 April 2006 (not yet published).
373 Art. 3(1) lit. e of the Law 21/1995 which regulates package travels.
(b) Additional information requirements

Some member states have introduced additional information requirements to be provided before conclusion of the contract. The following table shows some examples:

Table: Additional information requirements

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parties to the contract</td>
<td>FI, FR (2)</td>
</tr>
<tr>
<td>Optional Insurance</td>
<td>AT, BE, CZ, EL&lt;sup&gt;374&lt;/sup&gt;, PL, SK (6)</td>
</tr>
<tr>
<td>Details of minimum insurance cover where consumer is required to take out insurance</td>
<td>IE (1)</td>
</tr>
<tr>
<td>General terms and conditions</td>
<td>AT, BE&lt;sup&gt;375&lt;/sup&gt;, FI, HU (4)</td>
</tr>
<tr>
<td>Content of the package</td>
<td>CZ, FI, FR, HU, PT, SK (6)</td>
</tr>
<tr>
<td>Price of the package</td>
<td>CZ, FR, HU, LT, NL, PT, SK (7)</td>
</tr>
<tr>
<td>Security for money paid over in the event of insolvency</td>
<td>CY, EL, IE, MT, UK (5)</td>
</tr>
<tr>
<td>Repatriation of the consumer in case of insolvency</td>
<td>CY (1)</td>
</tr>
</tbody>
</table>

<sup>374</sup> Art. 7(a) of the Package Travel, Holidays and Tours Law of 1998 also includes information concerning the time the consumer will need to obtain a suitable passport or visa.

<sup>375</sup> The organizer/retailer is, according to Art. 4(1) of the Decree 339/1996, obliged to inform the consumer in writing or in any other appropriate manner before conclusion of the contract on his/her (the consumer’s) obligation to cover the risk of improper or non-performance of his/her contractual obligations by taking out a liability insurance.

<sup>376</sup> Art. 7 no. 1(b) of the Act of 16 February 1994 regulating package travel contracts and travel intermediation contracts.
| **Specific threats to life or health** | PL³⁷⁷ (1) |
| **Documentation for medical or hospital assistance** | PT (1) |
| **Conditions of currency exchange** | LT (1) |
| **Procedure and terms for executions of tour contract** | LT (1) |
| **Cases of contractual penalty for the consumer in case of cancellation** | CZ, SK (2) |
| **Program in the place of stay** | CZ, HU, PT, SK (4) |
| **Period for the consumer to inform about a substitute taking the package** | CZ, SK (2) |
| **Others** | SL³⁷⁸ (1) |

**b) Exception of the information requirements**

Some countries have adopted exemptions from the requirements if the information have already been made available to the consumer in some way and are not subject to changes afterwards: AUSTRIA (in advertisement or confirmation document), ESTONIA (brochure), FINLAND³⁷⁹ (brochure), GERMANY (brochure), the NETHERLANDS (by prospectus or any other publication), SLOVENIA³⁸⁰ (travel itinerary).

Exceptions also exist in case of conclusion of last minute contracts in the following member states: DENMARK (deviation possible if contract is entered into shortly before the package tour is due to begin), FINLAND³⁸¹ (some other suitable form), HUNGARY (at the latest at the time of conclusion), ITALY (information at the same time of contractual conclusion if contract is

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³⁷⁷  Art. 13 no.2 of the Act on Tourist Services.
³⁷⁸  According to Art. 884 (2) of the Code of Obligations, the travel information must contain detailed information, e.g., place and date of issue, the logo and title of the travel organiser, the name of the traveller, the location and dates of the beginning and end of the travel package, the number of days of accommodation, the necessary information on timetables, prices and conditions of transport and the quality of the means of transport, the necessary information on the accommodation including the location of the accommodation and type and category of the accommodation facilities, information on the number of meals (e.g. full board, half board, bed and breakfast).
³⁷⁹  The information (contract conditions) shall be given in writing, unless they have been published in a brochure to which the traveller has access (§ 7(1) of the Package Travel Act of 28 November 1994/1079).
³⁸⁰  Art. 884(3) of the Code of Obligations.
³⁸¹  If a contract is entered into immediately before the journey and it would therefore be unreasonably inconvenient to provide the contractual conditions in written form, they may supplied to the traveller in some other suitable form (§ 7(2) of the Package Travel Act of 28 November 1994/1079).
concluded just before departure), the NETHERLANDS\textsuperscript{382} (if travel agreement is made less than 72 hours for the commencement of travel).

None of these exceptions is mentioned in SPANISH law. Therefore, the doctrine claims that the information duties – in the brochure (cf. points above) - must be performed in the case of last-minutes contracts as well in order to increase consumer protection.

It is questionable whether such exceptions for last minute contracts are in conformity with the Directive. As Art. 4(2)(c) of the Directive only allows for exceptions from the formal requirements in case of a last minute contract, it could be concluded by an \textit{argumentum e contrario} that such exceptions from the duties stipulated in Art. 4(1)(a) are contrary to the Directive. In the course of the planned review, it could be clarified whether exceptions in case of last minute contracts shall also be allowed with regard to Art. 4(1) as exceptions from information duties.

\textbf{c. Information before start of the journey}

Art. 4(1)(b) of Directive 90/314 states the information to be provided in good time before the start of the journey, namely details of the transport connections, contact details of the organiser’s or retailer’s local representatives and, as the case may be, an emergency telephone number, special information in case of minors staying abroad and information on the optional conclusion of an insurance policy (no. i – iv).

Seemingly all member states have transposed the Directive’s prescriptions concerning the information duties to be provided in good time before the start of the journey with more or less deviations.

\textsuperscript{382} CC, Art. 7:501(3).
aa. The obligated party

Again, the majority of the member states imposes the information duties on the organiser and/or the retailer. Despite the use of different terms in the national legislation (e.g. AUSTRIA: professional, CYPRUS, the UNITED KINGDOM: the other party to the contract, LUXEMBOURG: travel agent, PORTUGAL: travel agency, SLOVAKIA: travel bureau), the interpretation according to the Directive stipulates that the notions should be interpreted respectively383. SPANISH legislation prescribes that the duty lies first on the retailer and only “as the case may be, on the organiser”384. ITALIAN law imposes the information duties before start of the journey on both the organiser and the retailer385. ESTONIA and SWEDEN only state the obligation that the information shall be provided without naming any obligated party. The information has to be provided by the organiser in DENMARK, GERMANY, the NETHERLANDS, POLAND and SLOVENIA. In MALTA, the organiser has to provide the information, either directly or through a retailer386.

Table: The obligated party

<table>
<thead>
<tr>
<th>Organiser and/or retailer</th>
<th>AT, BE, CY, EE, EL, ES, HU, IE, IT, LT, LU, PT, SE, SK, UK (15)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organiser</td>
<td>DK, DE, FI, MT, NL, PL, SL (7)</td>
</tr>
<tr>
<td>Travel agency</td>
<td>CZ (1)</td>
</tr>
<tr>
<td>No specific transposition</td>
<td>FR387, LV (2)</td>
</tr>
</tbody>
</table>

bb. Time of information

Half of the member states chose the moment of information delivery “in good time before the start of the journey” as it is stated in the Directive. Without further specification of the time period in which the information shall be provided before departure, seven countries (see table below) only demand “before start of the journey”. This can however be so shortly before

383 Cf. Point aaa under b. Pre-contractual information duties.
384 Art. 6 of the Law 21/1995 which regulates package travels.
385 Art. 87(2) of the Consumer Code.
386 Art. 7.1 Package Travel Regulations.
387 Art. L 211-11 of the Tourism Code specifies that the information shall be provided in the contract between the „seller“ and the „buyer“.
departure that consumer awareness or reaction cannot really be achieved. Therefore, such a transposition cannot be possibly considered as being in line with the Directive. Only three countries, Belgium, the Czech Republic and Slovakia, specify until when it still is “in good time before the start of the journey” by fixing seven calendar days as the latest possibility of complying with the information duty. Similarly, in Hungary, the information has to be provided at the “minimum of seven calendar days” before start of the journey or at the time of conclusion of the contract if it takes place less than 7 days before the departure. Latvia does not provide any specific transposition measures in their legislation. Nevertheless, Latvian law includes all the information duties of Art. 4(1)(b) of the Directive in the requirements to be fulfilled before conclusion of the contract. Also France demands that some of the information due under Art. 4(1)(b) shall be given prior to concluding the contract (as to the content cf. III. 1. d., pages 60 et seq).

Table: Time of information

<table>
<thead>
<tr>
<th>Time of Information</th>
<th>AT, CY, DE, EE, EL, ES, FI, IE, LT, MT, PL, SE, UK</th>
<th>DK, FR, IT, LU, NL, PT, SL</th>
</tr>
</thead>
<tbody>
<tr>
<td>In good time before the start of the journey</td>
<td>AT, CY, DE, EE, EL, ES, FI, IE, LT, MT, PL, SE, UK</td>
<td>DK, FR, IT, LU, NL, PT, SL</td>
</tr>
<tr>
<td>Before start of the journey</td>
<td>AT, CY, DE, EE, EL, ES, FI, IE, LT, MT, PL, SE, UK</td>
<td>DK, FR, IT, LU, NL, PT, SL</td>
</tr>
<tr>
<td>7 c-days</td>
<td>BE, CZ, HU, SK</td>
<td></td>
</tr>
<tr>
<td>No specific transposition (but information duties before conclusion of contract)</td>
<td>LV</td>
<td></td>
</tr>
</tbody>
</table>

**cc. Method of information**

The majority of the member states has adopted the formal requirement that the information shall be provided “in writing or any other appropriate form” or at least “in writing”. Spanish transposition law specifies “in writing or any other documentary form”. Sweden has opted...
for the wording “in an appropriate manner”.\(^{395}\) The Directive’s formulation “any other appropriate form” implies that the information shall be either in writing or a form that is equivalent to the written form. Based on an interpretation according to this Community law, the Swedish transposition law should be understood as “an appropriate, equivalent to a written form”. In the NETHERLANDS, the information shall be given “in writing or in any other understandable and accessible way” before coming to an agreement\(^{396}\). The CZECH REPUBLIC, ESTONIA and GERMANY have not introduced any formal requirement in which the information should be provided. This could be considered as a shortcoming in the transposition. However, the wording of the Directive (“in writing or any other appropriate form”) is rather vague. In the course of a review the Directive could make clearer what is meant by the “other appropriate form”. In this context it could be considered to make use of the definition of a “durable medium” in other directives, in particular in Art. 2(f) of Directive 2002/65.

Table: Method of information

<table>
<thead>
<tr>
<th>Method of Information</th>
<th>AT, CY, DK, EL, ES(^{397}), IE, MT, NL, PT, SL, UK (II)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Written form</td>
<td>BE, FI, HU, IT, LT, LU, PL, SK (8)</td>
</tr>
<tr>
<td>In an appropriate manner</td>
<td>SE (1)</td>
</tr>
<tr>
<td>No special form</td>
<td>CZ, DE, EE (3)</td>
</tr>
<tr>
<td>No specific transposition</td>
<td>FR, LV (2)</td>
</tr>
</tbody>
</table>

**dd. Content of the information requirements**

**1) Items of Information listed in Art. 4(1)(b)**

The majority of the member states has transposed the information items as they are listed in Art. 4(1)(b) of the Directive. In some cases, member states have deviated with regard to the point in time when certain information has to be provided. For instance, with regard to the

\(^{395}\) § 6(2) of the Package Tours Act 1992:1672.

\(^{396}\) CC, Art 7:501(2) states the form requirement for information which is listed in a separate decree of the government. Art. 3 of the Decree of 15 January 1993 lists the information to be given without mentioning a form requirement.

\(^{397}\) Literally it is not required a ‘documentary form’ but a form “in writing or in any other form that gives evidence”, e.g. a recorded oral message.
information about an optional conclusion of an insurance policy (n° iv), AUSTRIA, BELGIUM, the CZECH REPUBLIC (partially), LATVIA, POLAND and SLOVAKIA prescribe that this information must be provided already before the conclusion of a contract. The Czech Republic furthermore requires that (before the conclusion of the contract) information about details of transport is given, but not about details on the place to be occupied by the traveller. This may be seen as an infringement of the Directive. In FRANCE, the relevant information requirement (before the conclusion of the contract) is even more general, as the consumer shall be informed just on the offered performances related to transport\textsuperscript{398}.

There are many further examples for variations to the Directive’s text. With respect to the details of transport connection, ITALIAN law does not require any information on the place to be potentially occupied by the traveller, LUXEMBOURG law only demands the indication of a reserved place in case of travelling by boat or by train and SWEDISH law uses a the general term of “travel arrangements”. Most of the legislations do not refer to the examples listed in the Directive, “e.g. cabin or berth on ship, sleeper compartment on train”.

Moreover, SWEDEN also implemented the provisions demanding information on the organiser’s or retailer’s local representatives and of the local agencies in a general way by simply requiring information enabling the traveller to contact the organiser or retailer during the tour. Thus, the implementation adopts the aim of the Directive’s provisions, however leaving it to the organiser or retailer to decide the amount of detail they will provide in order to enable possible contact. ESTONIAN law explicitly mentions the address and phone number from a local agency from where contact is possible but not the name of the local agency. In PORTUGAL, the law requires information on “means of contacting the local representative of the agency or the bodies that may assist the customer in the event of difficulty or, failing that, the means of contacting the agency itself”\textsuperscript{399}. In ITALY, the telephone number of the organiser or retailer has to be given which may be used in case of difficulty and absence of the local representatives\textsuperscript{400}. In case of minors abroad, the Italian transposition law speaks of “journeys overseas” which would implicate a trip to another continent. But the Directive aims at the information and protection in case of minors travelling to foreign countries, also within

\textsuperscript{398} Art. L 211-9 of the Tourism Code.
\textsuperscript{399} Art. 23 of the Decree-Law No. 198/93.
\textsuperscript{400} Art. 87(2)(c) of the Consumer Code.
Europe. Spanish law includes with respect to insurance contracts the repatriation in the event of death⁴⁰¹.

### Table: Information requirements

<table>
<thead>
<tr>
<th>Information</th>
<th>Details of transport connections (incl. place to be occupied by the traveller)</th>
<th>Contact details of the organiser’s / retailer’s local representatives</th>
<th>Contact details of local agencies</th>
<th>Emergency telephone number</th>
<th>Special information in case of minors abroad</th>
<th>Optional conclusion of insurance policy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>AT, BE, CY, (CZ), DE, DK, EE, EL, ES, FI, FR, LV, (HU), IE, IT, LT, LU, MT, NL*, PL, PT, SE, SK, SL, UK (25)</td>
<td>AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK, SL, UK (24)</td>
<td>AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, PT, SK, UK (21)</td>
<td>AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LT, LV, MT, NL, SK, SL, UK (20)</td>
<td>AT, BE, CY, CZ, EE, EL, ES, DE, DK, FI, HU, IE, IT, LT, LU, LV, MT, NL*, PL, PT, SE, SK, SL, UK (24)</td>
<td>AT, BE, CY, (CZ), DK, EL, ES, FI, (HU), IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK, SL, UK (20)</td>
</tr>
</tbody>
</table>

* member states in italics provide the information duty before conclusion of the contract

* member states in italics and brackets provide the information duty in the brochure

* if necessary

### (2) Additional information requirements

Belgium, Estonia, Malta, Portugal and Slovakia introduced additional information requirements to be provided before departure. In Estonia and Slovakia detailed information on the package shall be given, e.g. in Estonia, the dates on which, the times and places at which

⁴⁰¹ Art. 6 of the Law 21/1995 which regulates package travels.
the package will start and end. Maltese law supplementary requires the email address of the local representatives or local agencies.

**Table: Additional information requirements**

<table>
<thead>
<tr>
<th>Fax number</th>
<th>BE (1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Details of the package</td>
<td>EE, HU, SK (3)</td>
</tr>
<tr>
<td>Information about provision of security</td>
<td>HU (1)</td>
</tr>
<tr>
<td>Email-address</td>
<td>MT (1)</td>
</tr>
<tr>
<td>Documentation for medical or hospital assistance</td>
<td>PT (1)</td>
</tr>
<tr>
<td>Procedure to follow in the specific case of illness or accident</td>
<td>PT (1)</td>
</tr>
<tr>
<td>Documents for additional services</td>
<td>HU, SK (2)</td>
</tr>
<tr>
<td>Insurance contract in case of withdrawal</td>
<td>CZ (1)</td>
</tr>
<tr>
<td>Contact details of the consulate office</td>
<td>CZ (1)</td>
</tr>
</tbody>
</table>

(3) **Exceptions from information requirements**

**AUSTRIA, ESTONIA and GERMANY** provide exemptions from the information requirements if the information has already been made available in a brochure or travel confirmation and no changes have taken place afterwards. **SLOVAKIAN** law states that the information has to be provided unless they are already contained in the contract or the brochure given to the traveller.

The time limit of seven days before departure in which the information has to be given does not apply for last minute bookings in **BELGIUM**\(^\text{403}\), the **CZECH REPUBLIC**\(^\text{404}\) and **Slovakia**\(^\text{405}\). The two latter then demand the information at the time of contractual conclusion. In **ITALY,**

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\(^{402}\) E.g. the times and places at which the package will start and end, new § 8(1)(d) of Package Travel Act 281/2001 as amended by Act 186/2006 coming into force 1 January 2006.

\(^{403}\) Art. 7 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.

\(^{404}\) CC, Sec.852(2).

\(^{405}\) If the contract is concluded less than 7 days before departure.
some general information shall be supplied at the same time of the conclusion of the contract when this takes place just before departure.\textsuperscript{406}

d. Elements to be included into the contract

Art. 4(2)(a) of the Directive states that the contract shall at least contain the elements in the Annex depending on the particular package.

aa. Inclusion of the elements

According to the Directive, the contract must contain the elements listed in the annex. The Austrian, Estonian, German and Slovenian legislators have adopted a different approach. The organiser is obliged to provide the traveller with a document confirming the travel contract containing all the necessary information. In Slovenia, if the confirmation is not issued, the contract must be in writing and contain the data that the confirmation must contain. The duty shall be considered as fulfilled in Austria if the professional makes reference to an advertising document available for the consumer which includes all of the elements.\textsuperscript{407} In Belgium, the same list of obligations applies to both the organiser and the retailer.\textsuperscript{408}

Table: Place of the elements

| Travel contract                              | CY, CZ, EL, ES, FI\textsuperscript{409}, FR, HU, IE, IT, LT, LU, LV, MT, PL, PT, SE, SK, SL, UK (19) |
| Travel confirmation document                 | AT, EE, DE, SL\textsuperscript{410} (4)     |
| Travel contract and order form               | BE (I)                                      |
| Brochure or any other publication available  | NL (I)                                      |

\textsuperscript{406} Consumer Code, Art. 87(3), (1).
\textsuperscript{407} § 4(3) of the Regulation on travel agencies.
\textsuperscript{408} Arts. 10 (organiser) and Art. 23 (travel intermediary) of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts. A slightly deferring list of obligations applies when the travel arranger does not act as a retailer (Art. 23 of the same Act).
\textsuperscript{409} Written travel contract or brochure.
\textsuperscript{410} Or as well in a travel programme.
bb. Moment of inclusion of the elements

Directive 90/314 states in its Art. 4(2)(b) that the prerequisites of the contract shall be communicated to the consumer before the conclusion of the contract. AUSTRIAN and GERMAN laws however determine that “at or immediately after conclusion of the contract”, a confirmation document including certain elements shall be handed over to the traveller. This approach contradicts the above mentioned provision of the Directive.

The SLOVENIAN Code of Obligations states that the travel organiser must issue the traveller with a travel confirmation by the conclusion of the contract at the latest or must conclude a contract in written form that contains all the mandatory components of the travel confirmation.

cc. Elements of the contract

(1) Elements of the Annex (and some variations in detail to these elements)

The elements of the Annex have been implemented as obligatory elements of the contracts by most of the member states. Some amendments have however been introduced. In AUSTRIA, the name and the address of the organiser, but not of the retailer have to be provided. This is similar in the NETHERLANDS (where also the phone number of the organiser has to be provided). The BELGIAN legislator has specified the time limit for cancellation by the organiser because of not reaching the minimum number of participants (15 days before departure). LUXEMBOURG even requires a period of 21 days before departure. Moreover, in Belgium, in case of the travel arrangement contract relating to a travel organisation contract, the name and address of the travel arranger and his role as arranger for the travel organiser have to be stated. In CYPRUS, the number of meals which are not included in the agreed price of the package and the excursion program shall be mentioned as well as the name and the address of the licensed insurer or the financial institution which guarantees the security when
required by the consumer. ESTONIAN law only requires the travel destination to be included in
the contract and not the relevant periods with dates where periods of stay are involved.
Furthermore, the contract shall state only the right of the operator to cancel the contract if the
minimum number of participants has not been reached. In this case, the tour operator must
have previously reserved this right and must not have informed the consumer belated. In
ITALY, no name of the insurer but the name and address, telephone number and details of the
business licence of the organiser or retailer signing the contract have to be stated. In the
context of the accommodation details, the suitability for disabled people, if appropriate, shall
be provided. The amount of the balance payment shall be in any event not higher than 25% of
the price to be paid upon booking. In Luxembourg, the contractual element concerning an
instalment shall also include that the last partial payment by the buyer may not be less than 30
% of the all round price and shall be carried out by delivery of the travel documents.
PORTUGUESE law not only requires to list the periods for complaints of the consumer
concerning failure to perform or improper performance but also the procedure to be followed.
SWEDISH law only uses headwords in order to describe the elements to be concluded in the
contract.

The LITHUANIAN transposition provision does not prescribe the inclusion of the following
elements in the contract: travel destination, means, characteristics and categories of transport,
details of accommodation, the meal plan, the deadline for informing the consumer in the event
of cancellation because of not reaching a minimum number of participants or the special
requirements which the consumer has communicated to the organizer or retailer when making
the booking, and which both have accepted. However, the Lithuanian law requires the
contract to include personal details and the place of residence of the tourist, instances of
making alterations in the contract or the cancellation thereof, health insurance formalities and
financial guarantees, the contract number and the date of its conclusion.

In HUNGARY, certain information elements of the table below already have to be contained in
the brochure which shall become integral part of the contract by reference in the contractual
text and signature of the traveller.

Table: Information on
<table>
<thead>
<tr>
<th>Consumer Law Compendium</th>
<th>Comparative Analysis</th>
<th>266</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. Package Travel Directive (90/314)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Travel destinations and relevant periods | AT, BE, CZ, CY, EE, EL, ES, DE, DK, FI, (HU), IE, IT, LU, LV, MT, NL*, PL, PT, SE, SK, SL, UK (23) |
| Details of transport | AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, (HU), IE, IT, LU, LV, MT, NL*, PL, PT, SE, SK, SL, UK (23) |
| Dates, times and points of departure and return | AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LT, LU, LV, NL*, PL, PT, SK, SL, UK (22) |
| Details of accommodation | AT, BE*, CY, CZ, DE, DK, EE, EL, ES, FI, (HU), IE, IT, LU, LV, MT, NL*, PL, PT, SE, SK, SL, UK (23) |
| Meal plan | AT, BE*, CY, CZ, DE, DK, EE, EL, ES, FI, (HU), IE, LU, LV, MT, NL*, PL, PT, SK, SL 411, UK (21) |
| Minimum number of participants; deadline for information in case of cancellation because of not reaching the minimum number | AT, BE*, CY, CZ, DE, DK, EE, EL, ES, FI, (HU), IE, IT, LU, LV, MT, NL*, PL, PT, SK, SL, UK (22) |
| Itinerary | AT, BE*, CY, CZ, DE, DK, EE, EL, ES, FI, (HU), IE, LT 413, LU, LV, MT, PL, PT, SE, SK, SL 414, UK (22) |
| Services included in the package price | AT, BE*, CY, CZ, DE, DK, EE, EL, ES, FI, FR 415, (HU), IE, IT, LT, LU, LV, MT, NL*, PL, PT, SE, SK, SL, UK (25) |
| Name and address of the organiser, retailer and, where appropriate, the insurer | BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR 416, (HU), IE, IT, LT, LU, LV, MT, NL, PL, PT, SL 417, UK (22) |

411 If the meal plan is a component of the package.
412 Information on the number of meals (e.g. full board, half board, bed and breakfast).
413 CC, Art. 6.749(2) 3rd indent includes the places or countries to be visited as well as the dates of arrival and departure.
414 Detailed itinerary is required.
415 Art. L 211-9 of the Tourism code demands information on the content of the services with respect to transport and stay before conclusion of the contract.
416 In Art. L 211-11 of the Tourism Code is stated that the names, addresses of the organiser, the seller, the guarantor and the insurer have to be provided in the contract before the start of the journey or the stay.
<table>
<thead>
<tr>
<th>Package Price</th>
<th>AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, (HU), IE, IT, LT, LU, LV, MT, PL, PT, SE, SK, SL, UK (24)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possibility of price revision</td>
<td>AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, IE, IT, LT, LU, LV, MT, PL, PT, SE, SK*418, UK (22)</td>
</tr>
<tr>
<td>Additional dues not included in the package</td>
<td>CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LU, LV, MT, PL, PT, SK, UK (18)</td>
</tr>
<tr>
<td>Schedule and method of payment</td>
<td>AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK, UK (23)</td>
</tr>
<tr>
<td>Special requests of the consumer having been accepted</td>
<td>AT, BE<em>419</em>, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LU, LV, MT, PL, PT, SE, SK, UK (21)</td>
</tr>
<tr>
<td>Periods for complaint of the consumer for non- or improper performance</td>
<td>AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK, SL, UK (24)</td>
</tr>
</tbody>
</table>

* if relevant to the particular contract

*member states in italics and brackets provide the information duty in the brochure*

(2) Additional elements

Additional elements to be included in the contract have, for example, been introduced by the following member states:

- **BELGIUM** (1. place and date of signature; 2. name, address of traveller or other beneficiaries; 3. conditions for cancellation by the traveller or organiser and / or retailer; 4. conditions for cancellation insurance, assistance insurance and / or any other insurance; 5. difference of classification of the accommodation and current

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417 Only the name and address of the organizer.
418 Contractors may determine the possibility for the travel bureau to increase the price of the package, however not during a period of twenty days prior to the departure.
419 The provision relating to the organiser does not state explicitly that the special requests must have been accepted.
standards in the member states; 6. special requirements which have been communicated by the traveller when making the booking),

- **CYPRUS** (indication if intermediate stay in another city),
- the **CZECH REPUBLIC** (1. names of the contractors; 2. amount of compensation for the organiser if the consumer cancels the contract),
- **FRANCE** (1. Possibility of avoiding the contract; 2. Possibility of assigning the contract; 3. Information of the purchaser before the travel or stay),
- **Greece** (1. number of daily travelled kilometres; 2. operating permit of the accommodation location; 3. other services (besides meal plan) offered in the accommodation; 4. number of insurance policy and amount of insurances cover; existence of other guarantees),
- **Hungary** (1. deadline up to which the traveller may cancel without reimbursement duty of the incurred costs; 2. name, address of traveller; 3. name of insurance company or financial institution responsible for financial security; 4. premium insurance policy possibly included in the package; 5. traveller shall bear costs of cancellation if contract is concluded within 35 days prior to departure or within a contractual period),
- **Ireland** (nominated agent with an address, in the case of packages sold by an organiser (whether dealing directly with the consumer or through a retailer) who has no place of business in the State),
- **Italy** (1. any costs arising for the traveller in case of transfer of the contract; 2. requirements and procedures for use of the guarantee fund; 3. details of insurance cover and any additional policies agreed with the traveller),
- **Latvia** (1. the date until which it is possible to decline services and the percentage sum then forfeited; 2. the type of insurance chosen by the client; 3. consumer right of withdrawal if distance contract or contract outside of the company’s usual place of business),
- **Lithuania** (1. name, address of traveller; 2. instances of making alterations in the contract or the cancellation thereof; 3. health insurance formalities; 4. financial guarantees; 5. contract number and the date of its conclusion),
- **Luxembourg** (1. rights and duties of the travel agent and traveller in case of price revision, cancellation or transfer of the package; 2. assignor has to inform the travel agent by registered letter with confirmation of acceptance at the least 21 days before
begin of the trip; 3. signature of the travel agent and the purchaser; 4. guarantee certificate (cost transfer in case of possible repatriation shall be attached to the contract),

- MALTA (indication if intermediate stay in another city),
- the NETHERLANDS (visa, passport requirements, health formalities),
- POLAND (1. legal basis of the agreement and the legal consequences; 2. deadline for informing the client about assigning the rights and assuming the obligations),
- PORTUGAL (1. maximum amounts of possible claims from the agency; 2. services paid for optionally by the consumer; 3. copy of the insurance policy or policies sold by the travel agency as part of the contract),
- SLOVAKIA (1. identification of the contractual parties; 2. amount of compensation for the organiser if the consumer cancels the contract; 3. conditions a participant must meet and a period for notification if a substitute takes the package),
- SLOVENIA (1. place and date of issue of the travel confirmation; 2. name of the traveller; 3. conditions under which the traveller may demand the annulment of the contract; 4. necessary information on border and customs formalities, hygiene, financial and other administrative regulations, 5. other information deemed to be useful if included in the travel confirmation),
- SPAIN (1. consumer duty to notify non- or improper performance in writing or any other demonstrable form; 2. period of limitation for these claims; 3. period in which the consumer may claim confirmation of reservation; 4. way of contacting organiser or retailer during the tour).

The broad spectre of varieties shows that it will be very difficult for organisers to fulfil the information obligations if a foreign law is applicable. This may constitute a barrier to trade.

(3) Exceptions

In BELGIUM, the contract may simply refer to a programme, brochure or a voucher which contains the elements and may only highlight further changes. Also, by precisely indicating the page in the brochure where the name and address of the insurance company are presented, the organiser or retailer is disburdened by the duty to indicate it in the contract. In GERMANY,
the organiser can also fulfil his duties by referring to the data contained in the brochure\textsuperscript{420}. Similar rules exist in DENMARK\textsuperscript{421}, there the information in brochures and other marketing material as well as the contractual confirmation constitute a part of the contract\textsuperscript{422}. These exceptions seem to be problematic as the Directive does not state any of the facilitations. In HUNGARY, it is sufficient to refer to the brochure in the contract if such a brochure was prepared for the traveller. AUSTRIAN law states that, in case of a booking less than 7 days before departure, a travel confirmation with the obligatory elements only has to be provided if it is reasonable for the professional. The traveller, however, has to be informed about periods for complaints of the consumer for non- or improper performance and further details at the latest at the time of departure\textsuperscript{423}. The SLOVAKIAN law rules that the description of the package may be replaced by the reference number of the package or other indication in the brochure if included in it and having been handed over to the consumer. In SLOVENIA, if prior to the delivery of a travel confirmation a travel itinerary with the necessary information was delivered, it is sufficient, if the confirmation document only refers to the latter\textsuperscript{424}.

e. Information requirements with regard to all terms of the contract

Art. 4(2)(b) of Directive 90/314 imposes on the member states the obligation to ensure that all terms of the contract are set out in writing or such other form as is comprehensible and accessible to the consumer. They must be communicated to him before the conclusion of the contract and the consumer shall be given a copy of these terms. It is clear from the wording (“all the terms of the contract”) that this obligation does not only refer to the standard form conditions but includes all particulars of the contract. Most of the member states have transposed the provision.

POLAND though has not fulfilled its duty because in the relevant Act a provision regulating the communication of the terms before the conclusion of contract lacks. Only the obligation to provide a copy of the written contract is regulated. SLOVENIAN law does not require that the contract terms according to the Annex of the Directive must be communicated to the traveller

\textsuperscript{420}§ 6(4) of the Regulation on duties to supply information in civil law.
\textsuperscript{422}§ 5 subs. 2 of the Act 472/1993, Annex I no. 11 of the Regulation No. 776/1993.
\textsuperscript{423}As laid down in § 31e(2) of the Consumer Protection Act.
\textsuperscript{424}Art. 884(1), (3) of the Code of Obligations. As to the relation between contract and travel confirmation, cf. Art. 885 et seq.
prior to the conclusion of the contract, since it requires that the travel confirmation with these
data shall be issued at conclusion of the contract at the latest or that a contract in written form
containing all the mandatory components of the travel confirmation must be concluded.

IRELAND transposed the relevant article almost literally. SWEDISH law substitutes the
Directive’s term “in writing” by the expression “in an appropriate matter”. CYPRUS added that
the traveller must receive the copy in good time. MALTA has provided for an exception in case
of a proposal by a consumer made to the organiser or the retailer not more than fourteen days
before the date of departure. DANISH law enumerates passports, visas and vaccinations as
examples for the required information. In the UNITED KINGDOM, the obligation is deemed to
be an implied condition with the effect that a failure to comply with it permits the consumer
to terminate the contract.

Several countries have regulated that the contract must be in writing (e.g. ITALY). Stricter than
the Directive they do not allow other forms. This is for example the case in SPAIN, where the
information and the contract itself must satisfy the written form. The sanction for non-
compliance of such form requirements need not be nullity of the contract. In Spain, there is
case law which states that the absence of written form does not render the contract invalid if it
can be proved in some other way. Also the Directive does not prescribe that the consequence
for non-compliance with the requirement of form must necessarily be that the contract is void.
Such a sanction may be prescribed in national law, but other sanctions are possible as well.
LUXEMBOURG has found an intermediary solution. A violation of the relevant provisions leads
to nullity of the contract; nevertheless, the traveller cannot assert a claim.

Some member states, e.g. BELGIUM, FRANCE, HUNGARY425, LATVIA, LITHUANIA,
LUXEMBOURG, also left out the alternative of being in such other form as is comprehensible
and accessible to the consumer named by the Directive. In French law, the requirement of the
contract as a written document results from other legal duties426. GREEK law likewise contains
such a rule. It is controversial, whether this is a mandatory condition for legal transactions
which may lead to nullity or, in regard to the intention of the legislator to simply guarantee

425 § 2(4) of the Government Decree No. 214/1996 rules that the contract must be in writing.
426 Cf. Art. 98 of Decree No. 94-490 of 17 June 1994. This principle is recapitulated in a decision of the CA
Paris judging that the traveller cannot be asked to pay for the services provided in the agreement if there is no
information, not. ITALY has an even stricter form requirement, because the contract needs to be in writing and a copy of the contract entered into has to be signed or stamped by the organiser or retailer.

Several member states have made use of Art. 4(2)(c) and allow exceptions in case of last minute bookings. For instance, in the UNITED KINGDOM and CYPRUS, the provision of the essential terms of the contract to the consumer is not necessary when time between booking and departure is so short that it is impracticable to provide written terms. In SLOVAKIA, the confirmation of information also has to be provided until 7 days before the beginning of the package. Otherwise it must already be fulfilled at the conclusion of the contract. AUSTRIAN law prefers not to apply the rules when the booking takes place less than 7 days before the departure; it would be unreasonable to do so and the information are of little importance according to the character of the trip. In that case, the consumer must be given notice only at the time of the departure. Also under GERMAN law, the organiser is disburdened from the duty to provide a written contract and to hand it to the consumer, if the booking takes place less than 7 working days before departure. In this case, nevertheless some core information must be given to the consumer until the departure at the latest.

f. General prohibition of misleading information

Art. 3(1) of Directive 90/314 states the general rule that “any descriptive matter concerning a package and supplied by the organiser or the retailer to the consumer, the price of the package and other conditions applying to the contract must not contain any misleading information”.

It should be noted that such an unspecified prohibition of misleading information could be considered as superfluous, because the general rules on unfair commercial practices of the member states should prohibit misleading practices anyway. Also on the level of EC law, there are manifold general rules against misleading advertising and other misleading commercial practices. Therefore the law would not change, if this Directive provision were omitted. Thus, the grouping of ‘no legal definition’ in this aspect does not necessarily mean a lack of or wrong transposition.
Nevertheless, several member states transposed the provision expressly. In **ITALY**, the provision of any misleading information about service procedures offered, the price and other elements of the contract, is always prohibited, irrespective of the method used to communicate such information to the consumer\(^{427}\). In **ESTONIA** transposition law, the term “shall not” is used instead of “must not contain any misleading information”. **LATVIA** as well as **LUXEMBOURG** law only provide regulations stating that the given information must be real and complete, clear and precise. The same can be found in **SLOVAK** and **CZECH** law demanding that the organiser must provide the consumer with exact, clear, correct and truthful information before the contract is concluded (also in brochure). **SWEDISH** law is less detailed than the Directive’s text as the information must be clear and understandable. Several countries have not specifically transposed this provision but provide a general rule in their contract law, e.g. **AUSTRIA**, **DENMARK**, **FINLAND**\(^{428}\), **GERMANY**\(^{429}\), the **NETHERLANDS**, **SPAIN**.

<table>
<thead>
<tr>
<th>Table: No misleading information</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Substantively as in the Directive</strong></td>
</tr>
<tr>
<td><strong>Variations</strong></td>
</tr>
<tr>
<td><strong>Not specifically transposed</strong></td>
</tr>
</tbody>
</table>

**g. Sanctions for non-compliance with information duties**

Directive 90/314 does not contain many provisions on sanctions for non-compliance with the various information duties stipulated in Art. 3 and Art. 4(1) and (2). The only express provision can be found at the end of Art. 3(2), saying that the particulars contained in the brochure are binding on the organiser or retailer, unless changes have been clearly communicated to the consumer or agreed between the parties to the contract. However, it could be argued that this provision just states the obvious. If a brochure had been made

\(^{427}\) Art. 87(4) of the Consumer Code.

\(^{428}\) The General clause of the Consumer Protection Act (*lex generalis*) applies.

\(^{429}\) And especially unfair trade practices law.

\(^{430}\) In case of any infringement of this provision, the organiser or retailer is liable to compensate the consumer for any loss due to false or misleading information and is obliged to pay a (criminal) fine, cf. Arts. 4.1, 4.2 and 16.1 of the Package Travel Regulations.
available to the consumer and subsequently a package travel contract has been concluded on the basis of the brochure, the general rules on the conclusion and interpretation of a contract should already lead to the result that the particulars contained in the brochure become part of the contract. Thus, the effect of this provision is rather limited. It is a mere reminder that the rules of general contract law provide for sanctions in many cases of non-compliance with information obligations.

A further sanction stipulated for on the level of EC law follows from the Injunctions Directive 98/27/EC. Directive 90/314 is listed in the Annex of this Directive. Therefore the consumer protection instruments of the national laws transposing the Injunctions Directive apply to the law on packages. This means that qualified entities ensure that the collective interests of consumers are complied with also for the law of packages.

Finally, the general rule of “effet utile” obliges the member states to provide for effective sanctions. In this respect, the member states have a wide discretion what sanctions their law stipulates for. Besides private law sanctions like contractual consumer remedies, the member states may as well prescribe various public law sanctions. Examples are fines or other administrative sanctions, to be found, for instance, in Austria, Belgium, Cyprus, France, Greece, Spain, Sweden. In many countries, among others in Greece, Hungary and Malta, the competent authorities can also revoke the licence to run a travel agency. On the contrary, e.g. in Czech law, no special sanctions are stated but the general regime for improper performance or damages applies.

The broad variety of sanctions provided for by the member states does not seem to constitute a barrier to trade. It might even be considered that the differences have a positive effect on the grade of compliance of organisers and retailers with information duties in cross border cases, because such differences make it more difficult to calculate the costs of infringements committed abroad. Therefore it should suffice to tackle the great differences of the material information obligations applicable in the member states. This would indeed facilitate compliance when packages are marketed and executed under the laws of different member states.

Nevertheless, EC law must also secure that the member states provide for effective sanctions. Although such a duty of the member states already follows from the general rule of “effet
utile”, it could be considered to insert a general reminder into the Directive, which could follow the model of Art. 11(1) of Directive 97/7

2. Limitation of price revision

Art. 4(4) of Directive 90/314 regulates under which circumstances a revision of prices agreed to in the package travel contract is allowed. The prices laid down in the contract can only be subject to revision if the contract expressly provides for the possibility of upward or downward revision and states precisely how the revised price has to be calculated. Besides, only variations in transport costs, dues, taxes or fees chargeable for certain services and the exchange rates can be taken into account.

a. Legislative technique of transposition

The transposition of the regulations in Art. 4(4) of Directive 90/314 into national law differs throughout the member states.

Table: Transposition laws of Art. 4(4)

| Special act on package travel | BE 432, CY 433, DK 434, EL 435, ES 436, FI 437, FR 438, IE 439, LU 440, MT 441, PL 442, PT, SE 443, UK 444 (14) |

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431 “Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers.”
432 Art. 11 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.
433 Art. 11(1)-(3) of the The Package Travel, Holidays and Tours Law of 1998.
434 Art. 13 of the Act No. 472/1993 on Package Travel.
435 Art. 4(4) of the Decree No. 339/96 on package travel.
436 Art. 7(1)-(3) of the Law 21/1995 which regulates package travels.
440 Art. 13 of the Package Travel Act.
441 Art. 11(1)-(2) of the Package Travel, Package Holidays and Package Tours Regulations, 2000.
442 Art. 17 no.1-2 of the Act on Tourist Services.
444 Reg. 11 of the Package Travel, Package Holidays and Package Tour Regulations 1992.
b. Transposition in particular

aa. Increase “and” decrease of price

Art. 4(4)(a) of the Directive provides the opportunity for a revision of the prices laid down in the package travel contract. According to the wording, the prices laid down in the contract shall not be subject to revision unless the contract expressly provides for the possibility of upward or downward revision. While all member states restrict the increase of prices, only the transposition laws of Austria, Belgium, Cyprus, Denmark, Finland, France, Greece, Ireland, Italy, Latvia, Luxembourg, Malta, Portugal, Slovenia, Spain, Sweden and the United Kingdom present provisions that give the possibility to decrease prices if a term for a decrease is laid down in the package travel contract. In contrast, the national laws of the Czech Republic, Estonia, Germany, Hungary, Lithuania, the
Netherlands\textsuperscript{463}, Poland\textsuperscript{464} and Slovakia\textsuperscript{465} cover only the case of an increase of prices. Moreover, Hungarian law only allows the increase of the price if a term for the increase is part of the package travel contract. On the basis of the wording of the Directive, it is unclear, whether a transposition which only deals with the possibility to increase the price, is an infringement of EC law. Art. 4(4) requires that the contract expressly provides for the possibility of upward “or” downward revision. There is good reason to assume that the “or” must be read as “and”, because otherwise it makes no sense that both directions of changes are expressly mentioned.\textsuperscript{466} In this case the transposition in these countries is not in line with EC law. This should be clarified when reviewing the Directive.

\textbf{Table: Increase and decrease of price}

| Regulations for the increase and decrease of prices | AT, BE, CY, DK, EL, ES, FI, FR, IE, IT, LU, LV, MT, PT, SE, SL, UK (17) |
| Only increase covered | CZ, DE, EE, HU, LT, NL, PL, SK, SL (9) |

\textbf{bb. Conditions for price revision}

Art. 4(4)(a) of the Directive states that a price revision is possible only for variations in transportation costs (including the costs of fuel), dues, taxes or fees chargeable for certain services (such as landing taxes or embarkation or disembarkation fees at ports) and the exchange rates applied to the particular package.

Almost all of the member states transposed these provisions literally or almost literally. In Dutch law, the transportation costs, such as fuel, tax and exchange rates may justify an increase of price\textsuperscript{467}. Only the Finnish legislator used a substantively wider wording for the transposition of Art. 4(4)(a) 2\textsuperscript{nd} indent. A revision of prices is possible if “changes in transport costs beyond the tour organiser’s control or which he could not have taken into account when the contract was concluded” have to be balanced\textsuperscript{468}. A literal interpretation of the

\textsuperscript{463} CC, Art. 7:505(3).
\textsuperscript{464} Art. 17 of the Act on Tourist Services.
\textsuperscript{465} CC, § 741c(1).
\textsuperscript{466} Howells/Wilhelmsson, EC Consumer Law, 238 (see also note 35).
\textsuperscript{467} CC, Art. 7:505(3).
\textsuperscript{468} Art. 14 of the Package Travel Act
transposition laws of the **Czech Republic** and **Slovakia** show a narrower formulation than on EU level. In the Czech Republic\(^{469}\), the increase of the package price is possible only as a result of the increase of “payments connected with transportation, e.g. airport and port taxes included in the price of the package”. Furthermore, an increase of prices due to variations in the exchange rate of the Czech Crown is solely possible if the exchange rate was raised by more than 10 % in average\(^{470}\). These two situations may not occur later than 21 days prior to the beginning of the package. Additionally, an agreement of the parties can state that the travel agency may unilaterally increase the package price if the method of such a revision is precisely stated\(^{471}\). A similar provision can be found in the Slovakian transposition law, which states that a change in the exchange rate of the Slovak crown can only be taken into account if the exchange rate increased by more than 5 % in average\(^{472}\). As a restriction, this increase of the exchange rate also has to appear until 21 days before the beginning of the departure. The customer has to be notified in writing about the price increase at the last 21 days before departure. Otherwise, the travel bureau does not have any right to claim the difference in the price. In **Slovenia**, only changes in the currency exchange rate or changes in the carriers’ tariffs affecting the price of the tour are mentioned.

In **Italy**, next to the possibility of price revision, detailed calculating methods for the variations in the fields mentioned in the Directive, shall be provided\(^{473}\).

**Table: Conditions for price revision**

<table>
<thead>
<tr>
<th>Similar to the Directive</th>
<th>AT, BE, CY, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SL, UK (23)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deviations</td>
<td>CZ, SK (2)</td>
</tr>
</tbody>
</table>

**cc. Period**

According to Art. 4(4)(b) of the Directive, the price stated in the contract shall not be increased during a 20 days period prior to the departure date. While most of the member states transposed this 20 day period, some national laws provide a longer period. Whereas the

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\(^{469}\) CC, § 852c(2).

\(^{470}\) CC, § 852c(2)(c).

\(^{471}\) CC, § 852c(1).

\(^{472}\) CC, § 741c(2)(c).

\(^{473}\) Art. 90(1) of the Consumer Code.
CZECH\textsuperscript{474} legislator established a period of 21 days, the transposition laws of FRANCE\textsuperscript{475} and the UNITED KINGDOM\textsuperscript{476} provide a period of 30 days.

\textbf{dd. Other deviations}

Furthermore, the transpositions laws of CYPRUS\textsuperscript{477} and the UNITED KINGDOM\textsuperscript{478} provide an additional restriction to price revision. According to the laws of these member states, no price increase against an individual consumer liable under the package travel contract may be made in respect of variations which would produce an increase of less than 2\%, or such greater percentage as the package travel contract may define. ITALIAN law regulates that a price increase may never exceed 10\% of the original price\textsuperscript{479}. In SLOVENIA, if the increase in the agreed price exceeds 10\%, the traveller may withdraw from the contract without being obliged to reimburse the damage but having a right to a refund of all payments made.

\section*{3. Consumer Rights}

\textbf{a. Right to transfer the booking}

Art. 4(3) of Directive 90/314 provides the possibility for the consumer to transfer his booking if he is prevented from proceeding with the package. The member states again chose different techniques to transpose this provision, as the following table shows.

\textbf{Table: Transposition method}

<table>
<thead>
<tr>
<th>Special act on package travel</th>
<th>BE\textsuperscript{480}, CY\textsuperscript{481}, DK\textsuperscript{482}, EL\textsuperscript{483}, ES\textsuperscript{484}, FI\textsuperscript{485}, FR\textsuperscript{486}, IE\textsuperscript{487}, LU\textsuperscript{488}, MT\textsuperscript{489}, PL\textsuperscript{490}, PT, SE\textsuperscript{491}, UK\textsuperscript{492} (14)</th>
</tr>
</thead>
</table>

\textsuperscript{474} CC, Art. 852c(2).
\textsuperscript{475} Art. L 211-13 of the Tourism Code.
\textsuperscript{476} Reg. 11(3) of the Package Travel, Package Holidays and Package Tour Regulations 1992.
\textsuperscript{477} Art. 11(3) Package Travel, Holidays and Tours Law.
\textsuperscript{478} Reg. 11(3)(ii) of the Package Travel, Package Holidays and Package Tour Regulations 1992.
\textsuperscript{479} Art. 90(2) of the Consumer Code.
\textsuperscript{480} Art. 12 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.
\textsuperscript{481} Art. 12(1)-(2) of the Package Travel, Holidays and Tours Law of 1998.
\textsuperscript{482} Art. 12 of the Act No. 472/1993 on Package Travel.
\textsuperscript{483} Art. 4(3) of the Decree No. 339/96 on package travel.
\textsuperscript{484} Art. 5(1)-(3) of the Law No. 21/1995 which regulates package travels.
With regard to the content of the national transposition laws, the following aspects may be highlighted.

**aa. Party the notice has to be given to**

Art. 4(3) of the Directive regulates that the notice of the transfer has to be given to the organiser or the retailer of the package travel. Also the national laws of BELGIUM, DENMARK, ESTONIA, GREECE, IRELAND, ITALY, MALTA, SPAIN and SWEDEN stipulate that the notice has to be given to the organiser or the retailer. According to the national laws of CYPRUS and the UNITED KINGDOM, a notice to “the other party” is required. The other member states’ laws have made a choice whether the notice has to be given either to the organiser or

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485 Art. 10 of the Package Travel Act of 28 November 1994/1079.
487 Art. 16(1), (2) Package Holidays and Travel Trade Act, 1995.
488 Art. 12 of the Package Travel Act.
489 Art. 10(1)-(2) of the Package Travel, Package Holidays and Package Tours Regulations, 2000.
490 Art. 16(1)-(3) of the Act on Tourist Services.
491 Arts. 9, 10 of the Package Tours Act 1992:1672.
492 Reg. 10 of the Package Travel, Package Holidays and Package Tour Regulations 1992.
493 CC, Art. 852b.
494 CC, § 651b.
495 CC, §§ 415-416.
496 CC, Art. 6.753(1)-(2).
497 CC, Art. 7:506 contains a special rule for travel agreements, whereas Book 6 contains a general rule.
498 CC, §§ 741f(1), 741d(2).
499 § 31c(3) of the Consumer Protection Act.
500 Art. 89(1), (2) of the Consumer Code.
501 § 873(1), (2) of the Law of Obligations Act.
502 Art. 899 of the Code of Obligations.
504 Art. 9 of the Cabinet Regulation No 163.
505 Reg. 10.1 of the Package Travel Regulations state that the notice has to be given to the organiser or retailer acting on the instructions of the organiser.
506 Art. 10(1) of the Package Travel, Holidays and Tours Law.
507 Reg. 10 subs. 1 of the Package Travel, Package Holidays and Package Tour Regulations 1992.
the retailer. In Austria\textsuperscript{508}, Germany\textsuperscript{509}, Finland\textsuperscript{510}, Hungary\textsuperscript{511}, Lithuania\textsuperscript{512}, the Netherlands\textsuperscript{513} and Poland\textsuperscript{514}, a notice has to be given to the organiser of the package travel. On the other hand France\textsuperscript{515}, Luxembourg\textsuperscript{516} and Portugal\textsuperscript{517} require a notice to the retailer. In Slovakia\textsuperscript{518}, the notice has to be given to the travel bureau, in the Czech Republic\textsuperscript{519} to the travel agency. Slovenian\textsuperscript{520} law does not contain an express provision saying that a notice is required.

<table>
<thead>
<tr>
<th>Table: Party the notice has to be given to</th>
</tr>
</thead>
<tbody>
<tr>
<td>Organiser or retailer</td>
</tr>
<tr>
<td>The other party</td>
</tr>
<tr>
<td>Organiser</td>
</tr>
<tr>
<td>Retailer</td>
</tr>
<tr>
<td>Travel agency</td>
</tr>
<tr>
<td>Travel bureau</td>
</tr>
<tr>
<td>Travel enterpriser</td>
</tr>
<tr>
<td>No express provision on notice</td>
</tr>
<tr>
<td>Transposition not entirely clear</td>
</tr>
</tbody>
</table>

The Directive is unclear at this point, because the wording of Art. 4(3) (“having given the organiser ‘or’ the retailer reasonable notice”) can have two different meanings with regard to the addressee of the notice:

(1) The member states are free to decide, to whom the consumer must address the notice – either the organiser or the retailer, or both. If the consumer addresses the notice to the wrong person, there is no notice (unless the wrong person is deemed to be an agent of the other).

\textsuperscript{508} § 31c(3) of the Consumer Protection Act.
\textsuperscript{509} CC, § 651b.
\textsuperscript{510} Art. 10 of the Package Travel Act of 28 November 1994/1079.
\textsuperscript{511} Art. 9(1) of the Government Decree No. 214/1996.
\textsuperscript{512} CC, Art. 6.753(2).
\textsuperscript{513} CC, Art. 7:506.
\textsuperscript{514} Art. 16(2) of the Act on Tourist Services.
\textsuperscript{515} Art. 99 of Decree No. 94-490.
\textsuperscript{516} Art. 12 of the Package Travel Act.
\textsuperscript{517} Art. 24 (1) Decree-Law 198/93.
\textsuperscript{518} CC, § 741f(1).
\textsuperscript{519} CC, Art. 852b (f).
\textsuperscript{520} Art. 899 of the Code of Obligations.
(2) It suffices that the consumer gives notice to either the organiser or the retailer, in both
cases the consumer has complied with the notice requirement.
It is obvious that the latter understanding would be more consumer-friendly. If this
understanding is correct several member states are in breach of the Directive. The question
therefore should be clarified in the course of the revision.

**bb. Time the notice has to be given**

Art. 4(3) of the Directive states that the consumer has to give the organiser or the retailer
“reasonable notice” of his intention to transfer his booking. The national laws of **Austria**, **Belgium**, **Denmark**, **Estonia**, **Germany**, **Ireland**, **Luxembourg**, **Malta**, the
**Netherlands**, **Sweden** and the **United Kingdom** contain no express period. They just
require that the notice has to be given within reasonable time before the departure, some even
allowing to give the notice until the departure (e.g. German law). Dutch law clarifies that a
notice given 7 days before the departure shall be considered as early enough in any case. The
**Czech Republic**, **Latvia**, **Poland** and **Slovakia** stipulate that the notice has to be given
within the period agreed in the package travel contract. In **Cyprus**, the transposition law
prescribes that the notice has to be sent within the period specified in the contract or in the
advertising material or, in case that no such period is specified in either of the documents,
within a reasonable time before departure.

In contrast, the transposition laws of **France**, **Greece** and **Portugal** set out a fixed period
of time whereby the length of the period may depend on the type of the package. In France,
the normal period covers 7 days. If the travel is a cruise this period is extended to 15 days. In
**Greece**, the transferor has to give the notice 5 working days before departure. In the case of
maritime journeys the period for giving notice is risen to 10 days. Under Portuguese law,
the information has to be given at least 7 days before departure. If the travel involves long-
distance flights and sea cruises the period is extended to 15 days. Other member states’
legislators provided a specific period in the transposition laws without any differentiation. In

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521 The Package travel contract has to include a period for the notification if a substitute takes a package.
522 Art. 99 of the Decree 94-490.
523 Art. 4(3) of the Decree 339/96 on package travel.
524 Art. 24(1), (2) of the Decree-Law 198/93
FINLAND\textsuperscript{525}, a notice of the transfer has to be given not later than 48 hours before departure. In HUNGARY\textsuperscript{526}, the notice has to be given without delay after the intention to transfer the contractual rights has arisen. In ITALY\textsuperscript{527}, this period covers 4 working days. SPANISH\textsuperscript{528} law sets out a period of 15 days before the start of the package, unless the parties have agreed to a shorter period in the contract.

In LITHUANIA, where no express period is stated, the tourist shall have the right to transfer the journey to a third person who will enter in all the terms of the contract\textsuperscript{529}. As already mentioned above, under SLOVENIAN law, no notice is required.

The meaning of “reasonable notice” is unclear. In the course of a review of the Directive it could be clarified that a reasonable period is meant which perhaps could be specified. It should also be decided whether the fixed periods provided for by the member states are in line with EC law. At least the longer periods may deprive consumers from their right to transfer the booking.

**Table: Time the notice has to be given**

<table>
<thead>
<tr>
<th>(Within reasonable time)</th>
<th>AT, BE, DE, DK, EE, IE, LU, MT, NL, SE, UK (\textit{II})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before departure</td>
<td></td>
</tr>
<tr>
<td>Other solutions</td>
<td></td>
</tr>
<tr>
<td>Specific period before departure</td>
<td>ES, FI (48h), HU (without delay), IT (4 working days) (\textit{4})</td>
</tr>
<tr>
<td>Differentiation</td>
<td>CY, EL, FR, PT (\textit{4})</td>
</tr>
<tr>
<td>Contractual agreement</td>
<td>CZ, ES, LV, PL, SK (\textit{5})</td>
</tr>
<tr>
<td>No express period</td>
<td>LT (\textit{I})</td>
</tr>
<tr>
<td>No notice required</td>
<td>SL (\textit{I})</td>
</tr>
</tbody>
</table>

\textsuperscript{525} Art. 10 of the Package Travel Act of 28 November 1994/1079.
\textsuperscript{526} Art. 9(1) of the Government Decree 214/1996.
\textsuperscript{527} Art. 89(1) of the Consumer Code.
\textsuperscript{528} Art. 5(2) of the Law 21/1995 which regulates package travels.
\textsuperscript{529} CC, Art. 6.753(1).
cc. Form of the notice

Art. 4(3) of the Directive does not require a specific form for the transferor’s notice. Also in AUSTRIA, BELGIUM, CYPRUS, DENMARK, ESTONIA, FINLAND, GERMANY, GREECE, HUNGARY, IRELAND, LATVIA, LUXEMBOURG, MALTA, POLAND, SWEDEN and the UNITED KINGDOM, the transferor does not have to meet a requirement of form for his notice. As already mentioned, SLOVENIAN law does not require a notice in order to transfer the rights of the package. In contrast to this, the transposition laws of the CZECH REPUBLIC, ITALY\footnote{Art. 90(1) of the Consumer Code.}, LITHUANIA\footnote{CC, Art. 6.753(2).}, the NETHERLANDS\footnote{CC, Art. 7:506(2).}, PORTUGAL\footnote{Art. 24(1) of the Decree-Law 198/93.}, SLOVAKIA\footnote{CC, § 741f(1).} and SPAIN\footnote{Art. 5(2) of the Law 21/1995 which regulates package travels.} stipulate that the notice has to be made in writing. FRENCH\footnote{Art. 99 of Decree No. 94-490.} law even demands a recorded delivery letter with confirmation of receipt. It is questionable whether these form requirements are in line with the Directive. In the course of its review it could be clarified that the consumer does not need to meet any form requirement for the notice.

<table>
<thead>
<tr>
<th>Table: Form of the notice given by traveller</th>
</tr>
</thead>
<tbody>
<tr>
<td>No specific form</td>
</tr>
<tr>
<td>AT, BE, CY, DE, DK, EE, FI, EL, HU, IE, LU, LV, MT, PL, SE, UK (16)</td>
</tr>
<tr>
<td>Written form</td>
</tr>
<tr>
<td>CZ, ES, IT, LT, NL, PT, SK (7)</td>
</tr>
<tr>
<td>Recorded delivery</td>
</tr>
<tr>
<td>FR (1)</td>
</tr>
<tr>
<td>No notice required</td>
</tr>
<tr>
<td>SL (1)</td>
</tr>
</tbody>
</table>

dd. Liability

According to Art. 4(3) of the Directive, the transferor of the package and the transferee shall be jointly and severally liable to the organiser or retailer, party to the contract, for payment of the balance due and for any additional costs arising from the transfer of rights. Most of the member states transposed this provision almost literally into their national laws, namely AUSTRIA, BELGIUM, CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE,
IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, SPAIN, SWEDEN and the UNITED KINGDOM. Similarly, under HUNGARIAN law\(^{537}\), the transferor and the transferee are jointly liable for contractual obligations and additional costs arising in the period before the transfer. In SLOVENIA\(^{538}\), it seems that only the transferor is liable.

<table>
<thead>
<tr>
<th>Joint and several debt</th>
<th>AT, BE, CY, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, SE, SK, UK (23)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deviations</td>
<td>SL (transferor) (I)</td>
</tr>
<tr>
<td>Transposition not entirely clear</td>
<td>CZ (I)</td>
</tr>
</tbody>
</table>

**b. Consumer rights in case of significant alterations**

**aa. Legal environment of the consumer rights granted under the Directive**

Directive 90/314 does not provide for a general rule on the cancellation of the booking by the consumer. The Directive only deals with consumer rights in case of a significant alteration of essential terms by the organiser (Art. 4(5)). For the sake of clarification, it should be noted that the rights granted to the consumer under the Directive are embedded in other rules of national law concerning the consequences of cancellation of the booking by the consumer. Therefore, different types of possible rights of the consumer to cancel the booking may occur. Firstly, the applicable national law may allow the consumer to cancel the contract without any reason. This is the case, among many others, in GERMANY, HUNGARY or SPAIN. It goes without saying that in such a case the consumer owes the organiser a compensation. The national laws may stipulate rules for the calculation of the compensation, if the consumer cancels without reason\(^{539}\). For instance, recent Spanish case law had to deal with this question\(^{540}\), calculating a different percentage of compensation depending on the timing of

\(^{537}\) Art. 9(1) of the Government Decree 214/1996.
\(^{538}\) Art. 899 of the Code of Obligations.
cancellation if a consumer cancels without any fair reason\textsuperscript{541}. In Hungarian law, the compensation shall not exceed the amount of the price paid. The exercise of the right of cancellation is based on other reasons than price increase, alteration of terms or program.

A second type of cancellation rights provided for by national laws allows the consumer to terminate the contract when there is a good reason even if this reason is beyond control of the organiser. According to FINNISH law for example, the consumer may cancel the contract if he has sufficient reasons not to participate in a trip to a dangerous region even if the organiser is not going to cancel it\textsuperscript{542}. SPANISH law sometimes even renounces compensation if the consumer cancels because of a substantial reason\textsuperscript{543}. GERMAN law allows the consumer to cancel the booking, if the travel is endangered by unforeseen force majeure. In this case, the consumer is partly disburdened from the obligation to pay the price. Additional costs have partially to be shared by the parties (e.g. cost for travelling back), partially to be borne by the consumer\textsuperscript{544}.

A third type of cancellation rights – very probably – occurs in all national laws when the organiser is in (usually severe) breach of contract. This case is partially regulated by the Directive in its Art. 5 and therefore shall not be dealt with here in the context of Art. 4.

**bb. Consequences of alteration of terms by the organiser**

Art. 4(5) sent. 1 of Directive 90/314 states the obligations of the organiser in case of significant alteration of essential terms and the rights of the consumer in this case. The organiser shall notify the consumer as quickly as possible about any important change in order to enable the consumer to either cancel\textsuperscript{545} the contract without penalty (1\textsuperscript{st} indent) or to accept a rider to the contract specifying the alterations made and their impact on the price (2\textsuperscript{nd} indent). Therefore, the consumer may choose between these two possible reactions. In case of voting for the right to cancel, Art. 4(6)(a) and (b) of the Directive again offers two

\textsuperscript{541} Cf. Art. 9(4) of the Law 21/1995 which regulates package travels.

\textsuperscript{542} § 15(1) of the Package Travel Act.

\textsuperscript{543} AP Malaga judgment of 29 September 2004: depression of the consumer; AP Salamanca judgment of 7 September 2001: NATO bombing in Yugoslavia.

\textsuperscript{544} CC, § 651j.

\textsuperscript{545} Although the Directive 90/314 uses the term ”withdrawal, “cancellation” is used here instead in order to avoid confusion with the withdrawal rights granted in the Directives 85/577, 97/7 and 94/47.
possibilities the consumer may choose: to take a substitute package of equivalent or higher quality or to be refunded with respect to all sums paid under the contract. In this case, the consumer may be compensated according to the applicable law of the relevant Member State, if not the cancellation is based upon an insufficient number of participants or force majeure (Art. 4(6)(b) no. i and ii).

With regard to the terms used, the Package Travel Directive rather coherently employs “withdrawal” when speaking about the consumer’s right to terminate the contract, and “cancellation”, when the organiser terminates. Nevertheless it should be considered to avoid the notion of “withdrawal” in this context, because this may be mixed up with the very different instrument of the so-called ‘cooling off periods’ provided for in other Directives, which are commonly called “withdrawal rights”. Therefore, in this study “withdrawal” is only used for cooling off periods. Consequently, “cancellation” is used here for both, the termination of the contract by the consumer and the termination of the contract by the organiser. In the German version of the Directive this problem does not occur.

The vast majority of the member states has transposed the provisions of Art. 4(5) and (6) by rather closely following the system of the Package Travel Directive. As the only country, LITHUANIA has not explicitly transposed these Directive provisions but simply grants the tour organiser a right to waive the contract for important reasons being still obliged to inform the tourist thereof.

(1) Requirements for the right to cancel

(a) Significant alteration of essential terms
The Directive demands a significant alteration of essential terms by the organiser and gives as an example the increase of price. The member states have transposed this prerequisite with only slight variations. For instance, regarding the example of the price as an essential term, GERMAN law states any price increase of more than 5 %547. HUNGARIAN law stipulates any price increase of more than 10 %. It cannot be stated that such variations, which aim at a

546 CC, Art. 6.751(1).
547 CC, § 651a(5).
clarification whether an alteration is “significant”, constitute a shortcoming in the transposition. Some further variations are displayed in the following table.

<table>
<thead>
<tr>
<th>Table: Alteration of terms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Significant alteration of essential terms</td>
</tr>
<tr>
<td>Alteration of essential term</td>
</tr>
<tr>
<td>Significant alteration to any term</td>
</tr>
<tr>
<td>Alteration of essential terms for external reasons</td>
</tr>
<tr>
<td>Impossibility of an essential term due to external incidents</td>
</tr>
<tr>
<td>Impossibility of fulfilling the contractual obligations</td>
</tr>
<tr>
<td>Not explicitly transposed</td>
</tr>
</tbody>
</table>

(b) Obligation to notify the consumer

Art. 4(5) of the Directive obliges the ‘organiser’ as the one who, in case of altering essential terms, shall notify the consumer as quickly as possible.

In the transpositions laws variations in the wording exist: e.g. in FRANCE where the notion of “seller” is used instead; moreover, in the CZECH REPUBLIC (travel agency), ITALY (organiser and retailer), LATVIA (undertaking), LUXEMBOURG (travel agent), PORTUGAL (travel agency) and in SLOVAKIA (travel bureau). Although in some cases not very clear, such a choice of

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\(^{548}\) In § 16 of the Act 472/1993 is stated ‘anticipated significant breach of contract’.

\(^{549}\) The only regulatory gap of the Directive which has been commented on in Greek legal literature is that no rules exist in case that the consumer is constrained to cancel the trip after conclusion of the contract but before beginning of the trip. In Greek law, those who identify the travel contract as a service contract, apply Art. 700 of the CC which regulates that the traveler can cancel the contract at any time; but he remains obligated to pay the agreed price minus the saved amount resulting from the non-performance of the contract.

\(^{550}\) Art. 101 of Decree No. 94-490.

\(^{551}\) Art. 903 of the Code of Obligation states ‘significant changes in the travel itinerary’.

\(^{552}\) CC, sec. 852(1) states that, as a result of external reasons, the terms of the travel contract may be changed before departure if the travel agency is forced to do so.

\(^{553}\) Art. L 211-14 of the Tourism Code.
w wording allows the conclusion that both the organiser and the retailer shall be obliged to inform the consumer. If this is correct, the position of the consumer is improved in comparison with the Directive, which just obliges the organiser. SLOVENIAN law does not contain any specific provision, but only knows the general provision that the organiser must provide the traveller with services being described in the contract, a confirmation or travel itinerary, and act according to the traveller’s rights and interests in the sense of good customs.

Another particularity exists in CZECH law not stating an obligation but only regulating that the travel agency may suggest a contractual change without any time limit\(^554\).

<table>
<thead>
<tr>
<th>Table: Party obliged to inform the consumer about need for alteration</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
</tr>
<tr>
<td>Variations</td>
</tr>
<tr>
<td>Not explicitly transposed</td>
</tr>
</tbody>
</table>

Moreover, the organiser shall notify the consumer “as quickly as possible” in order to enable him to take appropriate decisions. SLOVENIA has not transposed this notification duty of the organiser at all. On the contrary, FRANCE\(^555\) and ITALY exceed the Directive requirements by demanding written notification of the consumer by the organiser. As to the time of the notification duty, the majority of the member states has adopted the same formulation as the Directive. Whereas LUXEMBOURG grants the organiser a 3 days period for fulfilling his obligation duty, CZECH and SLOVAK law do not have any regulation with regard to the time in which the notification of the consumer shall take place. This does not seem to be in line with the Directive’s formulation “as quickly as possible” any more. The Italian regulation makes use of the term ‘immediately’\(^556\).

The majority of the member states demands an information about the significant alteration of essential terms. Additionally, the organiser shall inform the consumer about a price increase

\(^{554}\) CC, sec. 852e(1).


\(^{556}\) Art. 91(1) of the Consumer Code.
in Estonia. In Portugal, the organiser has to inform the consumer if the contractual obligations cannot be met. In Hungary, no notification duty exists in special law, but the general rules of civil law apply, demanding immediate notification if it seems to be impossible to perform the contract.

**Table: Time period for duty of notification**

<table>
<thead>
<tr>
<th>Time period</th>
<th>AT, BE, CY, DE, DK, EE, EL, ES, FI, FR, IE MT, NL, PT, SE, SK, UK (17)</th>
</tr>
</thead>
<tbody>
<tr>
<td>As quickly as possible</td>
<td>AT, BE, CY, DE, DK, EE, EL, ES, FI, FR, IE MT, NL, PT, SE, SK, UK (17)</td>
</tr>
<tr>
<td>Immediately</td>
<td>IT (1)</td>
</tr>
<tr>
<td>Without delay</td>
<td>LV, PL (2)</td>
</tr>
<tr>
<td>3 c-days</td>
<td>LU (1)</td>
</tr>
<tr>
<td>No time-limit</td>
<td>CZ, HU (2)</td>
</tr>
<tr>
<td>Not explicitly transposed</td>
<td>LT, SL (2)</td>
</tr>
</tbody>
</table>

**Table: Content of notification**

<table>
<thead>
<tr>
<th>Information about alteration</th>
<th>AT, BE, CY, DE, EE, EL, ES, FI, FR, IE, IT, LU, LV, MT, PL, SE, UK (17)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Instruction about right to choose</td>
<td>AT, FR, LU, PL (4)</td>
</tr>
<tr>
<td>Instruction about right of cancellation</td>
<td>BE, DK, SE (3)</td>
</tr>
<tr>
<td>Suggestion of alteration of contract</td>
<td>CZ, SK (2)</td>
</tr>
<tr>
<td>Information about any price increase</td>
<td>EE (1)</td>
</tr>
<tr>
<td>Cancellation of the journey</td>
<td>EE (1)</td>
</tr>
<tr>
<td>Information if contractual obligations cannot be fulfilled</td>
<td>PT (1)</td>
</tr>
<tr>
<td>Not explicitly transposed</td>
<td>LT, SL (2)</td>
</tr>
</tbody>
</table>

(2) **Consumer rights after notification of significant alteration**

The consumer may subsequently either cancel the contract without penalty or accept a rider to the contract specifying the alterations made and their impact on the price. Some of the member states only grant the consumer the right of cancellation without explicitly mentioning
the possibility of accepting a rider to the contract, e.g. DENMARK, ESTONIA, FINLAND, GERMANY and SWEDEN. The reason for this may be the fact that, as a matter of course, the parties can agree on a contract amendment.

Table: Consumer rights after notification of amendment

<table>
<thead>
<tr>
<th>Right of cancellation</th>
<th>AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IT, LU, LV, MT, NL, PL, PT, SE, SK, SL, UK (24)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not explicitly transposed</td>
<td>LT (1)</td>
</tr>
</tbody>
</table>

The possibility of the consumer to “accept a rider to the contract specifying the alterations made and their impact on the price” has not been transposed into GERMAN law as such. Instead, the traveller has a right to an equivalent or another journey, if an essential alteration of the services exists and the organiser is able to offer an alternative trip. Thus, Art. 4(5), 2nd indent of Directive 90/314 has probably not been correctly transposed. Moreover, in HUNGARY, the traveller is allowed to ask equivalent or higher standard service. If the organiser is not able to offer such a service or the traveller does not accept such an offer, the price can be reduced about 20 % in case that the reason for the cancellation of the contract by the organiser does not stem from the sphere of the traveller.

In BELGIUM, in case of the consumer accepting the amendments of the initial agreement, the change must be laid down in a rider or a new contract. The parties are however free to decide which method is appropriate.

<table>
<thead>
<tr>
<th>Alteration of contract</th>
<th>Rider</th>
<th>BE*, CY, EL, ES, FR, IE, LV, MT, NL, UK (10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acceptance of alteration of contract</td>
<td>AT, CZ, FI, HU*, IT, LU, PL, PT, SK (9)</td>
<td></td>
</tr>
</tbody>
</table>

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557 CC, § 651a(5), sent. 3.
558 § 10(2) of the Government Decree 214/1996.
### New contract

<table>
<thead>
<tr>
<th>Replacement with equivalent or higher standard services</th>
<th>DE, DK&lt;sup&gt;559&lt;/sup&gt;, EE&lt;sup&gt;560&lt;/sup&gt;, HU*, LV (5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transposition not entirely clear</td>
<td>SE, SL (2)</td>
</tr>
</tbody>
</table>

* more than once

### Table: Time limit

<table>
<thead>
<tr>
<th>Time limit</th>
<th>Country(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>As soon as possible</td>
<td>BE, CY, DE, EE, EL, FR, HU, IE, MT, UK (10)</td>
</tr>
<tr>
<td>2 w-days</td>
<td>IT (1)</td>
</tr>
<tr>
<td>3 c-days</td>
<td>ES (1)</td>
</tr>
<tr>
<td>5 c-days</td>
<td>CZ (1)</td>
</tr>
<tr>
<td>7 c-days</td>
<td>LU (1)</td>
</tr>
</tbody>
</table>

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559 § 16 of the Act 472/1993 gives the consumer the right to withdraw from the contract or to choose a substitute package without causing disproportionate costs or loss to the organiser in case of anticipated significant breach of contract before departure.

560 According to § 872(2) of the Law of Obligations Act, the traveller may, instead of withdrawing, demand a substitute package of equivalent or higher cost if the tour operator is able to offer such a substitute, or a substitute package of lower cost and a refund of the difference in price between the packages.

561 CC, sec. 852e(2).

562 Art. 91(2) of the Consumer Code states that the consumer shall inform the organiser or retailer of his decision within two working days from the date on which he received the notice concerning the alteration.
Art. 4(6) of Directive 90/314 gives the consumer, if he withdraws from the contract pursuant to (5) or if the organiser cancels the package for causes other than the fault of the consumer, the rights to either take a substitute package (a) or to be repaid as soon as possible (b). The member states have overall adopted these Directive provisions, although in some cases supplemented by additional rules (e.g. rules about other reasons for cancellation, cf. above under point III.3.b.aa.). In most of the member states the consumer is entitled to take a substitute package as stated in the Directive, as the following table shows.

Table: Entitlements of the consumer to take a substitute package

<table>
<thead>
<tr>
<th>Substitute package of equivalent or higher quality</th>
<th>AT, BE, CY, CZ, EE, ES, DE, EL, HU, IE, IT, LT, LU, MT, NL, PL, PT, SE, SK, UK (20)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Refund of the difference in case of lower quality package</td>
<td>AT, BE, CY, CZ, DK, EE, ES, FI, EL, HU, IE, IT, LU, MT, PL, PT, SE, SK, UK (19)</td>
</tr>
<tr>
<td>Substitute package</td>
<td>FR (1)</td>
</tr>
<tr>
<td>Another package without any undue expense or financial loss for the organiser</td>
<td>DK (1)</td>
</tr>
<tr>
<td>Substitute package at the original price, indemnification of useless costs</td>
<td>FI (1)</td>
</tr>
</tbody>
</table>

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563 No specific transposition exists but the general rules on the avoidance of the contract however require that a creditor cancelling a contract due to the non-performance of a debtor’s obligation must notify the debtor of such without delay.

564 The special regulation of travel contract states the obligation to pay the price difference between the original and substitute package, CC, Art. 852g(3).
Some member states have also stipulated a rule on the time to refund the difference if the substitute package is cheaper, for instance, BEELGIUM (“as soon as possible”), CZECH REPUBLIC (“with undue delay”) or SLOVAKIA (“forthwith”).

In case the consumer is not offered or does not take a substitute package, most of the member states provide express regulations concerning the reimbursement of all sums paid.

**Table: Obligation to reimburse of all sums paid**

<table>
<thead>
<tr>
<th>Reimbursement of all sums paid</th>
<th>AT, BE, CY, CZ(^{565}), DE(^{566}), DK, EL, ES, FI, FR, IE, IT, LT, LU, MT, NL, PL, PT, SE, SK, SL, UK (22)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediate repayment of the full price paid</td>
<td>HU (I)</td>
</tr>
</tbody>
</table>

FINLAND additionally stipulated that the consumer must be indemnified for useless costs.

Several member states also expressly transposed the provision on the time of repayment (“as soon as possible”)\(^{567}\). FRENCH\(^{568}\) law requires, for instance, the “immediate” refund of all sums paid if the buyer does not take the substitute package.

**Table: Time of repayment of all sums paid under the contract**

<table>
<thead>
<tr>
<th>As soon as possible</th>
<th>BE, EL, IE, MT, SE, UK (6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Immediately</td>
<td>FR, HU, PL, PT (4)</td>
</tr>
<tr>
<td>Upon cancellation of contract</td>
<td>CY (I)</td>
</tr>
<tr>
<td>Without delay</td>
<td>FI (I)</td>
</tr>
<tr>
<td>Moment of rescission of contract</td>
<td>ES (I)</td>
</tr>
<tr>
<td>7 w-days after cancellation by the consumer</td>
<td>IT (I)</td>
</tr>
</tbody>
</table>

\(^{565}\) General regimen of unjust enrichment applies without any time limit.
\(^{566}\) CC, § 346.
\(^{567}\) As an example for the other member states, LATVIA does not provide any particular time regulation of repayment of all sums.
\(^{568}\) Art. 101 of the Regulatory Act 94-490.
Some national laws also contain cancellation penalties for the organiser if he cancels the package. The organiser, if he cancels shorter than 20 days prior to the date of commencement of the package, is obliged to pay the consumer 10% of the package price in the Czech Republic and to reasonably compensate the damage of the consumer in Slovakia. In Hungary, the organiser must pay an interest of 20% per annum on the price to be repaid.

(5) Compensation according to member states’ law for non-performance

Art. 4(6) of the Directive also prescribes that the consumer shall be entitled to be compensated for non-performance of the contract, except where one of the cases listed in n° i (minimum number not reached) or n° ii (force majeure) occurs.

Most member states have expressly transposed the duty to compensate the consumer. The others seem to rely on their general rules on compensation in case of breach of contract.

Again, Czech law states a particularity imposing on the travel agency a penalty of 10% of the package price in favour of the consumer, if the cancellation has taken place within a period shorter than 20 days before departure\(^{569}\). Apart from this, the customer is entitled to damages\(^{570}\).

Table: Compensation for non-performance

| As in the Directive | AT, BE, CY, CZ\(^{571}\), DE, DK, EL, ES, HU, IE, IT, LT\(^{572}\), LU, LV\(^{573}\), MT, NL, PL, PT, SE, SK\(^{574}\), SL, UK (22) |

\(^{569}\) CC, § 852g(4).
\(^{570}\) CC, § 852g(4) last sent.
\(^{571}\) CC, Art. 852j.
\(^{572}\) CC, Art 6.751(3) 1\(^{st}\) indent explicitly transposed the compensation duty of the organiser who, on waiving the contract, must compensate the tourist for the material damage and reimburse the money already paid by the consumer.
Some variations can be found with regard to the two exceptions from the duty to compensate the consumer, namely if the minimum number is not reached (n° i) or in case of force majeure (n° ii).

Some member states have introduced a time limit for cancellation because of not reaching the minimum number of participants. For instance, in SLOVENIA the organiser must cancel at the latest 5 days before the planned departure. In BELGIUM, the period is 15 days and in ITALY 20 days.

With regard to the exception of force majeure, in some cases the definition of this notion seems to be different. For instance, under FINNISH law, the organiser is entitled to cancel the package because of an act of war, a natural catastrophe, a strike or similar situation at or near the package destination or if in consequence of some other unexpected circumstance the package cannot be brought about without risk to the traveller’s life or health. Force majeure is not defined in GERMAN legislation, though it has been more closely defined in a number of rulings in the German courts as an “external event that is not in any way connected to the company and could not, even with due care and attention, have been avoided”. In contrast, the Directive’s definition is wider also covering internal events that have their root in the company’s business operations, such as staff strikes affecting the travel agency/trip organiser if it was not foreseeable or its consequences could not have been avoided. Since the definition adopted by German courts limits the opportunities for the trip organiser to cancel, German case law actually works in the consumer’s favour.

Some difference also exist in SPAIN as regards the exception to the cancellation recognised in the Directive to the consumer in case of force majeure. These differences exist in various

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573 As a compensation for non-performance, restitution shall take place and, additionally, the customer has a right to claim losses according to the Civil law based on the doctrine of breach of contract.
574 If the organiser cancels shorter than 20 days prior to the departure, is obliged to reasonably compensate the consumer.
575 CC, § 852g(4), (5).
577 Cf. BGH judgment of 16 April 2002, X ZR 17/01.
administrative rules that some Autonomous Communities (Catalonia, Balearic Islands, etc.) have enacted to adapt the norms to the Directive. The (administrative, not civil) liability of the retailers (travel agencies) is therefore slightly different depending on the territory within Spain where they operate.

In FRENCH law, no express exclusions can be perceived\(^{578}\). In the CZECH REPUBLIC, the exemptions from the liability for damages (not for compensation) exist similarly to the provisions in the Directive\(^ {579}\).

The following table may indicate some further variations which can be found in the member states.

### Table: Exceptions from the obligation to compensate the consumer

<table>
<thead>
<tr>
<th>As in the Directive</th>
<th>AT, BE, CY, CZ, DK, EL, ES, HU, IE, IT LT, LU, MT, NL, PL, PT, SE, SL, UK (19)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Examples for variations with regard to n° i (minimum number)</td>
<td>Explicit right to cancel EE, FI, SK (3)</td>
</tr>
<tr>
<td>Examples for variations with regard to n° ii (force majeure)</td>
<td>Explicit right to cancel DE, EE, FI (3)</td>
</tr>
<tr>
<td></td>
<td>Not explicitly transposed FR, DE (2)</td>
</tr>
<tr>
<td></td>
<td>Not explicitly transposed FR (1)</td>
</tr>
<tr>
<td></td>
<td>Definition of force majeure EE(^ {580}), FI (2)</td>
</tr>
<tr>
<td></td>
<td>No explicit use of the term ‘force majeure’ CY, CZ, DK, MT(^ {581}) (4)</td>
</tr>
</tbody>
</table>

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\(^{578}\) Neither in Art. L 211-15 of the Tourism Code nor in Art. 102 of Regulatory Act 94-490.

\(^{579}\) CC, sec. 852g(5)(b). This is a technical problem as the regulation in CC, sec. 852g(5) duplicates the provision of sec. 852j (1).

\(^{580}\) Art. 103(2) of the Law of Obligations Act.

\(^{581}\) Reg. 13.3.2 of the Package Travel Regulations makes use of the wording “by reasons of unusual and unforeseeable circumstances beyond the control of the organiser, the retailer or other supplier of services, the consequences of which could not have been avoided even if all due care had been exercised” instead of the term ‘force majeure’.
4. Additional duties of the organiser

a. Obligation to make alternative arrangements

Art. 4(7) of Directive 90/314 states in its first sentence the obligation of the organiser to make alternative arrangements without extra cost and to compensate the consumer, where appropriate, in case that a significant proportion of the services is not provided after departure. It is unclear whether the duty to compensate the consumer “where appropriate” constitutes an independent specific liability rule or – more plausible – just refers to the general rule of Art 5(2) of the Directive. If one prefers the latter possibility, the organiser could raise the defences provided for in Art. 5(2), e.g. force majeure. This question could be clarified when reviewing the Directive.

Many member states have transposed these provisions by closely following the Directive. The following table shows the general picture.

Table: Obligation to make alternative arrangements

<table>
<thead>
<tr>
<th>Substantively as in the Directive</th>
<th>BE, CY, EL, FR, HU, IE, IT, LT, MT, NL, PL, PT, SE, SK, UK (I5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Variations</td>
<td>AT, CZ, DE, DK, EE, ES, FI, LU (8)</td>
</tr>
<tr>
<td>Additional requirements</td>
<td>FR, HU, PL, PT (4)</td>
</tr>
<tr>
<td>Not expressly transposed</td>
<td>SL (^{583}) (1)</td>
</tr>
<tr>
<td>Transposition not entirely clear</td>
<td>LV(1)</td>
</tr>
</tbody>
</table>

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\(^{582}\) Cf. Howells/Wilhelmsson, EC Consumer Law, 243 (see also note 55).

\(^{583}\) Art. 903 of the Code of Obligations only regulates when changes in the travel program shall be permitted.
The spectrum of – in most cases slight – variations to be found in some of the member states is relatively wide. For instance, in AUSTRIA, although the travel agent is obliged to render every assistance to the traveller, the Austrian Consumer Protection Act does not mention the obligation of the travel agent to compensate the traveller in case of the impossibility of alternative arrangements. Insofar Austria relies on its general provisions in the Austrian Civil Code concerning compensation (e.g. § 1042). In LUXEMBOURG, the transposition law does not oblige the travel agent to make alternative arrangements when the impossibility to perform the contractual obligations is duly justified.

The FINNISH legislator allows in the first instance to correct any defect of performance. If, however, material inconvenience to the traveller is caused, the latter may refuse such correction. If it is not possible to correct the defect or if it is not corrected without delay, the traveller is entitled to a price reduction corresponding to the importance of the defect. The CZECH law obliges the travel agency to provide the consumer in difficulty with prompt assistance if a damage was caused by a third person or unforeseeable circumstances. In case that all services or a significant part of them does not take place or the travel agency perceives that it will be unable to provide these contractually prescribed services, appropriate measures have to be taken by the travel agency without undue delay and free of charge.

The Directive establishes the duty to compensate the difference between the services offered and those supplied “where appropriate”. CZECH law and FRENCH law clarify that compensation is appropriate, when the service supplied is of lower quality.

Some countries, for instance DENMARK, state a right of cancellation in the situation regulated in Art. 4(7) of the Directive. In case of cancellation, the operator has to refund the payments made but is therefore entitled to a sum corresponding to the value which the package tour may be considered to have had for the customer. Cancellation or alternatively a price reduction is excluded if the operator offers to remedy the shortcoming with no extra cost or significant inconvenience within a reasonable period of time. Besides, compensation is granted for both shortcoming and - contrary to ordinary rules on damages - subsequent considerable inconvenience such as “ruined holiday”, unless the breach is due to force majeure.

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584 CC, sec.852k(1).
585 CC, § 852k(2).
ESTONIAN law offers the traveller the right to cancel the contract if an essential travel service is changed significantly. Instead of cancelling, the traveller may demand a substitute package of equivalent or higher cost if possible. Otherwise, the difference in price between the packages shall be refunded. A replacement service can be provided in HUNGARY and LUXEMBOURG, too. In ESTONIA, the consequences of a violation of a contractual obligation are also specified in detail. Firstly the traveller has to notify the tour organiser or retailer who in the second place shall take all reasonable steps in order to provide immediate assistance to a traveller in difficulty - except the traveller has caused the violation himself. In SLOVAK law, the travel bureau is liable towards the customer to take actions without undue delay in order to ensure that the tour may begin and to refund the customer according to the price difference between the offered and provided services.

The right to compensation in POLAND does not apply if the impossibility of the alternative arrangements has been caused either solely by actions or omissions of third parties, not involved in the alternative arrangements if their conduct was not foreseeable and preventable, or by force majeure. Moreover, the client can seek a proportional price reduction provided that the quality of a replacement service is inferior to the quality of service described in the tourist event programme.

GERMAN law gives a wide range of remedies to the traveller. Compared to the Directive a raised liability standard is set up. A special feature and condition is the existence of a travel defect, which means that when the trip does not meet the promised specifications or necessary quality standards, then German law regards it as unsatisfactory. In case of an infringement, the organiser may in the first place either rectify the defect or provide an equivalent replacement service. If he does not do so, the traveller is entitled to a price reduction subject to the duration of the inconvenience provided that he has informed the organiser about the defect. If the breach is fundamental, the consumer can also cancel the contract. It is important to note that those remedies do not depend on the organiser’s fault. This is only a requirement when the consumer additionally seeks damages which even include reparation for uselessly spent holiday time.

The SPANISH rule adds that when the consumer continues the travel according to the alternative arrangement, it will be deemed as implied acceptance of the proposal. PORTUGAL
supplements the obligation to communicate to the agency any deficiency in the performance of the contract in respect of services provided by third parties within the period stipulated in the contract or failing that, as soon as possible, in writing or another appropriate form.

SLOVENIAN law does not contain any specific provision. The substance of Art. 4(7) of the Directive can rather be found in several different articles of the Code of Obligations. It is stated that the agreed accommodation may only be replaced with accommodation in facilities of the same category or in facilities of a higher category at the travel organiser’s expense, and only in the agreed location. This seems stricter than the Directive’s “suitable alternative arrangements”. In case of substantial alterations without justified reasons, the organiser shall return everything obtained from the traveller who is allowed to cancel the contract.

b. Duty to provide equivalent transport back and compensation

If an alternative arrangement according to Art. 4(7) sent. 1 of the Directive is either impossible or not accepted by the consumer for good reasons, the organiser has to provide an equivalent transport back to the place of departure or to another return-point to which the consumer has agreed and shall compensate the consumer where appropriate (Art. 4(7) sent. 2).

Once again, most member states, such as e.g. BELGIUM, CYPRUS, FRANCE, GREECE, ITALY, LITHUANIA, LUXEMBOURG, MALTA, PORTUGAL, SPAIN, SWEDEN and the UNITED KINGDOM have implemented this provision in a similar way or even word-for-word.

Examples for variations or more detailed provisions can be found in several member states. For instance, AUSTRIA does not have a specific provision on compensation. Nevertheless the consumer is entitled to compensation following from the general rules of the Austrian Civil Code. Whereas SLOVAKIA omits the wording of the Directive “for good reasons”, the IRISH law replaces it with “on reasonable grounds” and the ITALIAN legislator chooses the term “in bona fide”.

The CZECH REPUBLIC regulates the question of transport in detail. The return journey includes necessary substitute accommodation and catering. Furthermore, if any price difference exists,
it has to be reimbursed\(^{587}\). Also in SLOVAKIA, the transport back to the point of departure or such other point of return as agreed by the consumer includes necessary substitution lodging and boarding. In HUNGARY, if an alternative arrangement is either impossible or not accepted by the consumer for good reasons, the organiser has to arrange for an equivalent transport back to the place of departure, bear its costs and reimburse the fees minus the prices of services having already been executed\(^{588}\). Also ESTONIAN law clarifies that all additional expenses are to be borne by the operator.

According to DANISH, ESTONIAN and GERMAN law, the consumer shall be returned, free of charge, to his point of departure or to another location specified in the contract using a means of transport corresponding to that specified in the contract if he cancels the contract and not if he does not accept the arrangements of the organiser as stated by the Directive. In POLAND the rules apply if he either cancels or does not accept the replacement benefit.

SLOVENIAN law has only very indirectly implemented the European provision as it generally obliges the organiser to do everything for safeguarding the interests of the travellers\(^{589}\).

Similarly, in the NETHERLANDS, a general rule exists that help and assistance must be provided, however “transport back and compensation” are not specifically mentioned\(^{590}\).

**Table: Duty to provide equivalent transport back and compensation**

<table>
<thead>
<tr>
<th>Substantively as in the Directive</th>
<th>BE, CY, EL, ES, FI, FR, HU, IT, LT, LU, LV, MT, PT, SE, UK (15)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Variations</td>
<td>AT, CZ, DE, DK, EE, IE, SK, PL (8)</td>
</tr>
<tr>
<td>Indirectly transposed</td>
<td>NL, SL (2)</td>
</tr>
</tbody>
</table>

\(^{587}\) CC, sec. 852k(4).

\(^{588}\) Art. 12(3) of the Government Decree 214/1996.

\(^{589}\) Cf. Art. 890 of the Code of Obligations as the general provision of liability of the organiser for damages.

\(^{590}\) CC, Art. 7:507(3)
c. Duty to make prompt efforts in cases of complaint

According to Art. 6 of Directive 90/314, in cases of complaint, the organiser and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions.

The Belgian, Dutch, French, Latvian, Lithuanian, Polish and Slovenian legislators have not transposed the provision. This may be due to the fact that the obligation is considered to be part of general contract duties in these countries\(^\text{591}\).

| Table: Express transposition of the duty to make prompt efforts in case of complaints |
|-------------------------------|-----------------|-----------------|
| Substantially equivalent to the directive | As in the directive | CY, DK, ES, HU, IE, MT\(^\text{592}\), PT, SE, SK, UK (10) |
| In relation to rights of the consumer | AT (1) |
| Following a consumer’s duty | EE, IT (2) |
| Possibility to refuse in case of unreasonable expense or convenience | FI, DE (2) |
| Indirectly transposed | EL (1) |
| No specific legislative transposition | BE, FR, LT, LV, NL, PL, SL (7) |
| Transposition not entirely clear | CZ, LU (2) |

In some member states, the national laws use a slightly different wording or legislative technique than the Directive. For instance, in Austria, Estonia, Germany, Finland and Hungary, the organiser must make prompt efforts to help not in case of complaints but in case of failures of performance. In Cyprus, Italy\(^\text{593}\) and the United Kingdom, the national regulations refer to complaints about failures of performance. The Swedish regulation speaks

\(^{591}\) With regard to the Netherlands cf. CC, Art. 6:248.

\(^{592}\) See Reg. 8.3 Package Travel Regulations prescribing that, in cases of complaint, the organiser or his local representative shall make prompt efforts to find appropriate solutions.

\(^{593}\) The consumer shall inform the organiser or retailer of his decision within two working days from the date on which he received the notice about the alteration of the contractual conditions.
of a “justified complaint” and according to the Greek regulation, a written complaint is needed. In Ireland, the organiser must help if the consumer is in difficulty. According to the Greek regulation, the organiser or retailer or local representative must, in case of written complaints or when called by the supervisory authorities, be able to provide explanations and to show that he endeavours to find appropriate solutions. Thus, a duty to give prompt assistance is not mentioned expressly, but comprised by the obligation to document the search for solutions. A peculiarity in Italy\footnote{Art. 98(1) of the Consumer Code.} is that the duty to help the consumer is “hidden” in a regulation that obliges the consumer to make complaints about failures of performance. In Estonia, the duty to try immediately to find suitable solutions is also connected to the consumers’ duty to notify the travel provider in case of failure of performance. In Finland\footnote{§ 19 of the Package Travel Act of 28 November 1994/1079.} and in Germany\footnote{CC, § 651c.}, the counterparty of the consumer is not obliged to take measures which cause unreasonable inconvenience.

| Table: Cases in which the organiser/retailer must make prompt efforts to find a solution |
|-----------------|-----------------|
| Complaints      | ES, DK, IE, MT, PT (5) |
| Complaints about failure of performance | CY\footnote{The transposition law, the Package Travel, Holidays and Tours Law of 1998, refers in its Art. 15(8) not to ‘failures in the performance’ but to ‘deficiencies’ in the contractual performance.}, HU, IT, UK (4) |
| Justified complaint | SE (1) |
| Written complaint | EL (1) |
| Failure of performance | AT, DE, EE, FI (4) |
| Call of supervised authority | EL (1) |
| No specific legislative transposition | BE, FR, LT, LV, NL, PL, SL (7) |
| Transposition not entirely clear | CZ, LU (2) |

Often, the provision of Art. 6 is integrated into the regulations on consumers’ rights. Consequently, some member states oblige the counterparty of the consumer, whether that is the organiser or the retailer. The local representative is mentioned in Cyprus, Greece, Italy, Malta, Portugal, Sweden and the United Kingdom. In Hungary, the traveller must inform the attendant of a problem without delay who, in reverse, is obliged to act and inform
the travel enterprise without delay. If no attendant exists, a travel agency, indicated by the travel enterprise before, shall be informed.

<table>
<thead>
<tr>
<th>Table: Obliged Person</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Organiser</strong></td>
</tr>
<tr>
<td><strong>Retailer</strong></td>
</tr>
<tr>
<td><strong>Agency</strong></td>
</tr>
<tr>
<td><strong>Other party of the contract</strong></td>
</tr>
<tr>
<td><strong>Organiser and service provider in question</strong></td>
</tr>
<tr>
<td><strong>Attendant</strong></td>
</tr>
<tr>
<td><strong>Local representative mentioned</strong></td>
</tr>
</tbody>
</table>

\(*\) *more than once*

5. Liability

a. Liability of organiser and/or retailer

Art. 5(1) of the Directive obliges the member states to ensure that the organiser and/or the retailer is liable to the consumer for the proper performance of the obligations under the package travel contract, irrespective of whether the organiser, the retailer or others suppliers of services were to perform the relevant obligation. The provision therefore does not specify possible remedies. Its main function is to make the organiser and/or retailer liable in case the improper performance was made by another supplier. In particular, this provision reveals the general problem that the Package Travel Directive did not clearly decide whether the organiser, the retailer or both shall be obliged towards the consumer. This decision is left to the member states’ discretion. They have to ensure that at least one of the two is liable in any case.

\(^{598}\) Art. 10(3) of the Law 21/1995 which regulates package travels states “retailer or, depending on the case, the organiser”.


\(^{600}\) Art. 14(4) of the Package Holidays and Travel Trade Act, 1995 states that in the case of complaints either the ‘organiser’ or the ‘local representative’ shall make prompt efforts in order to find appropriate solutions.
In the course of a review of the Directive it might be considered to rethink this vagueness. The most consumer friendly proposal could be a joint and several liability of both the organiser and the retailer.\(^ {601} \) But this could be a rather radical solution for some member states, where travel agencies are commonly just small retailers with low profit margins. A less invasive solution could be to make the organiser liable in any case and just to leave to the member states’ discretion whether the retailer shall be jointly liable.

IRELAND has transposed the provisions of the Directive concerning the liability of the retailer and the travel organiser almost literally. In MALTA, LITHUANIA, LUXEMBOURG and PORTUGAL, the rules concerning the liability are the same as in the Directive as well. Thus, the organiser and/or the retailer can be either separately or jointly responsible.

In FRANCE, the implementation of this system of wide responsibility, which includes liability for other performing suppliers of services, is regarded as a novelty. It is explicitly stated in French law that “each natural or legal person who organises or sells package travels…is strictly responsible to the buyer for the proper performance…”\(^ {602} \).

In AUSTRIA, the Consumer Protection Act exclusively makes use of the term ‘organiser’\(^ {603} \) comprising on the one hand a travel organisation which renders the services itself or through an auxiliary person and on the other hand a travel agency which mediates contracts between the travel organisation and the traveller. The question on separate or joint liability of the travel organisation and travel agency depends thus on each individual case. If the travel agency commits itself to perform the travel services, i.e. it acts as an intermediary of the travel organisation\(^ {604} \), both are jointly liable\(^ {605} \). If the travel agency only pledges itself to mediate a corresponding travel contract with the travel organisation, it is only liable in case of infringing a contractual duty, e.g. intermediation of a knowingly unreliable organisation. Otherwise, claims arising from improper performance of the contract can only be exercised against the travel organisation. The consumer’s claim for loss of vacation pleasures in case of non-performance of a considerable part of the contract, requires the organiser’s fault and is based

\(^{601}\) Suggested by Howells/Wilhelmsen, EC Contract Law, 242.  
\(^{602}\) Art. L 211-17 of the Tourism Code.  
\(^{603}\) Definition in § 31b(2) no. 2 of the Consumer Protection Act.  
\(^{604}\) According to CC, § 1313a.  
\(^{605}\) Joint liability is regulated in CC, § 1302.
on its degree, the gravity and duration of the defect, the purpose of the trip and the amount of
the price\(^ {606}\).

The CZECH legislation imposes the liability on the travel agency. A special feature is that the
consumer has to enforce his rights without undue delay, and at the latest within 3 months.
Moreover, in SLOVAKIA, the travel bureau transposing the definition of ‘organiser’ is liable
towards the consumer for proper performance of the contract. In POLISH law, the organiser is
liable for non- or improper performance of the contract for tourist services\(^ {607}\).

As FINNISH law only refers to the concept of ‘organiser’, the latter is singly responsible,
however also for other persons he uses when providing services. The traveller is entitled to
compensation for personal injury, material and property damage caused by a defect in the
performance if the organiser acted negligently\(^ {608}\). According to DUTCH law, it is the organiser
who is liable\(^ {609}\). In LATVIA, the undertaking (company) shall be liable for the provision of
services in compliance with the contract.

In BELGIUM, both are also liable for failure to perform or improper performance irrespective
of the fault being committed by themselves, their agents, assignees or representatives. This is
similar in CYPRUS and SLOVAKIA. In GREECE, generally any service provider, i.e. the
organiser as well as the retailer, is liable for faults committed against the consumer. The
legislator in Cyprus and in the UNITED KINGDOM decided to hold the contractual partner of
the consumer responsible for the whole performance of the contractual obligations.

A different legislation technique achieving the same result is used in HUNGARY. The organiser
is liable for every person he uses to fulfil his duties - irrespective of fault. But also the retailer,
who sells travels of a foreign organiser, is liable in the same way as the organiser of the travel.
Price reduction applies in case of performances not in line with the Directive. Besides, the
consumer has a right to compensation of his damages except that the organiser acted in the
intention of correct performance in a way which, under the given circumstances, was
generally expected from him.

\(^{606}\) CC, §§ 31e(3), 31f.
\(^{607}\) Art. 11a of the Act on Tourist Services.
\(^{608}\) § 23(1) of the Package Travel Act of 28 November 1994/1079.
\(^{609}\) CC, Art. 7:507(2).
In **Italy**, both the organiser and the retailer have to pay damages according to their respective liabilities unless the impossibility to perform is due to circumstances beyond their control. Liability can be escaped when the tour is cancelled because of force majeure or a lack of enough participants whereas overbooking does not constitute a reason. **Sweden** has also included the organiser’s or retailer’s possibility to escape liability. They are liable for faults unless they can prove that the damages were caused by circumstances outside their control. Another exception can be found in **Slovenia**, where it is in the first place the organiser who is responsible. He is also liable for damages caused by third persons involved in any services of the travel except that the organiser proves that he chose the service provider concerned with the required diligence. The Slovenian legislator specifically only refers to non- or partial performance. The liability for improper performance however can be derived from the general concept of liability for non-performance/improper performance.

In **Denmark**, the concept of joint liability applies. The retailer is liable towards the consumer for all his economic claims against the organiser. In **Spain**, though the wording of the legislative regulations states a separate liability as a rule, i.e. the organiser and the retailer are only liable for faults they committed themselves, exceptionally a joint liability applies if there are several retailers and organisers. However, in order to increase consumer protection, case law tends to assume a joint liability of the organiser and the retailer.

In contrast to the Directive, which uses the terms “non-performance”, “failure to perform”, and “improper performance”, **German** law, reflecting the peculiarities, prefers the general term of a "travel defect". As a consequence of this broad definition, liability and warranty are extended, so that a higher level of protection is granted to the traveller. The trip organiser (but not the retailer) is liable for the trip’s success irrespective of who is at fault and essentially carries the risk. Thus, remedial action (§ 651c BGB), price reduction (§ 651d BGB) and cancellation on the grounds of an unsatisfactory trip (§ 651e BGB) do not require the trip organiser to be at fault. According to case law, the rules apply to any cases where the service has been disrupted even if this does not impinge directly on the traveller. With regard to compensation claims, the German Civil Code is broadly aligned with the Directive.
b. Liability for damages and its exclusion

According to Art. 5(2) of the Directive the organiser and/or retailer is/are not liable for damages if

1. the failures are attributable to the traveller,
2. the failures are unforeseeable, unavoidable and attributable to a third party with no relation to the performance of any contractual services and provisions,
3. the failures are due to a case of force majeure, or
4. the failures are due to an event that the organiser and/or retailer or the supplier of services could not foresee and forestall with all due care.

Up to a certain degree it remains unclear, whether this provision regulates a classical ‘culpa liability’ or follows the more modern pattern of ‘strict liability’ with some exclusions.

These four reasons to exclude liability listed in Art. 5(2) of the Directive are transposed by BELGIUM, CYPRUS, CZECH REPUBLIC, DENMARK, FRANCE, GREECE, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL, SLOVAKIA, SPAIN and the UNITED KINGDOM. POLAND\(^{610}\) has only transposed No (1), (2) and (3).

Instead of adopting the four exceptions, GERMANY preferred to refer to its general rules\(^{611}\). The organiser is not liable if he is able to prove that he has acted neither intentionally nor negligently (‘culpa liability’)\(^{612}\). Also under FINNISH law, the travel agent has to prove that he did not act carelessly. It is unclear if such a transposition by the means of ‘culpa liability’ constitutes a false implementation of Art. 5(2) of the Directive. In principle, there is a difference between the defences given by the Directive and the culpa liability, but it is difficult to find cases which illustrate different results. In particular, if the burden of proof lies with the organiser/retailer who has to prove that he did not act negligently, legal practice will very probably come to the same results.

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610 Art. 11a, 1\(^{st}\) – 3\(^{rd}\) indent of the Act on Tourist Services.
611 CC, §§ 651f(1), 276.
In SLOVENIA\textsuperscript{613}, an exception from the organiser’s contractual liability exists in case of circumstances that the organiser was not able to prevent, remedy or avoid. In SWEDEN\textsuperscript{614}, the organiser’s liability is excluded only if he can prove that the non-performance is due to circumstances beyond his control, which he cannot reasonably be expected to have foreseen and/or to have avoided. In AUSTRIA, ESTONIA and HUNGARY, there seems to be no explicit transposition of Art. 5(2) sent. 1 part 2 of the Directive. In Hungarian law, exemptions are the failures which occur during the performance of the contract and are attributable to the consumer or to a third person who is not connected to the performance of contractual obligations; furthermore, if the fault was not foreseeable and avoidable for the enterpriser with due care, and the case of force majeure, being qualified as an unforeseeable unusual circumstance which is outside the travel enterpriser’s will and the consequence of which cannot be foreseen with due care.

Table: Exclusion of liability

<table>
<thead>
<tr>
<th>As in the Directive</th>
<th>BE, CY, CZ, DK, FR, EL, ES, IE, IT, LT, LU, LV, MT, NL, PT, SK, UK (17)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deviations</td>
<td>FI, DE, PL, SE, SL (5)</td>
</tr>
<tr>
<td>Not explicitly transposed</td>
<td>AT, EE, HU (3)</td>
</tr>
</tbody>
</table>

\textbf{c. Limitation of amount of payment for damages}

\textbf{aa. According to international conventions}

Art. 5(2) sent. 3 of the Directive permits the member states to allow limitations of the organiser’s and/or retailer’s liability in accordance with the international conventions governing such services. Most of the member states have made use of this option. In BELGIUM, CYPRUS, CZECH REPUBLIC\textsuperscript{615}, DENMARK, ESTONIA, FINLAND\textsuperscript{616}, GERMANY,

\textsuperscript{613} Art. 240 of the Code of Obligations.
\textsuperscript{614} § 16(2), (3) of the Package Tours Act 1992:1672.
\textsuperscript{615} The two possible limitations of damages stated in Art. 5(2), sent. 4 and 5 of the Directive are transposed in sec. 852j(3) CC, i.e. damages (including personal ones) can be limited if an international convention provides for it and this limitation is included in the travel contract.
\textsuperscript{616} Art. 24 of the Package Travel Act of 28 November 1994/1079; partially referring not directly to the international conventions but to national statutes like the Maritime Act (167/99), the Act concerning
GREECE, HUNGARY\textsuperscript{617}, IRELAND, ITALY, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL\textsuperscript{618}, SLOVAKIA, SPAIN, SWEDEN\textsuperscript{619} and the UNITED KINGDOM, the liability is limited according the international conventions. Although LITHUANIAN law has not directly transposed this provision, the principle can however be deduced by general contract law. Generally, the parties may determine the conditions of a contract at their own judgment, except when they are determined by mandatory rules of law\textsuperscript{620}.

AUSTRIA has signed various international conventions on flight liability (the Warsaw Convention 1929/1955 and the Guadalajara Supplementary Convention 1961 and Montreal Convention 1999) but the legislator did not transpose this provision into Austrian law. Furthermore, also FRANCE, LATVIA and SLOVENIA have not transposed Art. 5(2) sent.3 of Directive 90/314.

Table: Option to allow limitation of liability according to international conventions

<table>
<thead>
<tr>
<th>Use of Option</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>BE, CY, CZ, DE, DK, EE, EL, ES, FI, HU, IE, IT, LU, LT, MT, NL, PL, PT, SE, SK, UK (21)</td>
</tr>
<tr>
<td>No use</td>
<td>AT, FR, LV, SL (4)</td>
</tr>
</tbody>
</table>

bb. Limitation for other than personal/physical damages

Except for personal injury, Art. 5(2) sent. 4 of the Directive permits the member states to allow contractual limitations of compensation for damages that result from the non-performance or improper performance of services involved in the package, if the reduction is not unreasonable.

\textsuperscript{617} Since 13 May 2005.
\textsuperscript{618} Art. 40(1) of the Decree 209/97.
\textsuperscript{619} § 18 of the Package Tours Act 1992:1672; referring to the Maritime Act, the Air Transport Act, the Rail Transport Act and the International Rail Transport Act.
\textsuperscript{620} CC, Art. 6.156(4).
Most of the member states, namely AUSTRIA, BELGIUM, CYPRUS, CZECH REPUBLIC\(^{621}\), DENMARK, GERMANY, ESTONIA, FINLAND, GREECE, IRELAND, ITALY\(^{622}\), LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL\(^{623}\), SLOVAKIA\(^{624}\), SLOVENIA\(^{625}\) and the UNITED KINGDOM\(^{626}\) have made use of this option. Countries such as FRANCE, HUNGARY, LATVIA, SPAIN and SWEDEN have not made use of the option. Furthermore, such a contractual term limiting the compensation for other than personal damages would be void under French law.

Even in those countries which, in general, allow a limitation of compensation according to Art. 5(2) sent. 4 of the Directive, the individual solutions considerably vary. For instance, DENMARK provides a special regulation concerning this case. Under DANISH law an agreement limiting compensations can only be made if it is in accordance with rules in international conventions applicable to the travel contracts\(^{627}\).

In AUSTRIA\(^{628}\), the tour organiser cannot limit his liability for death or personal injury and his liability for intention and gross negligence. In BELGIUM\(^{629}\), the organiser can limit his compensation to twice the costs of the travelling expenses, but only in the case that the organiser does not provide the services himself. However, also in Belgium, the tour organiser cannot limit his liability for death or personal injury and his liability for intention and gross negligence. This is the same in ESTONIA\(^{630}\), where compensation in other cases may be limited to three times the price of the package. A limitation in case of death or personal injury and for intention and gross negligence is not possible. Also under GERMAN\(^{631}\) law, damages can be limited to three times the price of the package, in case of slight negligence or if a contractor of the organiser solely causes the damage. In IRELAND\(^{632}\), it is the double amount of inclusive

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\(^{621}\) The two possible limitations of damages stated in Art. 5(2), sent. 4 and 5 of the Directive are transposed in sec. 852j(3) CC, i.e. damages (including personal ones) can be limited if an international convention provides for it and this limitation is included in the travel contract.

\(^{622}\) Arts. 94, 95 of the Consumer Code.

\(^{623}\) See also Art. 40 of the Decree 209/97.

\(^{624}\) This rule existed before transposition of Directive 90/314.

\(^{625}\) Art. 894(2), (3) of the Code of Obligations.

\(^{626}\) Reg. 15(4) of the Package Travel, Package Holidays and Package Tour Regulations 1992.

\(^{627}\) § 24 of the Act 472/1993.

\(^{628}\) § 31f(1) of the Consumer Protection Act.

\(^{629}\) Arts. 19(2), (4), (5), 28 of the Act of 16 February 1994 regulating package travel contracts and the travel intermediation contracts.

\(^{630}\) § 878(3) of the Law of Obligations.

\(^{631}\) CC, § 651h(1).

\(^{632}\) S. 20(3), (4) of the Package Holidays and Travel Trade Act.
price of the package for adults and an amount equal to the inclusive price for a minor. A limitation in case of death or personal injury as well as for gross negligence and intention is not possible either. In POLAND\(^{633}\), it is twice the price of the tourist event with respect to each customer.

The PORTUGUESE\(^{634}\) legislator implemented a system of sums that may not be fallen short of. The sums that are applicable on travel organisers vary from ESC 220.000\(^{635}\) for the damage to baggage arising from damage to a motor vehicle up to ESC 88.5000.000 in the event of death or personal injury. The liability of travel agencies for damage to or the destruction or removal of baggage or other articles can be limited to ESC 280.000 in all or ESC 90.000 per article.

In HUNGARY, there is no provision that allows a limitation of the compensation for other than personal damages. But two general provisions concerning the limitation are applicable instead. A limitation of compensation for death and physical damages and for any damages caused intentionally or by gross negligence is forbidden. The compensation for property damages and physical damages caused by normal negligence can be limited if the disadvantage of the limitation is compensated by an advantage.

The FINNISH\(^{636}\) and CYPRIO\(^{637}\)legislator introduced the option to reduce damages as long as the reduction is not unreasonable. Moreover, such a reduction is only possible if the package is not booked for private purpose. In SLOVAKIA\(^{638}\), it is a right of the court to limit compensation. The GREEK\(^{639}\) law contains a regulation similar to the one in the Directive that allows a contractual limitation of the liability for non-physical damages. The scope of application, however, is small because there are several other regulations which also apply. The liability for intention and gross negligence of the organiser or the retailer himself cannot be excluded or limited. The liability for third service providers appointed by the organiser or the retailer and acting with intention or gross negligence cannot be excluded or limited in advance. The liability for slight negligence cannot be limited if this limitation is not negotiated individually. Above all, according to the Greek Consumer Protection Act any

\(^{633}\) Art. 11b(3), (4) of the Act on Tourist Services.
\(^{634}\) Art. 40(2), (3), (5) of Decree-Law 198/93.
\(^{635}\) 1€ = 200,482 ESC.
\(^{636}\) § 25 of the Package Travel Act of the 28 November 1994/1079.
\(^{637}\) Art. 15(4) of the Package Travel, Holidays and Tours Law of 1998.
\(^{638}\) CC, § 450.
\(^{639}\) Art. 5(2)(d) of Decree-Law 339/96.
agreement with a consumer that excludes or limits the liability of the service provider towards the consumer is void.

In Italy\textsuperscript{640}, the parties of the contract can agree in writing to limit the compensation for damages other than physical injuries. If there is no such agreement, the compensation for damages is permitted within the limits stated in Art. 13 of the International Convention of Travel Contracts from 1970. In Lithuania\textsuperscript{641}, the possibility to contractually limit the compensation for other than physical damages is not expressly stated, but can be agreed because it is not prohibited.

Such differences of the national laws concerning the possibility to limit compensation in case of damages resulting from non-performance or improper performance of services involved in the package show the difficulties to agree on a limitation that is valid in several or all member states. Organisers and retailers who want to market package tours in several member states practically have to refrain from agreeing any limitation of compensation, if they want to act lawfully. Depending on the political point of view, this may be seen as a barrier to trade or as a – not unwanted – incentive for businesses to offer a high standard of consumer protection.

**Table: Use of option provided in Art. 5(2) 4th indent of the Directive**

<table>
<thead>
<tr>
<th>Use of Option</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>AT, BE, CY, CZ, DE, DK, EE, EL, FI, IE, IT, LT, LU, MT, NL, PL, PT, SK, SL, UK (20)</td>
</tr>
<tr>
<td>No use</td>
<td>ES, FR, HU, LV, SE (5)</td>
</tr>
</tbody>
</table>

**d. Loss of enjoyment**

The ECJ has made clear in the case C-168/00 - *Simone Leitner*\textsuperscript{642}, that Art. 5 of the Directive is to be interpreted as conferring, in principle, on consumers a right to compensation for non-material damage resulting from the non-performance or improper performance of the services constituting a package holiday. In particular, such compensation for non-material damage can

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\textsuperscript{640} Art. 95 of the Consumer Code.  
\textsuperscript{641} CC, Art. 6.755(2).  
\textsuperscript{642} ECJ judgment of 12 March 2000, C-168/00 - *Simone Leitner*. 
arise from the loss of enjoyment the consumer has suffered because of the improper performance of the travel contract.

Only some member states expressly provide a compensation for loss of enjoyment, e.g. Austria, Belgium and Estonia. The Danish Act - contrary to ordinary rules on damages - gives the customer a possibility of being compensated for "considerable inconvenience" (which should include “ruined holiday”). In the Netherlands and in Hungary, the organiser may need to compensate immaterial damages, too. Germany only awards damages if the trip has been significantly derogated. In view of the ECJ case C-168/00, it could be argued that this additional pre-requisite may result in an infringement of EU-law. In Spain, according to general law and specific case-law on package travels covering all ‘damages’, the organiser/retailer is also responsible for non-material damage.

Most member states have not expressly stipulated the compensation for non-material damage in the context of their package travel law. Those member states which have literally transposed Art. 5(2) of the Directive will have to apply their law in the light of the C-168/00 judgment. Other member states, where the calculation of damages in case of travel contracts follows the general rules on damages must also take into account the case when applying the general rules. It will have to be seen, whether all member state courts grant also immaterial damages to consumers in case of non-performance or improper performance of travel contracts.

e. Communication of shortcomings

According to Art. 5(4) of Directive 90/314, the consumer has to communicate any failure in the performance of a contract which he perceives, on the spot to the supplier of the services concerned and, to the organizer and/or retailer in writing or any other appropriate form at the earliest opportunity. It should be noted that this provision is one of the few exceptional cases where the Directive seeks to impose an obligation on the consumer. Thus, because of the minimum clause, the member states are free to define a duty to notify which is more favourable to the consumer or not to transpose this provision at all (e.g. Spain). But it is questionable whether they may impose a notification duty that is stricter with regard to formal requirements or time limits than the Directive contains.
Some member states such as IRELAND, LATVIA, MALTA and the UNITED KINGDOM have transposed the provision almost literally. In DENMARK\textsuperscript{643}, FINLAND\textsuperscript{644} and SWEDEN\textsuperscript{645}, similar provisions can be found, except that no specific period has to be complied with in case of dishonest or gross negligent behaviour of the organiser. Furthermore, in Denmark\textsuperscript{646}, a contestation also has to be given in case of personal injury. Also GREEK\textsuperscript{647} law contains a provision comparable to Art. 5(4) of the Directive, but, in Greece, the communication has to be given in writing, so that there is a stricter form requirement than the Directive provides for. Under PORTUGUESE\textsuperscript{648} law, only the travel agency has to be informed. In POLAND, the organiser and the service provider ought to be informed by the ‘client’ without delay about any defects in the execution of the contract. Furthermore, the form in which such information should to be given depends on the kind of service involved\textsuperscript{649}. The formulation is more favourable to the consumer (“ought”) as it does not indicate an obligation of the client but rather a guideline. As indicated above, in making use of the minimum clause, such a formulation does not contradict the Directive’s provision.

The laws of AUSTRIA\textsuperscript{650} and the CZECH REPUBLIC\textsuperscript{651} state that the traveller is obliged to give a notice to the provider immediately after the discovery of the shortcomings. Furthermore, according to Czech legislation, the contract must state the way the consumer has to claim the violations of legal duties of the travel agency\textsuperscript{652}. In HUNGARY\textsuperscript{653}, this contestation must be given immediately to the tour guide (courier) and to the local representative of the organiser. ESTONIAN law prescribes a notification duty of the traveller about any violation of the contract to be exercised towards the immediate provider of the travel services and the tour operator or retailer\textsuperscript{654}. CYPRUS has indirectly imposed a notification duty on the consumer by obliging the supplier or the other party to the contract to include information concerning the

\textsuperscript{643} §§ 26, 27 of the Act 472/1993.  
\textsuperscript{644} § 18 of the Package Travel Act of 28 November 1994/1079.  
\textsuperscript{645} § 19 of the Package Tours Act 1992:1672.  
\textsuperscript{646} §§ 26, 27 of the Act no. 472/1993 on Package Travel  
\textsuperscript{647} Art. 5(4) of the Decree 339/96 on Package Travel.  
\textsuperscript{648} Art. 30(4), (5) of Decree-Law 198/93.  
\textsuperscript{649} Art. 16b of the Act on Tourist Services states that the client should inform “in a manner appropriate for this type of service”.  
\textsuperscript{650} § 31e(2) of the Consumer Protection Act.  
\textsuperscript{651} CC, Art. 852b.  
\textsuperscript{652} CC, sec. 852b(2)(a).  
\textsuperscript{653} § 12(5) Government Decree 214/1996.  
\textsuperscript{654} § 875(1) of the Law of Obligations Act.
conditions for compensation in the contract. The contract must contain an obligation for the supplier or the other party to the contract to clearly inform that an essential pre-requisite for the exercise of the claim of compensation is the notification, in writing or any other appropriate manner, of any problem to the supplier of the relevant services or to the other party to the contract\textsuperscript{655}.

In \textsc{Belgium}\textsuperscript{656}, the traveller has to complain immediately about shortcomings and, additionally, has to send the complaint to the organiser or the travel agent by registered letter until one month after the end of the travel at the latest. Under \textsc{Slovakian}\textsuperscript{657} law, a similar regulation can be found. In a first step, the traveller has to inform the local travel agent and also has give a written notification at the earliest opportunity after the shortcoming arose. Then, in a second step, the traveller has to inform the organizer in writing about the failure at least 3 month after the departure and present the written notification (first step). In \textsc{Italy}\textsuperscript{658}, the consumer must complain about partial or total failures to the organiser (or his local representative or the group guide) without delay to allow remedies of the former. The consumer can also send a registered letter (with notification of receipt) of complaint to the organiser or the retailer within 10 days after the return to the place of departure. Such formal requirements (e.g. registered letter, writing) may be contrary to the Directive, which only requires a notification in writing or any other appropriate form.

\textsc{German}\textsuperscript{659} law even requires a second obligation to communicate after the end of the trip apart from the primary duty to inform the tour operator or his local representative. It can be doubted whether this requirement is in conformity with European law.

According to \textsc{French} law\textsuperscript{660}, the purchaser may lodge a claim against the vendor for non- or improper performance of the contract by sending a registered mail with advice of receipt as soon as possible.

\begin{itemize}
\item \textsuperscript{655} Art. 15(9) of the Package Travel, Holidays and Tours Law of 1998.
\item \textsuperscript{656} Arts. 20, 29 Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.
\item \textsuperscript{657} CC, § 741i(1), (2). According to § 19 of the Consumer Protection Act, the organiser is obliged to provide continual presence of the representative (agent) who is qualified to deal with the complaints during the whole excursion.
\item \textsuperscript{658} Art. 98(1), (2) of the Consumer Code.
\item \textsuperscript{659} CC, §§ 651d(2), 651g(1).
\item \textsuperscript{660} No express transposition but presupposed in Art. 98 of Decree No. 94–490.
\end{itemize}
In LITHUANIA and LUXEMBOURG, the need for contestation is not precisely stated, but a general principle of due performance of a contract. In the NETHERLANDS, there is no duty to notify under statutory law. If the organiser stipulates such a duty by contract, he must inform the traveller about any period for its exercise\textsuperscript{661}. In SLOVENIA, no specific provision exists, therefore the general rule for notification of defects applies\textsuperscript{662}.

Table: Contestation of shortcomings

<table>
<thead>
<tr>
<th>As in the Directive</th>
<th>IE, LV, MT, UK ((4))</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deviations</td>
<td>AT, BE, CY, CZ, DE, DK, EE, EL, FI, FR, HU, IT, PL, PT, SE, SK ((16))</td>
</tr>
<tr>
<td>Not expressly transposed</td>
<td>ES, LT, LU, NL, SL ((5))</td>
</tr>
</tbody>
</table>

\textbf{f. Assistance to consumer in difficulty}

According to Art. 5(2) sent. 2 of Directive 90/314, the organiser is obliged to give prompt assistance to a consumer in difficulty in cases referred to in Art. 5(2) 2\textsuperscript{nd} and 3\textsuperscript{rd} indent of the Directive. The legislators of GREECE, IRELAND, PORTUGAL, SLOVAKIA, SPAIN and the UNITED KINGDOM transposed this provision. In SWEDEN, a similar provision can be found as well\textsuperscript{663}.

In AUSTRIA\textsuperscript{664}, BELGIUM\textsuperscript{665}, ESTONIA\textsuperscript{666} and MALTA\textsuperscript{667}, the tour operator shall take all reasonable steps in order to provide immediate assistance to a traveller in difficulty. In Austria, Estonia and Malta, this duty does not exist if the traveller has caused the difficulties himself. However, according to Belgian law, the tour operator is even in this case obliged to provide assistance, but may impose the costs of the assistance on the traveller. The POLISH\textsuperscript{668} legislator makes clear that the tourism organiser is never released from his or her duty to provide assistance to the victim-client during the tourist event, even though he has duly excluded liability.

\textsuperscript{661} Art. 1(e) of the Decree of 15 January 1993 containing rules concerning data that organisers of organised trips must state on behalf of travellers.

\textsuperscript{662} Art. 461 of the Code of Obligations, being applicable to all types of contracts (Art. 100 of the same Code).

\textsuperscript{663} § 16(4) of the Package Tours Act 1992:1672.

\textsuperscript{664} § 31e(1) of the Consumer Protection Act.

\textsuperscript{665} Arts. 18(3), 27 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.

\textsuperscript{666} § 877(4) of the Law of Obligations Act.

\textsuperscript{667} Art. 15(7) no. 2 Package Travel, Package Holidays and Package Tours Regulations.

\textsuperscript{668} Art. 11a(2) of the Act on Tourist Services.
Moreover, in **Finland**\(^{669}\), the obligation to assist the consumer is wider and more detailed than in the Directive. It also applies if the consumer has caused the difficulties himself. It is argued that in a foreign country it was very difficult to get right treatment or help without assistance of the organiser. Also in **Lithuania**\(^{670}\) and in the **Netherlands**\(^{671}\), the tour organiser is obliged to give help and support to the consumer even if the reason for the improper performance lies with the tourist. In that case it is possible that the costs for the assistance are charged to the consumer. **Italian**\(^{672}\) law states that the organiser or retailer must make every effort to help the customer in continuing his journey, even if in any case the consumer must compensate the damage where responsible for improper performance of the contract.

In **Denmark**\(^{673}\), the organiser only has to provide assistance to the consumer, if the consumer suffers personal injury. In **Slovenia**, Art. 887 of the Code of Obligations only provides a very broad obligation for the organiser to safeguard the rights and interests of the passengers pursuant to good customs. The **German** legislator has not expressly transposed this provision of the Directive. But from § 651c Civil Code (BGB) follows that the organiser must put things right in case of any defective performance. In practice, this should lead to the results the Directive requires.

In **France**\(^{674}\), the contact details of the seller’s local representative or, in case of their non-existence, of the local institutions which are likely to assist the consumer in case of difficulty or, if they do not exist, an emergency telephone number have to be stated in the contract.

In **Cyprus**, the obligation of the organiser to assist the consumer in case of difficulty also applies to the case of force majeure (Art. 5(2), 4\(^{th}\) indent of the Directive).

### Table: Assistance to consumer in difficulty

<table>
<thead>
<tr>
<th>Country</th>
<th>Relevant Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finland</td>
<td>§ 16 Package Travel Act of 28 November 1994/1079.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>CC, Art. 6.754(3) 1(^{st}) indent prescribes that the tour organiser,</td>
</tr>
<tr>
<td></td>
<td>having regard to the specific circumstances, has the duty to give all help</td>
</tr>
<tr>
<td></td>
<td>and support to the tourist if the contract does not correspond to the</td>
</tr>
<tr>
<td></td>
<td>expectations of the tourist.</td>
</tr>
<tr>
<td>Netherlands</td>
<td>CC, Art. 7:507(3).</td>
</tr>
<tr>
<td>Italian</td>
<td>Art. 96(2) of the Consumer Code.</td>
</tr>
<tr>
<td>Danish</td>
<td>§ 23(2) of the Package Travel Act.</td>
</tr>
<tr>
<td>French</td>
<td>Art. 98(19) of the Regulatory Act 94-490.</td>
</tr>
</tbody>
</table>

\(^{669}\) § 16 Package Travel Act of 28 November 1994/1079.
\(^{670}\) CC, Art. 6.754(3) 1\(^{st}\) indent prescribes that the tour organiser, having regard to the specific circumstances, has the duty to give all help and support to the tourist if the contract does not correspond to the expectations of the tourist.

\(^{671}\) CC, Art. 7:507(3).

\(^{672}\) Art. 96(2) of the Consumer Code.

\(^{673}\) § 23(2) of the Package Travel Act.

\(^{674}\) Art. 98(19) of the Regulatory Act 94-490.
6. Security in case of insolvency

According to Art. 7 of Directive 90/314 “the organiser and/or retailer party to the contract shall provide sufficient evidence of security for the refund of money paid over and for the repatriation of the consumer in the event of insolvency”.

Most of the member states have adopted the formulation of the Directive and oblige the organiser and/or retailer to provide security in case of insolvency. Again, different wording exists, e.g. FRANCE uses the term “agent de voyage” and IRELAND “package provider”, possibly being either the retailer or the organiser in the sense of the Directive. Moreover, in SPAIN, the particularity exists that in all of the Autonomous Communities, a security system has been developed with detailed regulations and thus deviating in some way in requisites and sums675.

Table: Obligated party

<table>
<thead>
<tr>
<th>Obligated party</th>
<th>AT, CZ, DE, FI, LT, LV676, PL, SL (8)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retailer</td>
<td>(0)</td>
</tr>
<tr>
<td>Organiser and/or retailer</td>
<td>BE, CY, DK, EE, EL, ES, FR, HU, IE, IT, LU, MT, NL, PT, SK, UK (16)</td>
</tr>
<tr>
<td>Transposition not entirely clear</td>
<td>LV, SE (2)</td>
</tr>
</tbody>
</table>


676 Undertakings which market package tourism services shall provide a safety guarantee.
The formulation “sufficient evidence in case of security” is quite open and leaves it up to the member states to choose appropriate measures. Nevertheless, the goal of the provision has been clearly clarified by the ECJ in several cases. In the case *Dillenkofer*\(^{677}\), the court transferred its rulings on civil liability of the state to the field of consumer law for the first time. Subject of the case were damages occurring to the claimant because of Germany’s lacking transposition of Directive 90/314. Especially, the question arose whether Art. 7 of Directive 90/314 grants a qualified right to the travelling consumer in the way that it lives up to the first requirement of state liability. This was positively answered by the ECJ taking into account consumer protection as an independent goal of the Directive\(^{678}\). Furthermore, the court argued that any regulation allowing the tour organiser to require an uncovered deposit payment would contradict the purpose of Art. 7. Thus, it was evident, that a third party independent from the organiser and sufficiently maintaining funds should be appointed as guarantor.

In this context, it is questionable whether the Dutch transposition is in line with the Directive. Art. 7:512 Dutch CC provides that the organiser shall take the necessary measures to insure that, (in short) in case of insolvency, his debts are being taken over by a third party or by repayment of the price under the travel agreement or other specific measures mentioned in this article; the organiser shall make these measures public. This regulation does not state the necessary requirements in order to appoint a guarantor who himself is not exposed to the risk of insolvency because of internal structures and policies.

<table>
<thead>
<tr>
<th>Table: Evidence of security</th>
</tr>
</thead>
<tbody>
<tr>
<td>Financial guarantee</td>
</tr>
<tr>
<td>Insurance policy</td>
</tr>
</tbody>
</table>

\(^{677}\) ECJ judgment of 8 October 1996, C-178/94 – *Dillenkofer*.

\(^{678}\) Line 39 of the Judgement C-178/94.

\(^{679}\) Or security. It is unclear whether this means an insurance policy or a security fund.

\(^{680}\) Art. 99(1) of the Consumer Code.

\(^{681}\) The organiser is obliged to conclude an Insurance Contract with an assuror and to provide the consumer with an insurance certificate together with one copy of the contract.
In the ECJ case Verein für Konsumenteninformation the court held that all risks possibly arising from the insolvency of the tour organiser shall be fully covered. In this regard, the member states provide a variety of regulations. The vast majority prescribes the refund of money paid over or repatriation costs as stated in the Directive. Additionally, in France also equivalent services shall be reimbursed if the consumer agrees thereto. Danish law contains a reimbursement of the intermediary who met the customer’s claims on behalf of the insolvent organiser. Italian law also ensures that immediate financial help is available if tourists are forced to return from non-EU countries in the event of an emergency, for which the organiser may or may not be responsible. In Slovakia, the difference between the package prices in case of a substitute package or the difference in case of partially exercising the package may be refunded. Portuguese law expressly states that medical assistance and medicines necessary in the event of accident or illness may be refunded.

<table>
<thead>
<tr>
<th>Security fund</th>
<th>DK, EL, HU, IE, IT, LU, MT, NL, SK, UK (10)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bond by authorised institution or insurance company</td>
<td>CY, IE, UK (3)</td>
</tr>
<tr>
<td>Necessary measures</td>
<td>NL (1)</td>
</tr>
</tbody>
</table>

### Table: Refund

| Payments (including partial payments) made | AT, BE, CY, CZ, DE, DK, EE, EL, ES, FR, HU, IE, IT, LT, LU, LV, MT, PT, SK, SL, UK (21) |

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682 Only if organiser or retailer is a travel agency. According to Art. 5(5)(b) of the Decree 339/1996, the organiser/retailer (i.e. travel agencies for general national tourism, shipping charter companies, tourist accommodations) is obliged to conclude an insurance contract concerning professional indemnity insurance for faults and omissions during the exercise of the profession; the insurer has to be lawfully operated insurance company in Greece or in a member state of the EU.

683 The Ministry of Productive Activities is responsible. As to the financing see Art. 100 of the Consumer Code. Total compulsory insurance premium paid into the national budget.

684 On a voluntary basis only (repeats only wording of Directive).

685 Trustee for the consumer.

686 Either his debts are being taken over by a third party, or by repaying the price under the travel agreement or other specific measures.

687 ECJ judgment of 5 May 1998, C-354/96 - Verein für Konsumenteninformation.

688 Or compensation for the cancelled part of the tour.

689 Generally, the third party (traveler/consumer) has a direct claim against the insurer (Art. 26 of the Act 2496/1997) if the insurance contract has been legally prescribed; the claim exists amounting to the limit of
The European Court of Justice further had to deal with Art. 7 of Directive 90/314 in cases *Rechberger* and *Ambry*. In the *Rechberger* case, the court found no indication in the text of the Directive that the guarantee mentioned in Art. 7 might be limited. Therefore, it seems problematic that some European legislators have opted for a certain limitation of the insurance sum. According to German law, the guarantor may limit its liability to an amount of 110 million euros per year concerning all the refundable positions. In case that the refunds exceed this maximum amount, the individual refund claims diminish equivalent to the proportion of the total individual sum to the maximum amount. Portuguese law states a limitation sum of 50 million euros.

In Austria, Belgium, Cyprus, Denmark, Estonia, Hungary, Ireland, Lithuania and the United Kingdom, a minimum insurance sum exists in the legislation. For example, in Austria, the minimum amount depends on the different package contents and rests with indemnity up to which the insurance is obligatory, independent of the real insurance sum whereas the insurer is not allowed to raise an objection against the third party which results from the insurance contract.

690 “To reimburse consumers in the event of financial failure”.
691 The obligation to refund shall only come into force two years after the act’s (Promotion of Tourism Development Act) entry into force on 30 January 2004.
692 It shall be such sum as may reasonably be expected to enable all monies paid over by consumers.
693 According to Art. 7(2) of Decree 339/1886, the insurance contract must state the method and manner of immediate reimbursement of the repatriation costs.
694 “Actions to be taken in the interest of travellers who get in an emergency situation after starting the tour” (e.g. travel home) and the costs of the forced stay abroad.
695 And assistance.
696 It shall be such sum as may reasonably be expected to enable reimbursement of all monies paid over by consumers.
697 Or improper performance; cf. Art. 5(5)(b) of the Decree 339/1996.
698 The damage caused to consumers due to the breach of contract.
700 ECJ judgment of 1 December 1998, C-410/96 – *Ambry*.
701 CC, § 651k(2).
702 Art. 45(2) Decree-Law 198/93.
approximately 10 % of the annual turnover\textsuperscript{703}. In Belgium, it is 15 % of the active balance\textsuperscript{704}. Cypriot law states a minimum insurance sum if the ‘other party to the contract’ chooses to enter a bond with an authorised institution or insurance company instead of an insurance policy. This minimum sum is an amount equivalent to 20\% or more of the payments received by the other party to the contract during the 12 month period preceding the date on which the bond came into effect or equivalent to the maximum amount of all payments “which the other party to the contract expects at any moment to be in his possession, pursuant to contracts which have not yet been fully performed, or whichever amount is greater,”\textsuperscript{705}. In Denmark, the regulation only applies to foreign organisers who have set up business in Denmark and minimum sum depends on the turnover\textsuperscript{706}. Hungarian law prescribes at least 12 \% of the travel companies net revenue\textsuperscript{707}. Lithuanian law\textsuperscript{708} distinguishes the cases when the tour organiser’s annual receipts do or do not exceed the amount of 4 million LTL. In the first case, the insured sum shall differ between LTL 100 000 and LTL 200 000, in the second it shall constitute 5 \% of the tour organiser’s annual receipts. In Latvian law, the security shall ensure the money the customer has paid in for a period which may not be less than one year and for a sum of 50 \% of the planned turnover for the following year, but not less than 20 000 lats. The ECJ, in the case Rechberger, did not give any estimation as to whether a national system stipulating a “minimum insurance sum” can be considered conform with the Directive. An argument in favour would be that such a regulation supports the goal to effectively support the consumers by ensuring that the guarantor maintains sufficient funds.

In Germany, Luxembourg and Slovakia, a guarantee certificate has to be provided before payment which can be requested by the consumer. In Belgium, a list of organisers who provide an insurance has to be published, thus enabling the consumer to collect necessary information. Maltese law prescribes that information on the insurance has to be provided in the travel brochure whereas Polish law demands a written confirmation on it.

\textsuperscript{703} § 4 Regulation on travel agencies implementing Art. 7 Package Travel Directive.
\textsuperscript{704} At least the equivalent of 1 000 000 BEF. Art. 3 of the Royal Decree of 25 April 1997 implementing Art. 36 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts.
\textsuperscript{705} Art. 18(4) of the Package Travel, Holidays and Tours Law of 1998.
\textsuperscript{706} Between 300 000 DKK and 30 million DKK.
\textsuperscript{707} Art. 8(2) of the Government Decree 213/1996.
\textsuperscript{708} Art. 7(3) of the Law on Tourism. The calculation shall take into account the last year and cover all contracts for the supply of tourist services concluded for tours abroad.
In the case *Ambry* the court held that a national legislation demanding a registered office or a branch of the insurer in its territory pursues a legitimate goal by ensuring immediate payment in case of repatriation. Nevertheless, it was regarded contra the EC Treaty. It does not seem as if any of the member states has adopted or maintained a similar regulation.

### Table: Special requirements

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limitation of insurance sum</td>
<td>DE, PT (2)</td>
</tr>
<tr>
<td>Minimum insurance sum</td>
<td>AT, BE, CY, DK, EE, HU, IE, LT, LV, PT, UK (11)</td>
</tr>
<tr>
<td>Guarantee certificate</td>
<td>DE, LU, SK (3)</td>
</tr>
<tr>
<td>Information duty</td>
<td>BE, MT, PL (3)</td>
</tr>
<tr>
<td>Security as conditions for licence</td>
<td>CZ, FR, HU, PL, PT, SK, SL (7)</td>
</tr>
</tbody>
</table>

Some of the member states state exceptions from the obligation to provide a security in case of insolvency. The German provisions do not apply if the organiser only operates occasionally and not within his professional capacity, if the journey does not last longer than 24 hours, does not include an overnight stay and does not cost more than 75 Euros and finally, if the tour organiser is a public legal person which cannot be subject of an insolvency procedure. In Danish law, exceptions exist if the travel activity of non-profit associations constitutes only a minor part of its activities and the intermediary of a foreign organiser complies with the scheme approved by another member state of the European Union. Finally, the United Kingdom makes exemptions from the requirements to provide security where 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 Art. 7 in that member state; also where the contracting party is subject to specific civil aviation regulations.

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709 CC, § 651k(6).
710 The Civil Air Regulations 1995 require a person (not acting as ‘retailer’) who sells a package involving flights to hold an Air Travel Organiser’s Licence (ATOL), issued by the Civil Aviation Authority (CAA). ATOL holders must lodge a bond with the CAA to protect their customers against insolvency.
In the light of the ECJ jurisdiction *Centros*\(^{711}\), *Überseering*\(^{712}\) and *Inspire Art*\(^{713}\), the question may be raised if, e.g., an organiser having its seat in member state A may take along its actual security system installed under the rules of member state A to member state B and thus possibly not complying with B’s national statute. A preliminary assessment of this issue comes to the result that the organiser will have to comply with the rules of member states B. But this question may need further, also empirical, research. Such a need to change into a new security system may constitute a barrier to trade. This would be particularly true, if an organiser who wants to install branches or offices in several member states needed to comply with each of the respective national rules on security systems.

\(^{711}\) ECJ judgment of 9 March 1999, C-212/97.
\(^{712}\) ECJ judgment of 5 November 2002, C-208/00.
\(^{713}\) ECJ judgment of 30 September 2003, C-167/01.
C. Unfair Contract Terms Directive (93/13)

Drafted by Martin Ebers

Executive Summary

1. Transposition deficiencies

Even though most member states did endeavour to accommodate the requirements of the Directive 93/13 and the case law of the ECJ, some shortcomings in the member states can be noted. Examples of most importance are

- Some member states (esp. CZECH REPUBLIC, LATVIA and the NETHERLANDS) act on the proviso that unfair clauses are binding unless the consumer invokes unfairness. This legal consequence contradicts the requirements of the ECJ, which in Océano,\textsuperscript{714} Cofidis\textsuperscript{715} and Mostaza Claro\textsuperscript{716} explicitly emphasised, that unfairness is to be determined on the court’s own motion. In other member states, the legal situation is unclear, so it remains to be seen whether national case-law will bring the relevant provisions in line with European Community Law.\textsuperscript{717}

- According to Art. 3 and recital (15) of the Directive 93/13, the member states are obliged to fix the criteria in a general way for assessing the unfair character of contract terms. Although this requirement also applies to pre-formulated individual contracts for single use, the general clauses in AUSTRIA and in the NETHERLANDS only relate to standard terms. Even though in these member states other legal instruments are available to monitor such types of terms, this legislative technique gives rise to the danger that the requirements of the Directive will go unheeded.

\textsuperscript{716} ECJ judgment of 26 October 2006, C-168/05 – Elisa María Mostaza Claro v. Centro Móvil Milenium SL (unpublished).
\textsuperscript{717} See infra, Part 3 C.IV.4.
• For those member states which only transposed certain parts of the Annex, it remains unclear whether this legislative technique can be accepted through applying the decision of the ECJ in C-478/99,\(^{718}\) since in those countries the danger exists, that the consumer will be misled about his rights.\(^{719}\)

• The principle of transparency prescribed in Art. 5, sent. 1 of the Directive 93/13 has not been explicitly transposed in the CZECH REPUBLIC, ESTONIA, GREECE, HUNGARY, LUXEMBOURG and in SLOVAKIA. Therefore it is doubtful whether the requirements of the Directive have been sufficiently adhered to.\(^{720}\)

• The requirements articulated by the ECJ in C-70/03\(^{721}\) (concerning the transposition of Art. 5 and Art. 6 of the Directive 93/13) have thus far not been implemented in SPANISH law, but a draft is currently being discussed in the Spanish parliament.\(^{722}\)

• In ESTONIA pre-formulated ambiguous terms must be interpreted to the detriment of the party supplying the term. The Directive 93/13 in contrast goes beyond the mere interpretation to the detriment of the user, since it requires in Art. 5, sent. 2 not only an interpretation favourable to the consumer, but the “most” favourable interpretation.\(^{723}\)

• If one assumes, that the member states are obliged by Art. 7(2) of the Directive 93/13, to provide consumer associations with standing to bring collective proceedings against the user of unfair terms, then in LITHUANIA and MALTA an infringement of the Directive can be affirmed, since in both countries consumer associations do not have a right to proceed directly against the user of the clause, but merely have the right to proceed against a measure of the relevant public body or to bring an action before a court for an order requiring the public body to make a compliance order.\(^{724}\)


\(^{719}\) See infra, Part 3 C.IV.3.b

\(^{720}\) See infra, Part 3 C.V.1.b


\(^{722}\) See infra, Part 3 C.II.23.

\(^{723}\) See infra, Part 3 C.V.2.b.

\(^{724}\) See infra, Part 3 C.VI.3.b.
2. Enhancement of Protection

a. Extension of scope

Many member states have broadened the scope of application of their national laws on reviewing contract terms, for instance by

- Broadening the notion of consumer,\textsuperscript{725}
- Monitoring contractual terms which reflect mandatory provisions,\textsuperscript{726}
- Monitoring individually negotiated terms.\textsuperscript{727}

b. Use of options

The member states have made different use of the options the Directive offers:

- The Directive largely leaves the member states the choice of collective proceedings which must be put in place in order to prevent the continued use of unfair terms, Art. 7(2). The member states have chosen different enforcement mechanisms based on administrative measures, collective court proceedings and criminal proceedings.\textsuperscript{728}

c. Use of minimum clauses

Most of the member states have made use of the minimum clause (Art. 8). Some examples of major importance are

- The Directive 93/13 is essentially concerned with the establishment of a very pronounced system of control of the content of contractual clauses and of a principle of transparency. The Directive does not prescribe requirements for the incorporation of clauses into the contract (apart from recital 20, according to which the consumer

\textsuperscript{725} See \textit{infra}, Part 3 C.III.1.b. and Part 4 A.III.
\textsuperscript{726} See \textit{infra}, Part 3 C.III.3.a.
\textsuperscript{727} See \textit{infra}, Part 3 C.III.3.b
\textsuperscript{728} See \textit{infra}, Part 3 C.VI.
must have the opportunity of becoming acquainted with all the terms of the contract). A number of member states do in contrast provide for a review of incorporation of the term into the contract, which in some circumstances can bring about a more advantageous position for the consumer (e.g. by way of establishing a duty to bring the terms to the consumers’ attention or even a duty to handout the terms).

- Art. 3(1):
  o Whereas according to the Directive, unfairness only exists if a term causes an imbalance and this imbalance is furthermore contrary to the principle of good faith, seven countries make direct reference to “significant imbalance” without mentioning the additional criterion “good faith”. This tends to lead to a lowering of the burden of proof for consumers.729

- Art. 3(3) in conjunction with the Annex:
  o Many member states have blacklisted the Annex No. 1 of the Directive and therefore provide a higher level of consumer protection. Moreover, the blacklist in some member states such as those of Belgium, Estonia, Malta, Portugal and Spain, contains more clauses than the Annex of the Directive 93/13.730
  o While Annex No. 2 of the Directive 93/13 establishes certain exceptions with regard to clauses used by suppliers of financial services, many member states provide a higher level of consumer protection by having not transposed Annex No. 2.731

- Art. 4(1):
  o In some member states, while assessing the fairness of contractual terms regard is to be paid not only to the circumstances prevailing at the time of conclusion of the contract (as the Directive provides), but also to conditions following conclusion of the contract.732

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729 See infra, Part 3 C.IV.2.
730 See infra, Part 3 C.IV.3.b.
731 See infra, Part 3 C.IV.3.b.
732 See infra, Part 3 C.IV.2.
• Art. 4(2):
  o In many member states the review of terms also encompasses the subject matter of the contract and the adequacy of price.\footnote{See infra, Part 3 C.IV.2.}

• Art. 6(1):
  o If a clause is unfair, then the Directive 93/13 basically only requires removal or amendment of the offending term and the contract as such remains in force. However, in some member states the contractual rights and obligations generally can be adjusted, not only concentrating on the specific unfair term. In some member states public bodies can furthermore require the incorporation of new terms in order to prevent a significant imbalance between the rights and obligations.\footnote{See infra, Part 3 C.IV.4.}

• Some member states (esp. POLAND, PORTUGAL and SPAIN) provide for a Standard Terms Register, whose aim is to increase the protection of consumers by publicising standard terms and judgments on unfair terms, with some effects towards Notaries, Registrars and judges.\footnote{See infra, Part 3 C.II.19, 20 and 23.}

\section*{3. Inconsistencies or Ambiguities}

Some major inconsistencies or ambiguities of the Directive are:

• Definition of consumer (regarding mixed contracts)

• Although the Directive is basically applicable to all types of contracts, the Directive uses the terms “seller and supplier” and “goods and services”.

• The wording of the general clause (Art. 3) has caused problems in some language versions of the Directive 93/13.\footnote{See infra, Part 3 C.IV.2.}
With regard to the fairness test (Art. 3) and consequences of unfairness in individual proceedings (Art. 6 (1)) the following inconsistencies and ambiguities can be detected:

- The relationship of the principle of good faith to the criterion of “imbalance” remains unclear. Are these criteria to be understood cumulatively, as alternatives, or in the sense that any clause which generates a significant imbalance is always contrary to the principle of good faith?

- The expression “significant” imbalance has caused some problems, since it is difficult to determine whether this term means that the imbalance is gross (extremely significant with a substantive evaluation) or evident (with an evaluation of its external perception).

- The Directive alone does not reveal the legal nature of the Annex. Clarification in relation to this point first came with the decision of the ECJ in C-478/99.

- The wording of Art. 6(1) (consequences of unfairness) does not reflect the ECJ case-law (C-240/98 to C-244/98 - Océano; C-473/00 - Cofidis; C-168/06 – Mostaza Claro).

The principle of transparency laid down in Art. 5 of the Directive 93/13 suffers from some significant ambiguities:

- Transparency is required in Art. 5 “in the case of contracts where all or certain terms offered to the consumer are in writing”. This formulation raises the question, of whether the requirement of transparency likewise applies to orally concluded contracts (see thereto recital 11).

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• The Directive does not explicitly state whether the business has the duty of delivering or making available the document with the terms in the cases where the contract is normally written.

• The Directive does not specify (with the exception of the *contra proferentem* rule) what the consequences of intransparency are. Therefore, it is unclear whether the requirement of transparency is a condition for incorporation of terms, whether intransparent clauses are to be assessed according to Art. 3 and whether the intransparency per se results in nullity/non-binding effect.

Certain issues in relation to collective proceedings also appear in need of regulation:

• From the wording of Art. 7(2) it is not entirely clear whether consumer associations must be given a right of standing in any event.

• The notion “persons and organisations” moreover does not sufficiently explain if a single person or a group of persons not organised could take actions under Art. 7.

Finally, the international scope of application of the unfair terms provisions in Art. 6(2) is not clearly defined, since the Directive does not define the notion of “close connection with the territory of a Member State”.


The analysis reveals some important gaps in the Directive. Examples of this are:

• As the legal consequences for unfairness of a contractual term are only rudimentarily regulated in the Directive, the danger exists that the requirements of the Directive are not transposed with sufficient effectiveness in the member states. This applies especially in those member states which do not provide for courts/authorities to monitor terms on their own motion. The particular danger in these cases is that the consumer cannot defend himself against unfair terms because he is either not aware of
his rights (and that he has to exercise these rights) or is deterred from asserting them by limitation periods or the costs entailed with bringing a court action.

- The Directive is silent (with the exception of the *contra proferentem* rule) on the consequences of lack of transparency. This gap leads to considerable legal uncertainty and at the same time jeopardises the effectiveness of transposition of the Directive.

- Court decisions in the context of collective proceedings are in the vast majority of member states only binding on the business who is party to the case. Furthermore decisions in collective proceedings are generally restricted to the clause in question in its particular wording. These legal consequences are particularly disadvantageous in those member states which do not have an administrative procedure to monitor unfair terms. Therefore it should be considered how these can avoid the negative consequences of *res judicata*.

### 5. Potential Barriers to (Cross Border) Trade

Obvious barriers to trade in the field of the Directive are

- The different benchmarks in member states when reviewing contractual terms.

- The different standards in member states when reviewing the transparency of contractual terms and the (not harmonised) consequences of intransparency.

The case law of the ECJ has not prompted a harmonisation in this respect, since the ECJ stressed in C-237/02 that the court would not decide whether a contractual term is in breach of good faith in a concrete case. Accordingly, traders cannot use a contractual clause which is valid across the EU, but must instead formulate different clauses for each member state. Hence, considerable obstacles to the functioning of the internal market exist. Providers can only perform pre-formulated contracts across borders with considerable transaction costs.

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6. Conclusions and Recommendations

In order to remove inconsistencies and ambiguities, the following issues could be tackled:

- Definition of consumer (esp. with regard to mixed purpose cases)

- In place of the terms “seller/supplier” a uniform term should be used for all consumer protecting directives, to denote the contractual partner of the consumer. Conceivable formulations are “business” or “professional”.

- The Directive should clearly express that it is applicable to all types of contracts.

- Clarification of the wording of Art. 3(1) (amendment of misleading wording in some language versions; clarification whether the criteria “good faith”/”imbalance” are to be understood cumulatively, alternatively or in the sense that any clause which generates a significant imbalance is always contrary to the principle of good faith; definition of “significant” imbalance).


- The consequences of unfairness should also be clarified, in that the unfairness of a term can be assessed on the court’s own motion (as referred to in the cases of Océano, Cofidis and Mostaza Claro). 742

- Clarification whether the requirement of transparency applies to orally concluded contracts.

- Provisions on whether the business has the duty of delivering or making the document available with the terms in cases where the contract is normally written. Moreover, it should be considered whether the Directive should be amended to expressly incorporate the prohibition of “surprising terms”, in the same way as the proposals of directives of 1990 and 1992.

742 See Part 3 C.IV.4.
• The consequences of intransparency should be expressly regulated.

• Certain issues in relation to collective proceedings also appear to be in need of regulation: Clarification whether consumer associations must be given a right of standing in any event and whether a single person or a group of persons not organised could take actions under Art. 7. Moreover, it should be considered how the negative consequences of _res judicata_ can be avoided.

• Definition of the notion of “close connection with the territory of a member state” in Art. 6(2).

Moreover, in order to remove at least the most obvious barriers to trade it must be considered whether application of the minimum clause should be excluded to some of the provisions of the Directive 93/13 thereby bringing about maximum harmonisation in these areas. In this respect it would be desirable if at least some of the terms listed in Annex no. 1 could be formulated not only in terms of an indicative, illustrative list, but as a blacklist.

A complete harmonisation of the law on unfair terms however, in the present state of development of the law, appears neither possible nor desirable, as the fairness of a clause can only be determined by comparison to (hardly harmonised) dispositive law and a maximum harmonisation would bring about a marked reduction in consumer protection in those countries where it is particularly high.
I. Introduction: Policy reasons for monitoring pre-formulated terms

1. The law in the Member States prior to transposition of the Unfair Contract Terms Directive

If one enquires into the policy reasons for monitoring pre-formulated contract terms, two primary lines of argument come to the fore.⁷⁴³

The first theory is based on a consideration of transaction costs: A party using pre-formulated terms is usually better informed about the content of the terms than the other party (whether a consumer or business). By drafting terms just once for several transactions, the user can spread costs an infinite number of times, whereas for the other party it is often too expensive to obtain the information required for negotiating on the conditions of the transaction. Informational asymmetries – disparities in the level to which each party is familiar with the terms of the contract – and the uneven distribution of transaction costs therefore have to be balanced by reviewing pre-formulated terms.

A series of legal systems, especially German, Dutch and Portuguese law, were based on this model even before transposition of the Directive 93/13. Characteristic of these countries is that in principle only standard terms are subject to review, i.e. terms pre-formulated for a multitude of contracts, but not individual agreements. This is due to the fact that an uneven distribution of transaction costs regularly results only where standard terms are used, and not with individually negotiated clauses. At the same time however standard terms are capable of endangering not only the consumer, but any contractual partner against whom they are used. Therefore, the protection afforded by monitoring of terms in the aforementioned countries extends not only to B2B transactions, but also to B2B and P2P transactions.

According to the second model (“abuse theory”) the control of pre-formulated contract terms is based in contrast upon the notion that unfair terms are often used against weaker parties. The main catalyst for control of terms is not the dangerousness of standard terms, but rather

the protection of a specified class of persons. In view of the economic, social, psychological and intellectual superiority of the business the customer has no choice other than to submit to the clauses in question. A review of validity shall accordingly counter an imbalance in bargaining power and knowledge.

This fundamental notion underpinned the laws of some countries, namely FRANCE, BELGIUM, LUXEMBOURG, even prior to transposition of the Directive 93/13. Characteristic of these countries is that in principle they only protect the consumer, as the inferior party (and especially in FRANCE744 those persons concluding contracts which are not directly related to his or her profession). Consequently this protection does not only cover standard terms, but rather all clauses, whether pre-formulated or individually negotiated.

Alongside both these models many other mixed systems exist as well as the model of the NORDIC STATES, where according to the general clause (Contract Acts, Art. 36) it is possible even in B2B contracts to review individually negotiated standard terms.


The first proposals for the Directive 93/13 initially followed the French system, in which the rules were limited to consumer contracts, although individually negotiated terms were subject to the fairness test as well. Since the Common Position of the Council in 1992 however a compromise between the French and the German models emerged: According to Art. 3(1) and (2) of the Directive 93/13 individually negotiated terms – in contrast to FRANCE – are excluded from the scope of the Directive, however – in contrast to GERMANY – it is not necessary that the contract terms were pre-formulated for a multitude of contracts, so that in addition to standard terms also pre-formulated individual contracts for single use, but not individually negotiated terms, are subject to control of the Directive. This mixture of both systems is particularly emphasised in recital 9 of the Directive 93/13, which refers both to the need to protect against abuse of power – as in FRANCE – as well as to the danger for the consumer of unfair exclusion of essential rights – an allusion to the GERMEN model – particularly present in one-sided standard contracts.

744 See Part 4 A.III.2.
The ECJ in its case law on the Directive 93/13 primarily applies the “abuse theory”. According to the ECJ,\(^{745}\) the system of protection introduced by Directive 93/13 “is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of the terms.”

3. The law in the Member States following transposition of the Unfair Contract Terms Directive

Most member states, which prior to enactment of the Directive 93/13 already had a developed system of monitoring the content of contractual clauses, limited their transposition of the Directive to minor adaptations to the rules whilst retaining the old system. Those member states, which prior to transposition of the Directive had no extensive system of monitoring of contract terms, by and large followed the model of the Directive. The ten new member states of the European Union which acceded in April 2004 have as far as possible adopted one of the existing systems.

The system of monitoring the fairness of terms in all 25 member states can be classified into four different models:

- In the Nordic States (DENMARK, FINLAND, SWEDEN) review of content relates to all contracts (B2B, B2C, P2P), also individually negotiated terms are subject to review.

- In other States, which traditionally follow the “transaction costs theory”, control of content likewise extends to all contracts (B2B, B2C, P2P), however according to the standard model only standard terms are subject to review. A review of “terms not individually negotiated” in contrast – in accord with the Directive – is only possible for B2C contracts. This model is followed by GERMANY, PORTUGAL, AUSTRIA and NETHERLANDS. Also the new member states HUNGARY, LITUANIA and SLOVENIA.

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have adopted this model. To a certain extent ESTONIA also counts amongst this group, as according to the Estonian Law of Obligations Act review of all contracts is possible, however with the difference, that this primarily (and not only, as in the aforementioned member states, for B2C contracts) relates to “terms not individually negotiated”.

- Into the third group fall all member states, who restrict the monitoring of content to B2C contracts, but thereby also subject individually negotiated terms to review. These are FRANCE, BELGIUM and LUXEMBOURG as well as CZECH REPUBLIC, LATVIA and MALTA.

- Finally a number of member states follow the concept of the Directive 93/13, in which the content review is restricted to B2C contracts and only terms not individually negotiated can be controlled. These are UNITED KINGDOM, IRELAND, SPAIN, GREECE and ITALY (although some of these member states provide a black list for certain individually negotiated clauses). Amongst the new member states CYPRUS, POLAND and SLOVAKIA have opted for this model.

**II. Legal framework in the Member States**

**1. Austria (AT)**

The AUSTRIAN Civil Code has since its inception contained the provision against immorality (CC Art. 879(1)) and general rules on formation of contract. In addition, since 1979 the Austrian Civil Code prescribes special rules on the incorporation and applicability of contractual clauses: According to CC Art. 864a unusual standard terms, disadvantageous to the other contractual party, can only form part of the contract if the other party’s attention has specifically been drawn to them.

According to CC Art. 879(3) a contractual term contained in general conditions of business or contractual forms, which does not make clear one of the party’s ancillary performance duties, is void, if, in consideration of all the circumstances of the case, it grossly disadvantages one

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746 However, with the peculiarity that in SLOVENIA in B2C contracts even individually negotiated terms are subject to review.
party. Whereas the rules of the CC do not only apply to B2C contracts, but also to B2B and P2P transactions, the Consumer Protection Act which also came into force in 1979 contains special provisions to monitor the content of clauses, which apply only to B2C contracts.

The only changes within this statutory framework so far have been limited to the details. With the Amendment Act of 1 January 1997 the pre-existing “black lists” in Art. 6(1) and (2) of the Consumer Protection Act were slightly extended. Furthermore breach of the transparency imperative in Art. 6(3) of the Consumer Protection Act was for the first time recognised as an independent ground of nullity in its own right.

2. Belgium (BE)

Prior to 1991, there had not been any explicit protection in the field of unfair contract terms. Thus consumers had to have recourse to principles of general contract law. The Act of 14 July 1991 on Trade Practices and Consumer Protection (hereinafter TPA) was the first general regulation on unfair contract terms. The provisions were enacted in anticipation of the Directive, directly inspired by its content. However, the European Commission notified a reasoned opinion on 8 March 1994 pointing out that a significant number of the provisions of the Act of 1991 did not conform to the Directive. It was perceived as particularly problematic that the TPA does not apply to services provided by liberal professions. The Belgian legislator therefore opted to pass a separate Act on unfair clauses in contracts between consumers and practitioners of liberal professions (Liberal Professions Act – LPA).

The TPA was amended on several occasions (Act of 7 December 1998 and the Act of 25 May 1999) in order to meet the Directive’s requirements. The reforms expanded the personal and substantive scope and transposed the interpretation rule and the transparency requirement of Art. 5 of the Directive 93/13 into the TPA. Moreover, the reform changed the effects of unfair clauses. Whereas according to the earlier version of the Act unfair terms first became ineffective through judicial declaration, since 1998 they are void from the start.

The TPA goes beyond the scope of the Directive in also bringing within its ambit terms which were negotiated by the parties, whereas the LPA for liberal professions is confined to unfair

747 Act of 3 April 1997, replaced by the Act of 2 August 2002 on misleading and comparative advertising, unfair contract terms and distance marketing in respect of liberal professions – Liberal Professions Act – LPA.
standard terms which were not individually negotiated by the parties. However, the LPA contains an exception to this principle since the unfair clauses enumerated in the ‘blacklist’ in the annex to the Act are prohibited and void, even if they were individually negotiated (Art. 7(4) of the Liberal Professions Act).

Art. 34 of the TPA empowers the King to impose or prohibit by Royal Decree certain clauses in contracts applicable to certain commercial sectors or to specific products or services. The King has also the power to impose type-contracts in the relation seller - consumer. The power of the King is restricted in two ways. On the one hand the King is only empowered to take action if inevitably to guarantee the balance between the rights and obligations of the parties or to assure the fairness of commercial transactions. On the other hand the King must primarily consult the Unfair Contract Terms Commission and the High Council of Tradespeople (Hoge Raad voor de Middenstand). At present only one Royal Decree has been issued: the Royal Decree of 9 July 2000 on the Essential Data and the Terms and Conditions to Be Mentioned on The Order Form of New Cars. A Royal Decree on the contract terms in broker contracts of real estate agents is in preparation.

3. Cyprus (CY)

Prior to 1996 in CYPRIOT legislation there were no express rules regarding the monitoring of standard contract terms. Instead the general rules of conclusion of contract applicable against all persons of the General Contract Law, Cap 149, were applied. Moreover, the Sale of Goods Law of 1994 contains a provision which renders null and void those terms excluding the supplier’s obligations implied by the said law. In 1996 the House of Representatives passed the Unfair Terms in Consumer Contracts Act. The Act was amended in 1999 to transpose the Directive 93/13. This Law applies to any term in a contract concluded between a seller or supplier and a consumer where it has not been individually negotiated.

748 Law 10(I) of 1994.
749 Law 93(I) of 1996.
750 Law 69(I) of 1999.
4. Czech Republic (CZ)

Prior to implementation of the Directive 93/13 there were no specific provisions in the Civil Code of Czechoslovakia of 1964, which had as their object the protection of the consumer from unfair terms. Also the Consumer Protection Act 634/1992, which was passed in December 1992 by the Federal Assembly and subsequently (after separation of the state) further developed by the CZECH REPUBLIC and SLOVAKIA separately, did not (and does not) contain any specific provisions to monitor contract terms for the Czech Republic. Moreover, the Consumer Protection Act 634/1992 only specified obligations for the provision of information to consumers, prohibition of misleading advertising and discrimination, and further obligations in the sale of products and provision of services, as well as principles for co-operation and the rights of organisations created for consumer protection. The Directive 93/13 was transposed into the Civil Code in 2000 with Act 367/2000. The Czech Republic transposed the Directive almost literally by inserting its provisions into CC Art. 52, 55, 56. The relevant rules only apply in the B2C context. In contrast to the Directive the definition of consumer (Art. 52(3)) in Czech law is not limited to natural persons. Furthermore, terms individually negotiated come within its ambit. Unfair terms are considered valid unless the consumer invokes nullity (Art. 55(2), 40a).

5. Denmark (DK)

The DANISH system of consumer protection law is comparable to that of the other Nordic countries (FINLAND and SWEDEN, see 7. and 24.). A key feature of those countries is the vast usage of the general clause, laid down in sec. 36 of the Contracts Acts. This clause makes it possible to wholly or partly disregard an (even individually negotiated) agreement, if the term is unfair/unreasonable with respect to the contract’s content, the position of the parties and the circumstances prevailing during and after the conclusion of the contract. The general clause is not limited to B2C contracts, but applies to contracts in general. But it must be noted, that in the context of non consumer contracts, the threshold of unreasonableness is higher. A further characteristic of the Scandinavian states consists in the administrative control of clauses through the Consumer Ombudsman, whose task in Denmark is to monitor compliance with the Danish Marketing Practices Act in the interests of consumers. The Directive 93/13 was transposed into Danish law in 1994 by means of amendments to the Contracts Act. Through the transposition an even higher degree of flexibility was achieved, making it possible not
only to disregard an agreement in whole or in part, but also to amend it. In addition to approximating the general clause additional special rules for consumer contracts were inserted into the Danish Contract Law (ss. 38a-38d). The definition of consumer corresponds with the Directive, but gives a broader consumer protection by covering not just natural persons, but also legal persons, provided that they are not acting within the course of a business. In the case of consumer contracts, the general clause in sec. 36 of the Contracts Act applies with two modifications. Firstly, in application of the general clause, account may not be taken of circumstances to the detriment of the consumer arising at a later date if this means that a contractual term may not be amended or overridden. Secondly, even if a contract contains terms which are incompatible with proper business practice and cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer, the consumer may ask to have the remainder of the contract retained without amendment, if this is feasible.

6. Estonia (EE)

Before the transposition of the Directive there were no special rules in national law explicitly covering unfair contract terms. All consumer law questions were regulated by the Civil Code of the Estonian Soviet Socialist Republic of 12 June 1964 (in force from 1 January 1965). On 15 December 1993 the Parliament passed the Consumer Protection Act (hereinafter CPA) which came into force on 1 January 1994. The CPA contained general provisions concerning responsibilities of and restrictions upon the Seller (sec. 7 and 8) but did not provide similar special rules as prescribed by the Directive. The Directive had to be implemented into Estonian law after the European Agreement Establishing an Association between the European Communities and their member states and the Republic of Estonia came into force on 1 February 1998. The legislator transposed the Directive in sec. 35-44 of the Law of Obligations Act which includes rules on the non-incorporation of surprising (uncommon or unintelligible) terms, sec. 37(3), the priority of individual agreements over standard terms, sec. 38, the “contra proferentem” rule of interpretation, sec. 39(1) and the “battle of forms”, sec. 40. The scope of application is broader than that defined in the Directive. All kinds of persons are covered including consumers, non commercial legal persons and commercial legal persons. Specific consumer protection provisions are included in a blacklist, sec. 42(3), covering a total of thirty seven terms. If a blacklisted term is used in B2B-contracts, the term is presumed to be unfair, sec. 44.
7. Finland (FI)

The Finnish system of consumer protection law is comparable to that of other Nordic countries (Denmark and Sweden, see 5. and 24.). As in the other Scandinavian states, central features are the general clause of Contracts Act (CA) sec. 36 and administrative protection measures and means of control, which in Finland are enforced by the Consumer Ombudsman and the Consumer Agency on the basis of the Act of Consumer Agency (1056/1998) respectively. In contrast to other Scandinavian states, since 1978 there is also a Consumer Protection Act (CPA), which in Chapter 3 lays down a general clause which gives the court the power to adjust or disregard express terms of the contract in B2C-contracts, whether individually negotiated or non-negotiated. The Directive 93/13 was transposed in 1994 by amendments to a few points in the CPA. In contrast to the Directive 93/13 the CPA also relates to individually negotiated terms. Moreover, in contrast to Art. 4(2) of the Directive 93/13, Chapter 4, section 1 CPA expressly provides for adjustment of the price. At the end of 1998 there was a further amendment Act to transpose Art. 6(2) of the Directive 93/13.

8. France (FR)

The control of unfair contractual terms was initially developed through case law. There were also certain widespread, fragmented rules concerning unfair terms in the Code Civil. The first comprehensive legislative approach was the law 78-22 of 10 January 1978, the provisions of which were later transferred in 1993 into Art. L-132-1 et seq. of the new Consumer Code. Originally the law 78-22 was enacted in order to set up an administrative system of control of unfair terms before the commission des clauses abusives. The commission can only issue recommendations, on the basis of which the executive may prohibit certain clauses by decree. However, this procedure remained practically unused, since only two decrees banning the use of certain terms (black list) had been enacted. Against this background, the Cass. civ. established in 1991 established the principle of judicial review of unfair contractual terms in

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751 Law on Protection and Information for Consumers; so-called “loi scrivener”.
In addition to control through administrative bodies and judicial review of content in individual cases, since 1998 it has also been possible for consumer associations to institute legal actions (Art. L-421-1 et seq. of the Consumer Code).

The Directive 93/13 was transposed through the enactment of law 95-96 of 1 February 1995 which slightly modified the Consumer Code. The key general clause of Art.L-132-1 of the Consumer Code provides benchmarks for assessing unfairness albeit without explicitly mentioning the requirement of good faith as stated in Art. 3(1) of the Directive 93/13. The French provisions still apply solely to terms used in B2C contracts (consumer contracts) but, in contrast to the Directive, individually negotiated terms are covered as well.

9. Germany (DE)

Since 1977 the German legislator had already comprehensively regulated the use of unfair contract clauses in the Act Concerning the Regulation of the Law of Standard Business Terms (Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, hereinafter AGBG). Not only was (and is) the consumer protected, but every natural or legal person, against whom standard contract terms are used. Therefore also contracts between private parties and commercial transactions are in principle within its scope. In this respect the scope of protected persons is considerably wider as in the Directive. Prior to implementation of the Directive however it was only possible to review contractual terms pre-formulated for a multiplicity of contracts, unilaterally made by one party. Clauses which were pre-formulated for a one-off contract or contracts which were incorporated on the initiative of a third party (such as notary, agent etc.) thus laid outside of the ambit of the AGBG. The “grey” list of suspicious clauses (clauses whose validity depends on an appraisal) in Art. 10 of the AGBG (now: CC Art. 308) as well as a black list of wholly void clauses (clauses whose invalidity is not subject to any appraisal) in Art. 11 of the AGBG (now: CC Art. 309) serve as benchmarks for the control of contractual content. Clauses not catalogued in these lists, were judged according to the most important norm (in practice), the general clause Art. 9(1) of the AGBG (now CC Art. 307(1)). This provision declares that clauses are void if, contrary to the

requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage.

In transposing the Directive in 1996 the legislator opted for a minimalistic solution. It merely modified Art. 12 of the AGBG (international scope) and introduced a new provision in Art. 24a of the AGBG (now CC Art. 310(3)), which extends the scope for consumer contracts and also enables a review of clauses, which were formulated for one-off use and were introduced into the contract on the initiative of a third party (notary, agent). Within the framework of the reform of the law of obligations, with effect from 1 January 2002 the legislator repealed the AGBG and its substantive provisions were integrated into the CC with minor, mainly drafting changes (CC Art. 305-310). To meet the requirements of the ECJ (C-144/99), CC Art. 307(1) made clear that intransparent clauses are void.

10. Greece (EL)

Even in the 1970s the Greek academic and judicial communities had begun to intensively address the ever increasing practice of conclusion of contracts through the use of standard terms. This protection was provided in three levels of review (of incorporation, of interpretation, and of reviewing the content of the clause). In 1991 a comprehensive consumer protection act was passed, which for the first time expressly provided rules for protection against unfair terms, but whose scope of application was limited to consumer contracts (B2C). This act was repealed in 1994 and replaced with a new Consumer Protection Act. The requirements of the Directive 93/13 were transposed in Art. 2 of this Act, further amendments followed in 1999. The scope of the Greek provisions extended according to Art. 1(4) to all natural and legal persons, who are the end recipients of goods or services, irrespective of the purpose/nature of the transaction; it thus goes considerably further than the Directive.

11. Hungary (HU)

In socialism general conditions of business were practically irrelevant, it was only at the end of the 1960s that pre-formulated contract terms started to appear. The case law developed.
special benchmarks for the incorporation of standard contract terms, specifically consumer law provisions however were still unknown. With the amendment act of 1978 the HUNGARIAN Civil Code (Act IV of 1959) was comprehensively reformed. Henceforth CC Art. 209 provided that unilaterally formulated standard contract terms used by legal persons, which conferred an unjustified advantage on one party, were rescindable. The party entitled to rescind was the “other” contractual party confronted with the clause (in which case the nullity was declared with effect inter partes) as well as certain state or community organs (here the nullity applied erga omnes).

In 1997 the Directive 93/13 was transposed into the Hungarian Civil Code in the part “Law of Obligations”, Title “Contract”, Chapter XVIII. The provisions of the CC have been amended numerous times in recent years to take account of the case law of the ECJ (C-240/98 to C-24498; C-372/99; C-473/00; C-70/03). The last amendment occurred with the Act III of 2006, in force since 1 March 2006.

The CC contains general provisions applicable to all persons on the incorporation and interpretation of standard contract terms (CC Art. 205a et seq.). A content review is likewise available in all contractual relationships, although in stages. According to CC Art. 209(1) (new version) a standard contract term is unfair if, contrary to the requirement of good faith, it causes a considerable and unjustified disadvantage to the other party. Furthermore, with consumer contracts terms not individually negotiated can be reviewed; a review of individual agreements on the other hand is no longer possible since 1 March 2006. In respect of B2C contracts, the rules of the CC are complemented with a black and a grey list by the government regulation 18/1999 (II.5.). Since the coming into force of the Act III of 2006 the legislator changed the consequences of unfairness. CC Art. 209a(2) provides that unfair terms in consumer contracts are void and that unfairness can only be asserted to the advantage of the consumer. The scope of application of the actio popularis is limited to B2C contracts since 1 March 2006.

755 See the 37th opinion of the economic council of the Supreme Court.
Further changes are expected with the planned "big" reform of the CC, including *inter alia* limiting the definition of consumer to natural persons and regulation of the concurrence of standard contract terms (battle of forms).

12. Ireland (IE)

Before transposition of the Directive there was no protection in IRISH law comparable to that in the Directive. Instead ‘fairness’ was addressed by a number of contract law doctrines, such as the doctrines of duress and undue influence, mistake and misrepresentation. Moreover, the extent to which a supplier could exclude his liability for breach of the statutory implied terms in contracts for the sale of goods and supply of services was regulated by the Sale of Goods Acts 1893 and 1980 (for sale of goods) and Part IV of the Sale of Goods and Supply of Services Act 1980 (for the supply of services). As regards the sale of goods, any attempt to exclude liability for breach of the statutory implied terms against a consumer was void (see e.g. sec. 55 of the Sale of Goods Acts 1893), whereas, in relation to services an express exclusion would be valid if fair and reasonable and if it had been specifically brought to the consumer’s attention (sec. 40 of the Sale of Goods Acts 1980).

Related provisions in the Sale of Goods and Supply of Services Act 1980 allowed a Minister to make orders on various matters, such as: required particulars in contracts; notice on the use of standard form contracts; font size in printed contracts and contracts required to be in writing (sec. 51-54, 1980 of the Act), but they were never implemented.

The Directive was transposed by the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995. Like in the UNITED KINGDOM, the content and structure of the implementing provisions remained quite close to the Directive, limiting the scope of the Regulations to B2C transactions.

It was not until 2000, that the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations 2000 (SI No. 307 of 2000) were introduced to extend enforcement powers under Regulation 8 of the 1995 Regulations to ‘consumer organisations’.
13. Italy (IT)

In ITALIAN law there were no special separate regulations on unfair terms before the implementation of the Directive. However already in 1942, the Italian Civil Code contained certain general provisions on incorporation (Art. 1341(1), 1342) and interpretation of standard terms applicable to all persons, such as for instance CC Art. 1370 (contra proferentem rule). In addition, according to CC Art. 1341(2) pre-determined and pre-formulated clauses are void, if they were not individually accepted in writing, especially limitations of liability. Special rules on the review of content of clauses on the other hand were not introduced into the CC until 1996: In order to transpose the Directive, the legislator produced a new chapter in the Civil Code (ex CC Art. 1469-bis to 1469sexies). The scope of these rules was restricted to consumer contracts. Meanwhile the rules have been amended many times. In 1999, in response to pressure from the European Commission, the Italian legislator extended the scope of review of clauses to all contractual relationships (whereas thus far the only contracts to which it applied were contracts for the sale of goods and the supply of services). A further amendment occurred in 2003 with Art. 6 of the Act 14/2003: After the ECJ made clear in C-372/99 that Art. 7(3) of the Directive 93/13 requires “the setting up of procedures of a deterrent nature and a dissuasive purpose which may also be directed against conduct confined to the recommending of the use of unfair contract clauses, without actually using them in specific contracts”, the Italian legislator refined the relevant provision (CC Art. 1469sexies) according to these guidelines. With the passing of the consumer code, on 22 July 2005 which came into force by legislative decree of 23 October 2005, the provisions on unfair clauses of the CC (ex CC Art. 1469bis-1469sexies) were carried over to the consumer code. This instrument changed the legal consequences of the use of unfair terms by introducing the concept of relative nullity (nullità di protezione) in Art. 36(3): Henceforth the consumer can rely on the validity of the contract so long as it suits him, as only he (or the court which is obliged to take into account his interests) can claim nullity and no limitation period looms.

14. Latvia (LV)

In LATVIA the first normative act in the field of consumer protection came into force on 28th of October in 1992 – law “On Consumer Rights Protection”. This normative act did not

stipulate specific provisions regarding unfair contract terms. However, from 1992 to 1999 (when the new Consumer Rights Protection Act came into force) consumer rights protection developed intensively. In 1999, the Consumer Rights Protection Act was modified in order to transpose the Directive 93/13. The provisions apply only to B2C-Contracts, however, the concept of consumer has been extended by the Latvian legislator, since the notion “consumer” encompasses all transactions which are not directly related to his or her entrepreneurial activity, sec. 1(3). Sec. 5(1) provides that contracts between a consumer and a business shall provide for equal rights of both contracting parties. According to sec. 5(2) contract terms (even though they have been individually negotiated) shall be deemed to be in contradiction with the principle of legal equality of the contracting parties if the terms put the consumer in a disadvantageous position and are contrary to the requirements of good faith, while sec. 6(3) adopts the wording of Art. 3(1) of the Directive 93/13, blacklisting twelve clauses of the Annex. A key feature of Latvian law is the administrative control of contractual clauses by the Consumer Rights Protection Centre, whose competences are laid down in Art. 25 of the Consumer Rights Protection Act.

15. Lithuania (LT)

Consumer protection is a relatively new sphere of law in the Republic of Lithuania. Before the transposition of the Directive 93/13, consumer law issues were regulated by the 7 July 1964 Civil Code (soviet times code) and since 1994 by the Consumer Protection Act, but the Lithuanian law did not provide for a level of protection comparable to the Directive. In 2000, the legislator replaced the Civil Code of 1964 with the new Civil Code of Lithuania (in force since 1 July 2001), closely mirroring the Unidroit Principles and the Principles of European Contract Law. Parallel to this the Act on Consumer Protection (entry into force 1 January 2001) was amended. Both the Civil Code as well as the Consumer Protection Act serve to implement the provisions of the Directive 93/13. In contrast to the Consumer Protection Act the Civil Code however does contain general rules on standard conditions, being applicable to all kinds of contacts. According to CC Art. 6.185(2), standard conditions prepared by one of the parties shall be binding on the other only if the latter was provided with an adequate opportunity of becoming acquainted with said conditions. Moreover, the Civil Code provides special rules on surprising terms (CC Art. 6.186(1) and (2)), the battle of forms (CC Art. 6.187) and the interpretation of standard terms (CC Art. 193(4)). CC Art. 6.186(3) also
provides that all kinds of parties being confronted with standard terms have the right to claim for dissolution or modification of the contract in the event where, even though the standard conditions of the contract are not contrary to the law, they exclude the party's rights and possibilities that are commonly granted in a contract of that particular class, or exclude or limit civil liability of the party who prepared the standard conditions, or establish other provisions which violate the principle of equality of parties, cause imbalance in the parties' interests, or are contrary to the criteria of reasonableness, good faith and justice. These rules were complemented with special provisions for the review of terms not individually negotiated in consumer contracts (CC Art. 6.188). The provisions of the Consumer Protection Act correspond with these rules almost word for word. At present, courts apply both acts alongside each other.

16. Luxembourg (LU)

The Consumer Protection Act which had been enacted on 25 August 1983 provided comprehensive regulations on unfair contract terms. Structurally very similar to the Directive, the provisions contained a general clause defining criteria for assessing unfairness as well as a non-exhaustive black list of unfair clauses. Therefore the transposition of the Directive by the Law of 26 March 1997 lead only to slight modifications to the domestic law as four clauses were added to the black list. Parallel to this, provisions on the distinction between individual agreements and pre-formulated clauses were introduced into CC Art. 135-1 and a new rule on the incorporation of standard terms was adopted: According to CC Art. 1135-1 standard terms are only binding against the other party, as long as the other party has had the possibility to acquaint himself with the terms at the time of signing, and if in the prevailing circumstances he is to be treated as having accepted them. Whereas the review of content provided in the Consumer Protection Act is only applicable in the context of B2C relationships, the incorporation rules of CC Art. 1135-1 apply to all persons.

17. Malta (MT)

Before the transposition of the Directive 93/13, there were no express legal norms dealing with the use of unfair terms in consumer contracts. However, in practice, the provisions of the

761 Law of 26 March 1997 (Memorial A No. 30 of 29 April 1997).
Civil Code were utilised by the MALTESE Courts as a legislative tool for regulating the use of unfair terms by traders especially with respect to exemption of liability clauses.

In 1994 the legislator passed the Consumer Affairs Act. Among other things the Act created (and conferred powers upon) the post of Director of Consumer Affairs, and provided for the establishment of the Consumer Affairs Council and of the Consumer Claims Tribunal and for the regulation of the role of consumer associations. The Directive 93/13 was transposed in 2000, by amending the Consumer Affairs Act 1994\(^\text{762}\), especially Art. 94 which empowers the Director on his initiative or at the request of a qualifying body to require the deletion or alternation of unfair terms in a consumer contract. The Maltese Consumer Affairs legislation goes beyond the minimum requirements, since the Maltese law extends the protection of consumers to all contractual terms without making any distinction as to whether the term was individually negotiated or not. A characteristic of the Maltese system are the far reaching powers of the Director of Consumer Affairs. If a trader is considered to have acted in breach of the Consumer Affairs Act, the Director of Consumer Affairs can request the initiation of criminal proceedings before the Court of Magistrates (Criminal Jurisdiction). If the trader is found to be in breach of the requirements of the Consumer Affairs Act, a maximum fine of Lm2000 (4658 Euros) can be imposed by the said court.

**18. Netherlands (NL)**

Before 1992, the DUTCH Civil Code did not contain specific provisions on unfair contract terms. Those terms used in consumer contracts were dealt with by the courts by means of the general doctrine. Also, general terms excluding or limiting the legal liability of the seller or supplier were deemed void as being contrary to good morals or public order\(^\text{763}\). Furthermore, general terms were interpreted in favour of the consumer in case a term was not very clear. The courts often applied the principle of “good faith” in order to fill in gaps and to nullify unacceptable terms.

The new Dutch civil code which came into force on 1 January 1992 contains special provisions on unfair contract terms (Art. 6:231-6:247). The provisions were inspired by the

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\(^{763}\) Art. 1373 in conjunction with Art. 1371 of the Old Dutch Civil Code.
German act on unfair contract terms.\textsuperscript{764} The scope of the provisions also extends to B2B transactions, however, contractual parties who employ more than 50 staff cannot seek review of either incorporation or content (Art. 6:235 BW). The black list and the grey list (Art. 6:235, 6:236 BW) on the other hand relate only to consumer contracts. After the ECJ (C-144/99\textsuperscript{765}) criticised that Dutch Law does not contain explicit provisions on the principle of transparency, the legislator amended CC Art. 6:231 and 6:238 and clarified moreover, that in case of doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. A further amendment occurred in 2004. As Dutch law on unfair terms, in contrast to the Directive, only applied to written contracts, the word “written” was removed in 2004.\textsuperscript{766}

19. Poland (PL)

Already in 1933 Art. 71, 72 of the POLISH law of obligations contained provisions on unfair terms. Although Polish civil law was familiar with the concept of review of contractual clauses, the level of protection for consumers was very different to the one prescribed by the Directive, especially until 1990. Since 1990 certain mechanisms for consumer protection were established in the Civil Code. By virtue of CC Art. 384 the Council of Ministers could, by means of a regulation, specify particular conditions for concluding and executing contracts with consumers (normative ‘standard forms’), if it was justified by the aim of protecting consumer interests. In fact, the Council adopted only one regulation with a limited scope of application on 30 April 1995 (on the conclusion and execution of contracts of sale of movable goods with consumers). CC Art. 385.2 (as per the amendment of the Civil Code of 28 July 1990) stipulated that if contractual clauses, contractual forms or rules secured significantly unjustified benefits for the party who used them, the other party (unless being a businessperson) could apply to court to have them declared ineffective inter partes, i.e. there was no possibility for abstract control of contractual clauses.

The Directive was transposed by the Act on the protection of some consumer rights and liability for damage caused by a dangerous product of 2 March 2000 amending the Polish Civil Code of 1964 – Arts. 384-385.4. The new concept distinguishes between forms used in

\textsuperscript{764} GERMAN Act Concerning the Regulation of the Law of Standard Business Terms, see above Part 3 C.II.9.
all contracts, those used in contracts between professionals (traders) and those used in contracts with consumers. A review of incorporation of standard terms is according to CC Art. 384 in principle not confined to B2C relationships, but yet stronger provisions on incorporation apply to consumer contracts. The battle-of-forms rule in Art. 485, modelled on Art. 2:209 PECL, on the other hand, relates only to B2B contracts. A review of content of standard terms is limited to B2C transactions. The notion of “consumer” differs from the Directive, since a person can also be regarded as a consumer when he is concluding a contract for a purpose not directly related to his business.

Since transposition of the Directive 93/13 Polish law also contains in Art. 479\(^{36}\) et seq. of the Polish Civil Procedure Code for the first time rules on the abstract review of terms in collective proceedings. Standing is enjoyed not only by consumer associations, local consumer ombudsmen as well as the President of the Office for Competition and Consumer Protection, but every person, who could have concluded the contract following an offer by the user. If the designated consumer court in Warsaw prohibits the use of a certain contractual clause, the decision is published in the Economic and Court Journal and entered in a register with the President of the Office of Competition and Consumer Protection. Once the judgment is published in the Register it has general effects. The Register is open to the public, and at present it contains more than 1000 clauses.

20. Portugal (PT)

The PORTUGUESE legislator had already established provisions for the protection against standard contract terms in 1985 with the Decree-Law 446/1985 of October 25. It followed very closely the German Act Concerning the Regulation of the Law of Standard Business Terms of 1976, i.e. it was applicable also to contracts concluded between businesses (B2B) and amongst private parties (P2P). Conversely the scope of application was limited to standard terms pre-formulated for frequent use. The content review was carried out according to the general clause of Art. 15 (contradiction against good faith). Additionally the act contains in Art. 18 et seq. as well as Art. 21 et seq. four different catalogues of forbidden clauses, whereby the first two (black and grey list) apply generally, whereas the other two (also a black and a grey list) are only applicable to consumer contracts.
The Directive 93/13 was transposed by means of legislative decree 220/1995 of August, in which the decree merely made some minor amendments, above all a correction of the prohibited lists and an extension of some procedural provisions. In the course of transposition the legislator began to compile a register of those judgments, as a consequence of which the use of clauses was prohibited or declared ineffective. As far as substantive scope is concerned, with the repeal of the old Art. 3(1) lit. (c) it enabled a review of clauses that were imposed or approved by legal persons of public law. Only through a further amendment in 1999 (Decree-Law 249/1999 of July 7) on the other hand did pre-formulated individual contracts come within the purview of the act.

21. Slovakia (SK)

Prior to transposition of the Directive 93/13 there were no specific provisions in the Civil Code of 1964 or in the Consumer Protection Act 1992 which had as their aim the protection of the consumer from unfair terms (see above, 4.). Public control and market surveillance authority in the field of consumer protection were regulated by the Act 274/1993 Coll. on Jurisdiction of Bodies in Matters of Consumer Protection, which defined the powers of individual authorities in matters of consumer protection (Ministry of Economy and other ministries and other institutions of state administration, Trade Inspection, county offices, district offices, municipalities).

In order to transpose the Directive, the SLOVAKIAN legislator amended the Civil Code in 2004, inserting the provisions of the Directive almost literally. These rules were complemented by the Consumer Protection Act, also adopted in 2004, whereby the notion of consumer contract was more closely defined Art. 23a of the Consumer Protection Act, and general provisions for public control and market surveillance authorities as well as the rights of consumer organisations were laid down. The scope of application of the domestic provisions is broader than the one prescribed by the Directive since legal persons are regarded as consumers also, provided they are acting for purposes outside their trade, business or profession. One key feature of Slovakian Law is the co-operation between the government and non-government organisations in promoting consumer protection and policy. According

767 Amendment No 150/2004 Fifth head: Consumer contracts: Art. 52-54, date of coming into force 1 April 2004.
to Slovakian Law, Consumer organisations have a legal right to work with public authorities in both creating and monitoring consumer policy, and in improving the effectiveness of its administration. Their representatives sit on the government’s advisory Consumer Policy Council (the Vice-Chairman is the representative of the Association of Slovak Consumers).

22. Slovenia (SL)

Before the transposition of the Directive 93/13 into SLOVENIAN law, the Code of Obligations of 1978 (replaced by a new Code in 2002) contained two articles regarding general terms and conditions of the contract. Neither of them included a detailed description or definition of unfair terms. Art. 143 provided that any provisions of general terms and conditions that oppose the actual purpose for which the contract was concluded or good business customs shall be null and void, even if the general terms and conditions in which they are contained were approved by the relevant authority. In addition, the court could reject the application of individual provisions of general terms and conditions that remove another party’s right to object or appeal, or provisions based on which a party loses contractual rights or deadlines or that are otherwise unjust or too strict for the party.

The Slovenian legislator transposed the Directive in February 1998, amending Arts. 22-24 of the Consumer Protection Act. The new provisions came into force on 28 March 1998. Compared with the Directive Slovenian law provides greater protection for consumers because individually negotiated terms can equally well be declared unfair and therefore null and void. Terms used in other contracts (B2B or P2P) can be reviewed under Art. 121 Code of Obligations. Art. 121 of the Code of Obligations provides that general terms and conditions that oppose the actual purpose for which the contract was concluded or good business customs shall be null and void.

23. Spain (ES)

Although in SPAIN there was not a separate Law on unfair contract terms, there did exist a concise regulation on the topic with a protection to some extent comparable to that of the Directive. In 1980 the Law 50/1980 of 8 October on the insurance contract was passed, whose Art. 3 deals with standard terms and unfair terms in contracts of insurance. Apart from
that branch of the Law, with a more general approach, the *Law 26/1984 on General Consumer Protection* created a full regime on unfair contract terms in contracts concluded by consumers. Art. 10 of the Law 24/1986 contained (mixing to some extent the notions of standard terms and unfair terms, with some confusion) a definition on standard contract terms and the formal requirements for them to be considered part of the contract, a general rule on equity in contractual clauses and a list of 12 sections on forbidden terms, a rule on the interpretation *contra stipulatorem*, the priority of particular clauses over general clauses and the sanction of nullity. This regulation on unfair contract terms was inspired by Comparative Law, with a special influence of the *German Law* on standard terms in contracts.\(^{769}\)

The Directive 93/13 was transposed in 1998 by enactment of the Law 7/1998, 13 April 1998, on standard terms in contracts and the Law 26/1984, in which the list of unfair clauses was extended by a further 29 clauses. Both acts are different in terms of scope and content. The act on standard contract terms deals with standard terms in contracts in general, its provisions apply equally to B2C contracts and B2B contracts. This act however only regulates the incorporation and interpretation of standard terms, but does not review content. The General Consumer Protection Law on the other hand contains (for consumer contracts) provisions on content review.

One of the main characteristics of the domestic system of preventive control of unfair terms is the Spanish Standard Terms Register listing terms that have been declared unfair by final court decisions. The Notaries and Registrars of the Land Registry and the Commercial Registry must adhere to this Register and refuse to authorise contracts containing any of the listed terms. The public Register enables anybody to invoke the unfairness of these terms before courts.

The requirements articulated by the ECJ in C-70/03\(^ {770}\) (concerning the transposition of Art. 5 and Art. 6 of the Directive 93/13) have thus far not been implemented in Spanish law, but there is currently a draft being discussed in the Spanish parliament, modifying not only the wrong transposition, but also some other questions on unfair terms (e.g. round-off clauses

\(^{769}\) *German Act Concerning the Regulation of the Law of Standard Business Terms* of 1976, see above I.9.

against the consumer, unfair practices in service contracts, unfair clauses on requisites for termination).

24. Sweden (SE)

In 1971 Sweden issued an Act on Contract Terms in consumer relationships (Contract Terms Act, CTA) which contained mainly market law rules, enabling the Consumer Ombudsman to negotiate with suppliers’ organizations and issue prohibitions against the use of unreasonable terms and conditions. Measures could be taken to fend off the use of certain contract clauses which were considered unreasonable. Such cases are tried separately via the Consumer Ombudsman and the Swedish Consumer Agency and before the Market Court as the only and final court, since Market Courts’ judgments cannot be appealed. Furthermore, since 1976 all contractual clauses (in B2C, B2B and P2P relationships) can also be subjected to a content review under sec. 36 of the Contracts Act – as also in the other Scandinavian Countries (Denmark and Finland, see 5. and 7.). With the accession of Sweden to the EU the CTA 1971 was repealed and replaced with the CTA of 15 Dec 1994 (1994:1512). The Act (covering only B2C relations) contains not only marketing law, but also civil law provisions, that essentially refer to sec. 36 of the Contracts Act. However, the general clause in sec. 36 of the Contracts Act applies with two modifications. Firstly, circumstances that occurred after conclusion of the contract can only be considered if this would not be to the disadvantage of the consumer (CTA Art. 11(2)). Secondly, the possibility of amendment of unreasonable contract terms is limited; in the case of unfair terms which have not been individually negotiated, the consumer can request that the remainder of the contract shall remain unchanged i.e. the court does not amend the remaining clauses.

25. United Kingdom (UK)

Even before the coming into force of legislative regulations the case law developed a series of protective mechanisms to review standard contracts. According to the case law standard terms would only then form part of the contract, if the user had given the other contractual party reasonable opportunity to become acquainted with the terms (reasonable notice test771). An

additional role was played by the interpretation of contracts according to the *contra proferentem* rule and even a review of content was possible within limits. The first piece of legislation was the *Unfair Contract Terms Act 1977* (UCTA). UCTA is not limited to consumer contracts; it applies to B2B contracts, and also, in limited circumstances, to P2P contracts. However, it only covers a narrow range of terms, since it is designed to control exclusion clauses, where one party attempts to exclude or limit their normal liability for negligence or breach of contract or tries to “render a contractual performance substantially different from that which was reasonably expected”. UCTA remained unaffected in transposing the Directive and remains in force.

The Directive was initially transposed in 1994 via statutory instrument (Unfair Terms in Consumer Contracts Regulations, UTCCR) resembling the Directive almost word by word. Since the implementation of the Directive, the Office of Fair Trading (OFT) has been the leading regulator in this field. However, contrary to Art. 7 of the Directive 93/13, the UNITED KINGDOM did not introduce a general right of standing for consumer associations, since this had been opposed by the privity of contract doctrine. The Queen’s Bench Division of the High Court therefore asked the ECJ whether the Directive allowed private persons or organisations having a legitimate interest in protecting consumers to take action before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for use are unfair. However, the question was withdrawn: as a result of political change, the government gave a right of standing to consumer associations in the Consumer Contracts Regulations 1999 and granted the Claimant Consumers’ Association the right to litigate.

From the dual applicability of UCTA 1977 and UTCCR 1999 results a particularly complex legal framework, since the two laws contain inconsistent and overlapping provisions, using different language and concepts to produce similar but not identical effects. The Law Commission and Scottish Law Commission in February 2005 therefore published a draft Unfair Terms in Contracts Bill and proposed in its final report to clarify and unify the legislation on unfair terms presently contained in UCTA 1977 and UTCCR 1999.\(^{772}\) The report also recommends improved protection for small businesses and to allow them to

\(^{772}\) See the final report of the Law Commission and the Scottish Law Commission on unfair terms in contracts, LAW COM No. 292/SCOT LAW COM No. 199.
challenge any standard term of the contract that has not been altered through negotiation, and is not the main subject matter of the contract or the price.
III. Scope of application

1. Consumer, Seller and Supplier, Public-sector undertakings


The Directive 93/13 is applicable to terms in contracts concluded between a seller or supplier and a consumer (B2C). All member states have, in the course of transposition of the Directive, introduced special B2C rules to review pre-formulated clauses.

In addition to this, in a number of member states a review of B2B and P2P contracts is possible at different levels.

In the NORDIC STATES (DENMARK, FINLAND, SWEDEN), due to the general clause of sec. 36 Contracts Act, a content review of unfair terms (even if they are individually negotiated) has always been possible in all manner of contractual relationships, thus also in B2B and P2P contracts. However, according to sec. 36 Contracts Act, in determining what is unfair, regard shall not only be paid to the content of the contract and to the circumstances prevailing at and after the conclusion of the contract, but also to the positions of the parties. This means that in B2B contracts, very strict requirements must be overcome to render a clause unfair.

In GERMANY, PORTUGAL and ESTONIA as well as in AUSTRIA, HUNGARY, LITHUANIA, NETHERLANDS and SLOVENIA there are general clauses which provide for a content review of standard terms, which do not merely apply to B2C contracts, but also to B2B and P2P contracts. A further special feature of Germany, Portugal and Estonia is that in relation to B2B contracts a grey list and black list are also employed:

- The GERMAN provisions for monitoring of standard terms (CC Art. 305 et seq.) in principle protect all contractual parties, against whom standard terms are used. So far as standard terms are being used against a business, certain specific provisions do not have any direct application, especially the grey list (CC Art. 308) and black list (CC...
Art. 309), which apply to B2C contracts (CC Art. 310(1)). However, where the use of a particular clause against consumers would be prohibited according to CC Art. 308, 309, in a B2B situation the judge must examine whether the clause is also to be considered void in the business sphere. According to the case law of the BGH especially the black list (CC Art. 309) has an indicative effect, of whether the relevant rule leads to a disproportionate imbalance to the detriment of the business.

- The PORTUGESE Law, in addition to the general clause applying to all transactions (Art. 15 of the Decree-Law 446/1985), also has a grey and a black list, which are applicable to all contractual relationships (Art. 18, 19 of the Decree-Law 446/1985).

- In ESTONIA the general clause for standard terms (Art. 42 of the Law of Obligations Act) is applicable to both B2C and P2P contracts alike. The black list, which applies to B2C contracts (Art. 42(3) of the Law of Obligations Act) is, pursuant to Art. 44 to be considered as a grey list in respect of B2B contracts.\(^{773}\)

In the UNITED KINGDOM a review of standard contract terms for both B2B and P2P contracts is possible, since UCTA 1977 also applies to contracts between businesses and certain “private” contracts for the sale of goods where neither of the two parties is a business. However, UCTA applies only to exclusion and limitation of liability clauses and indemnity clauses.

In contrast, there are no special general clauses providing for a content review of pre-formulated terms in BELGIUM, CYPRUS, CZECH REPUBLIC, FRANCE, GREECE, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, POLAND, SLOVAKIA and SPAIN.

It is nevertheless worth noting, that in some of these member states a content review is indirectly possible: Many member states regulate the incorporation of standard terms, which have general application to all kinds of contractual parties.\(^{774}\) In the course of reviewing incorporation and interpretation this often represents a hidden form of content review, in

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\(^{773}\) Cf. Art. 44 of the ESTONIAN Law of Obligations Act: “If a standard term specified in subsection 42(3) of this Act is used in a contract where the other party to the contract is a person who entered into the contract for the purposes of that person’s economic or professional activities, the term is presumed to be unfair”.

\(^{774}\) See supra, Part 3 C.II.1.-25.
which not only formal aspects are examined. Thus for example in a number of member states the incorporation of standard terms does not merely depend upon whether the other party has had the opportunity of becoming acquainted with the contractual terms (such formal requirements are e.g. the duty of the user to inform the other party of its use of standard terms; the duty of the user to give the other party genuine opportunity to become acquainted with the terms; duty of the user to communicate the standard terms; the duty of the user to draft the terms visible). Rather, in some of the member states the content of the clause (and its fairness) are considered as well, when deciding whether or not a term has been incorporated into the contract.

Finally it should be noted, that many member states (e.g. BELGIUM AND SPAIN\ref{775}) apply general concepts, which can be used to correct an extremely disproportionate imbalance in the main performance duties, also in B2B contracts, such as on the basis of the laesio enormis or the benchmark of “public policy/good morals”. In FRANCE, the Cass. civ. has sporadically allowed a review of clauses between two businesses (via the doctrine of cause, CC Art. 1131), although the French provisions on content review are in principle limited to consumer contracts\ref{776}.

**b. Definition of consumer\ref{777}**

Art. 2 lit. (b) of the Directive 93/13 defines consumer as any natural person who is acting for purposes which are outside his trade, business or profession. The member states have only partly followed this definition. In a number of member states one finds deviating definitions of consumer. In SPAIN, GREECE and HUNGARY all “final addressees” are protected as consumers. This concept offers in most cases a wider protection than the Directive 93/13, since it also encompasses atypical transactions, which are not related to a further transfer. In FRANCE, POLAND and LATVIA businesses concluding contracts which are not directly related

\begin{quote}
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\textsuperscript{775} SPANISH courts quite often use an “indirect control” by applying the general theory on vices of consent (mistake, fraud, etc.). Moreover, the Civil law of Navarre and Catalonia admits a laesio enormis (but not the Spanish Civil Code).
\textsuperscript{777} See thereto in detail Part 4 A. of the study.
\end{quote}
with his or her profession are also protected as “consumers” or “non-professionnels”. In AUSTRIA, BELGIUM, CZECH REPUBLIC, DENMARK, FRANCE, GREECE, HUNGARY, SLOVAKIA and SPAIN (controversial), legal persons are treated as consumer, provided that the purchase is for private use or (in GREECE, HUNGARY and SPAIN) the legal person is the final addressee. HUNGARY is presently planning to limit the notion of consumer to natural persons. In PORTUGAL, it is unclear whether legal persons can be protected as “consumers”, however, a draft of a new Consumer Code acknowledges that legal persons may, in certain circumstances, benefit from the protection conferred to consumers.

In MALTA, any other class or category of persons whether natural or legal may, from time to time, be designated as "consumers" for all or for any of the purposes of the Consumer Affairs Act by the Minister responsible for consumer affairs after consulting the Consumer Affairs Council. Furthermore, in Malta the notion of “consumer” includes any other individual not being the immediate purchaser or beneficiary, whether or not a member of the consumer’s household, who having been expressly or tacitly authorised or permitted by the consumer, may have consumed, used or benefited from any goods or services provided to the consumer by the trader.

c. Definition of seller or supplier

According to Art. 2 lit. (c) “seller or supplier” means any natural or legal person who is acting for purposes relating to his trade, business or profession, whether publicly or privately owned. The notion of business in Art. 2 lit. (c) of the Directive 93/13 is autonomous to European law and is to be interpreted widely. The Directive states that the term seller/supplier encompasses all natural and legal persons in the course of their business or profession, thus including farmers and freelancers.

Most member states have transposed the terms “seller” and “supplier” (in part under the generic term “professional/business”) in accordance with the Directive 93/13. In some member states on the other hand there are no express definitions, above all in FRANCE and LUXEMBOURG. In BELGIUM there is the peculiarity that separate rules are enacted concerning

778 As to the situation in the UNITED KINGDOM see in detail Part 4 A. III.2.
779 See thereto in detail Part 4 B. of the study.
contracts between consumers and practitioners of liberal professions; instead of broadening the scope of the TPA the legislator preferred to pass a separate Act dealing with unfair contract terms in consumer contracts with practitioners of liberal professions. In MALTA any category or class of persons can be designated as a “trader” by Order of the Minister responsible for consumer affairs after consulting the Consumer Affairs Council, and publication in the Gazette.

d. Public Sector Undertakings

For detailed information on the domestic legislation of the 15 “old” member states with regard to unfair terms used in contracts for public services please refer to the study “Application de la Directive 93/13 aux prestations de service public, Rapport de synthèse” conducted by Harriet Hall and Claire Tixador.  

2. Exclusion of specific contracts

a. Contracts in the area of succession rights, family, employment and company law

According to recital 10 contracts relating to employment, succession rights, rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements are excluded from the Directive, as such contracts as a rule are not consumer contracts. For contracts relating to employment, succession rights and rights under family law this is uncontroversial as there is hardly a case imaginable, in which such a contract could at the same time be a consumer contract. Whether member states can exclude contracts relating to the incorporation and organisation of companies or partnership agreements from a review of clauses on the other hand is doubtful, as according to the wording and the preparatory works the exceptions named in recital 10 shall only apply in the absence of a consumer contract. With company contracts concerning the acquisition of

781 See the common position of the council of 22 September 1992.
company rights as a capital investment without a business function, however, a consumer
contract can be present.

Contracts relating to employment, succession rights, rights under family law and to the
incorporation and organisation of companies or partnerships are above all in CYPRUS and
IRELAND expressly excluded from the scope of application of the national provisions. The
DUTCH provisions do not relate to contracts of employment, in ESTONIA company law
contracts are excluded. Since the modernisation of the law of obligations, contracts of
employment in GERMANY are also in principle subject to review of standard terms (CC
Art. 310(4)); company law contracts on the other hand are excluded, although according to
the case law of the BGH company law contracts remain subject to content review under CC
Art. 242, 315. In UNITED KINGDOM contracts in the areas of family law, succession law,
employment law and company law were expressly excluded from the scope of application by
UTCC 1994, Schedule I a)-d); this limitation was however abolished in 1999.

b. Real property contracts

The Directive is basically applicable to all types of contracts. However, there is the view in
academic literature that real property contracts are not included, as according to recital 5 the
Directive 93/13 refers only to “goods and services”. This is also confirmed by the English
language version of Art. 4(1) of the Directive 93/13, as its term “goods” only encompasses
movable objects. But a difficulty with this view is already presented by the French language
version, which with the term “biens” does not contain any limitation to moveable objects.

Accordingly in the UNITED KINGDOM the CA correctly clarified in Khatun & Others v
Newham LBC782, that both the Directive and the English implementing act apply to contracts
relating to land. The court reasoned that to exclude contracts relating to land from the scope
of “goods and services” would go against the grain of the aim and purpose of the Directive,
which is to provide a high level of protection. There can thus be no justification for doing so.
Although English common law distinguishes between real and personal property, other
language texts of the Directive use terminology that can just as readily apply to immovable
goods as to movables. Further, the text and preparatory works of the Directive indicate that

the drafters attached no significance to the distinction between land and other transactions and proceeded on the basis that the Directive would apply to both. Such materials powerfully suggest that if they were to be excluded from the scope of the Directive, then this would have been specifically provided for. Similar arguments have been made in IRELAND about the application of the regulations to contracts relating to land. However, there is no Irish authority in this point although the United Kingdom case *Khatun & Others v Newham LBC* would represent persuasive authority.

The BELGIAN law did not originally encompass contracts for real property, it was only clarified with the Act of 7 December 1998, that such contracts are included.

3. Exclusion of specific contractual terms

a. Contractual terms based on mandatory provisions

According to Art. 1(2) of the Directive 93/13 contractual terms which reflect mandatory statutory or regulatory provisions and provisions or principles of international conventions, particularly in the transport area, are excluded from the scope of the Directive. Roughly half of the member states have implemented this exclusion, namely BELGIUM (in the Liberal Professions Act), CYPRUS, CZECH REPUBLIC, GERMANY, ESTONIA, HUNGARY, IRELAND, ITALY, LATVIA, PORTUGAL, SLOVAKIA, SPAIN (in the law 7/1998 on standard terms), UNITED KINGDOM. Under SLOVAKIAN law only legislative rules on creation of legal instruments are excluded; however, according to Art. 7(5) of the Slovakian Constitution certain international conventions take priority over laws of the Slovak republic. In GERMANY CC Art. 307(3) excludes mandatory provisions from content review (via the general clause assessing unfairness and the black and grey lists). Nevertheless, clauses repeating mandatory legislative provisions may be reviewed in terms of incorporation and transparency.

The remaining member states, i.e. AUSTRIA, BELGIUM (Trade Practices Act), DENMARK, FINLAND, FRANCE, GREECE, LITHUANIA, LUXEMBOURG, MALTA, NETHERLANDS, POLAND, SLOVENIA and SWEDEN have decided not to transpose Art. 1(2) of the Directive 93/13 at all. To some extent the exclusion of mandatory provisions may nonetheless be established as an
unwritten principle through case law and/or legal literature, for example in the Nordic countries (Denmark, Finland, Sweden) and also in Austria, Greece and Lithuania. In France clauses in contracts with companies in public control e.g. contracts for gas, oil, electricity, telecommunications as well as contracts for public transport or the provision of public services, are capable of review. In any event it is uncertain whether these are in the jurisdiction of the administrative courts (according to the Cass. civ.) or of the ordinary courts (the academic view).

b. Individually negotiated terms

Art. 3 of the Directive 93/13 excludes contractual terms which have been individually negotiated by the consumer. 15 member states have adopted this exclusion: Austria, Cyprus, Estonia, Greece, Germany, Hungary, Ireland, Italy, Lithuania, Netherlands, Poland, Portugal, Slovakia, Spain, United Kingdom.

The remaining 10 member states, by not having transposed this exclusion, allow their courts/authorities to monitor individually negotiated terms. This is the case in the Nordic countries (Denmark, Finland, Sweden) and also in Belgium (Trade Practices Act), Czech Republic, France, Latvia, Luxembourg, Malta and Slovenia. The Belgian Liberal Professions Act opts for the middle way. The unfair contract terms, mentioned in the Annex n° 1 of the Directive are sanctioned with relative nullity even when individually negotiated (Art. 7(4) LPA). The principle of Art. 3 of the Directive 93/13 (Art. 7(2) LPA) applies to other contractual terms.

According to Art. 3(2), sent. 3 of the Directive 93/13, where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him. This provision has been transposed faithfully by nearly all member states. In Germany “individually negotiated terms” are excluded from review, but this is counterbalanced through a very narrow definition of the aforementioned notion. The BGH held that for a term to be individually negotiated the customer has to fully understand the content of the contract and be aware of its legal consequences. 783

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Although 10 countries generally provide for review of individually negotiated terms, of those only France and Slovenia have decided not to transpose Article Art. 3(2)(3). It can be concluded that in the remaining countries which allow the monitoring of individually negotiated terms (Belgium, Czech Republic, Denmark, Finland, Luxembourg, Latvia, Malta, Sweden) the distinction between standard and negotiated terms remains relevant for assessing unfairness i.e. that different benchmarks apply. However, Belgian practice doesn’t show such a different approach.
IV. Assessing the fairness of contract terms according to Art. 3

1. Concept of the Unfair Contract Terms Directive

The most important provision of the whole Directive in practical terms, the general clause in Art. 3(1) defines the standard of the unfairness test:

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The general clause according to its wording requires an “imbalance in the parties’ rights and obligations”. This does not relate to the main performance duties, as these are not subject to the fairness test according to Art. 4(2) of the Directive 93/13. Therefore, it only relates to the remaining rights and duties arising out of the contract. An imbalance can above all be present, if the respective contractual positions are structured differently by the terms with regard to one and the same question. The issue of whether an imbalance is present in a given case however, cannot be assessed in isolation from the surrounding legal context. Rather, the position of the consumer has to be compared to the position in which he would have been but for the term in question. Therefore, the term must be judged in its regulatory context, arising by virtue of the respective member state law. An imbalance only then exists “to the detriment of the consumer”, if the dispositive statutory law is more advantageous to the consumer than the clause in question. According to the principle minima non curat praetor this imbalance must furthermore be significant.

In addition to these criteria the Directive furthermore requires that the imbalance is “contrary to the requirement of good faith”. The relationship of the principle of good faith to the criterion of “imbalance” remains unclear. The wording of the Directive suggests that a clause is unfair only if it causes an imbalance and this imbalance is furthermore contrary to the principle of good faith. Following this reading, a clause can therefore cause an imbalance without at the same time being contrary to good faith. Others however assume that any clause which generates a significant imbalance is always (automatically) contrary to the principle of
It is ultimately worth considering whether the criteria “significant imbalance” and “good faith” are to be understood as alternatives in the sense that the two criteria operate independently of one another, so that a clause is unfair if it results in a significant imbalance, or if it is contrary to the requirement of good faith. In view of these multifarious interpretation possibilities it is not surprising that the member states have constructed their general clauses very differently.

According to Art. 4(1) the unfairness of a contractual term shall be assessed (1) by taking account of the nature of the goods or services for which the contract was concluded and (2) by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and (3) in relation to all the other terms of the contract or of another contract on which it is dependent. The annex to the Directive 93/13 additionally has a certain indicative effect in the assessment of the fairness of a clause.

2. The form which the general clause has taken in the Member States

The member states are obliged by Art. 3 of the Directive 93/13 in conjunction with recital 15 to fix in a general way the criteria for assessing the unfair character of contract terms. All member states prescribe such general clauses to monitor terms. However, although Art. 3 of the Directive applies to pre-formulated individual contracts for single use, the general clauses in Austria and in the Netherlands only relate to standard terms. Even though in these member states other legal instruments are available to monitor such types of terms, this legislative technique gives rise to the danger that the requirements of the Directive will go unheeded.

A word for word transposition of Art. 3(1) of the Directive 93/13 has admittedly only occurred in seven member states, namely Cyprus, Czech Republic, Hungary, Ireland, Italy, Spain and United Kingdom. Most notably in Italy, the verbatim transposition of the Italian language version of the Directive led to the term “malgrado la buona fede” in the Italian Consumer Protection Act (Codice del Consumo). This formulation obviously is based

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785 See infra, under Part 3 C.IV.2.
786 On the legal nature of the Annex and its transposition in the Member States see infra, under Part 3 C.IV.3.
on a translation error, as the expression “malgrado il requisito della buona fede” does not mean “contrary to good faith”, but rather “despite good faith”.

The other member states in contrast have not transposed the criteria in the Directive 93/13 word for word, but either retained the general clauses of their respective national laws or adopted principles deviating from, or even going further than prescribed in the Directive for the review of terms:

- **In Austria** the principle of good faith is not mentioned, instead CC Art. 879 applies a test of whether the relevant term grossly disadvantages the other contractual party taking account of all circumstances of the case.

- **Belgian** law applies the principle of good faith indirectly. The key feature of the Belgian domestic legislation on unfair contract terms is the existence of two slightly different general clauses. According to TPA Art. 31(1), an unfair term is a clause or a condition which creates a “manifest” imbalance between the parties’ rights and obligations. By contrast, in respect of the liberal professions LPA Art. 7(2) defines an unfair term as a clause or a condition which has not been individually negotiated and which creates a “significant” imbalance between the parties’ rights and obligations arising under the contract, “to the detriment of the consumer”. At present Belgian practice does not show any distinction between the application of both criteria (manifest imbalance versus significant imbalance).

- **The vast usage of classic general clauses is a key feature of Danish law.** The most important one is laid down in Art. 38c(1), 36 of the Consolidated Act 781/1996 on Contracts Act. It refers to the criterion “significant imbalance” and the characteristic of “stridende mod hæderlig forretningsskik” (in direct translation “violating honest business practices”). However, the Danish legislature did not use the wording of the Directive (“god tro”), since according to Danish legal language the expression that a person is in “god tro” means that this person did not know and could not have known of a certain fact. Against this background the expression used in Art. 38c(1) seems to

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787 The term “manifest” may also refer to the legal concept of marginal control by the judge, which means that the powers of the judge are confined to the assessment whether the contract is in conformity with the requirements of good faith.
many authors to be a more adequate way to express the criterion of “good faith”. In order to meet the requirements of the Directive, the legislator included a special provision (Art. 38c(2)) which explicitly states that circumstances arising after the contract has been concluded cannot be taken into consideration to the detriment of the consumer. Furthermore, in contrast to the Directive (Art. 4(2)) adequacy of price, and subject matter of the contract are not beyond its scope. Overall the Danish approach, although not referring to the principle of good faith, offers a higher level of protection than the Directive.

- In Estonia, pursuant to Art. 42(1) of the Law of Obligations Act, a standard term is deemed void, if the term causes “unfair harm” to the other party, particularly if it causes a “significant imbalance in the parties’ rights and obligations” arising from the contract to the detriment of the other party or if the standard term is “contrary to good morals”. Additionally, according to para. (2) “unfair harm” is presumed if a standard term derogates from a fundamental principle of law or detrimentally affects the rights and obligations of the other party in a manner inconsistent with the nature of the contract such that it becomes questionable as to whether the purpose of the contract can be achieved. However, this does not necessarily indicate that results differ from those that would be achieved under the Directive.

- In Finland, Chapter 3 Section 1 of the Consumer Protection Act (CPA) states that a business offering consumer goods or services shall not make use of a contract term which, in view of the price of the good or service or other relevant circumstances, is to be deemed unfair from the point of view consumers. The principle of good faith, although known in general contract law, is not applied when it comes to assessing unfairness. Besides, in contrast to the Directive the review of terms also encompasses the subject matter of the contract and the adequacy of price.

- In France clauses in consumer contracts are unfair according to Art. L 132-1(1) of the Consumer Code whose object or effect is to achieve a significant imbalance in the rights and obligations of the contractual parties to the detriment of the consumer (“un déséquilibre significatif entre les droits et obligations des parties au contrat”). Whilst the concept of good faith in France exists as a general principle of interpretation (CC
Art. 1134(3)), it does not however play a role in the review of contract terms. It was deliberately not adopted, as the view was held that a business which endeavours to achieve a significant imbalance cannot, by definition, be acting in good faith. Furthermore, the French legislator did not take over the definition “bonne foi” as the French language version of the Directive (like the Italian, *ante*) is regarded as misleading.

- The **German** law by contrast in CC Art. 307 attaches significant emphasis to the principle of good faith. The “significant imbalance in the parties’ rights and obligations arising under the contract” on the other hand is not named. According to the general clause of CC Art. 307(1) standard contract terms are invalid, if they “place the contractual partner of the user at an unreasonable disadvantage contrary to principles of good faith”. CC Art. 307(2) lists examples of where this is presumed (incompatibility with the essential basic principles of the statutory rule from which it deviates, restriction of essential rights or duties resulting from the nature of the contract in such a manner that there is a risk that the purpose of the contract will not be achieved).

- In **Greece** Art. 2(6), sent. 1 of the Consumer Protection Act provides that standard contract terms which lead to a disturbance in the balance of the contractual rights and duties to the detriment of the consumer may not be used and are invalid. The concept of good faith was not adopted. One also observes that the general clause not only serves the review of terms in individually negotiated transactions, but also – by mentioning the “use” of terms – as a basis for collective proceedings. A further characteristic is that owing to the non-transposition of Art. 4(2) of the Directive 93/13 the main subject matter of the contract and the adequacy of price are also subject to review.

- In **Latvia**, Art. 6(1), sent. 3 of the Consumer Rights Protection Law clarifies that a manufacturer, seller or service provider may not offer such contractual terms as are in contradiction with the “principle of legal equality of the contracting parties”. Additionally, pursuant to para. (3) “a contractual term which has not been mutually discussed by the contracting parties shall be deemed to be unfair, if to the
disadvantage of the consumer and contrary to the requirements of good faith, it creates a substantial disparity with respect to the rights and duties of the contracting parties provided for by the contract”. Thus Latvia combines the principle of “good faith” and the broad new emerging principle of “legal equality”. Moreover, the scope of review is broader than envisaged in the Directive, since also the subject matter of the contract and the adequacy of price are subject to review (Latvia has not transposed Art. 4(2) of the Directive 93/13).

- In Lithuania, CC Art. 6.188(2) (Peculiarities of conditions in consumer contracts) provides only a brief definition of unfairness: “Conditions of a consumer contract which have not been individually negotiated shall be regarded as unfair if they cause a significant imbalance in the parties’ rights and duties to the detriment of consumer rights and interests…”. There is no reference to the principle of good faith, but the provision is supplemented by a comprehensive list of forbidden terms as a black list which is a verbatim translation of the Annex of the Directive 93/13. Moreover, Art. 11(2) of the Lithuanian Law on Consumer Protection provides that other contractual terms (than those in the black list) may be regarded as unfair also, provided that they are contrary to the requirements of “good will” and cause inequality of mutually enjoyable rights and obligations between the seller, service provider and consumer.

- In Luxembourg, Art. 1 Consumer Protection Act provides a definition of unfairness very similar to the French concept (see above). The provision solely refers to an imbalance in the rights and obligations to the detriment of the consumer (déséquilibre des droits et obligations au préjudice du consommateur). In contrast to France and most other member states price adequacy and subject matter of the contract are not excluded from review since Luxembourg has decided not to transpose Art. 4(2) of the Directive 93/13.

- Malta developed quite a unique system for monitoring the unfairness of terms. Art. 44-45 of the Consumer Affairs Act contain a combination of different concepts: Firstly the provisions refer to “a significant imbalance between the rights and obligations of the contracting parties to the detriment of the consumer” (Art. 45(1) lit.
(a)), a verbatim transposition of the Directive. Secondly the legislator adopted the principle of good faith (“or is incompatible with the requirements of good faith”, Art. 45(1) lit. (d). Additionally a term may be regarded unfair if “it causes the performance of the contract to be unduly detrimental to the consumer” (Art. 45(1) lit. (b)); or causes the performance of the contract to be significantly different from what the consumer could reasonably expect” (Art. 45(1) lit. (c)). All these definitions are applied alternatively, i.e. it is sufficient for a term to fulfil one of the criteria to be considered unfair.

- Pursuant to Art. 6-233 lit. (a) of the DUTCH Civil Code a standard contract term is considered voidable, if it is “unreasonably disadvantageous” (onredelijk bezwarend) to the other party. In addition to the possibility for the other party to annul a specific unfair clause, the other party can also argue that the stipulation – although valid – is not applicable in the sense that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and justice. There is no reference to good faith, significant imbalance or other related concepts.

- In POLAND, CC Art. 385/1(1), sent. 1 states that contractual clauses do not bind the consumer if they shape his/her rights and obligations in a manner contrary to good faith, strikingly (distinctly, disproportionately) (rażąco) infringing his/her interests (referred to as “prohibited contractual clauses”). It has to be noted that the principle of “good faith” has been introduced into the Civil Code with the aim of gradually replacing another general clause – the principle of social cooperation which has been used throughout the Socialist period and is still in existence at present.

- In PORTUGAL, the general clause Art. 9(2) of Consumer Protection Act 24/96 refers to the elements of significant imbalance (desequilíbrio nas prestações gravemente) and good faith (atentatório da boa fé). Another formulation taken from the Directive, to the detriment of the consumer (significativo desequilíbrio em detrimento do consumidor), can be found in Art. 9(2) lit. (b).

- In SLOVAKIA, CC Art. 53(1) states that a consumer contract may not include contract terms, which cause a significant imbalance in the parties’ rights and obligations
arising under the contract, to the detriment of the consumer (unacceptable condition in the contract). CC Art. 54 provides, that terms of the consumer contract may not deviate from the provisions of Civil Code to the disadvantage of the consumer. The consumer may not waive the rights conferred on him by law (as these provisions are mandatory). According to the general provision CC Art. 39 an agreement shall be invalid if its content or purpose contradicts or circumvents the law, or contravenes proper morals. Overall the Slovakian concept is rather analogous to the concept envisaged in the Directive albeit without mentioning the principle of good faith.

- In SLOVENIA, according to the general clause Art. 24(1) of the Consumer Protection Act, the terms of the contract are considered unfair (1) if they bring about a significant imbalance in the contractual rights and obligations of the parties to the detriment of the consumer or (2) if they cause the fulfilment of the contract to be detrimental to the consumer without good reason or (3) if they cause the fulfilment of the contract to differ substantially from what the consumer rightly expected or (4) if they go against the principles of fairness and good faith. The Slovenian approach combines the benchmarks prescribed by the Directive (“significant imbalance”, “to the detriment of the consumer”, “good faith”) with the principle of fairness. Finally, in contrast to the Directive (Art. 4(2)) there are no any restrictions concerning adequacy of price and subject matter of the contract.

- SWEDISH law contains no precise definition of unfairness. There is Art. 11 of the Act on contract terms in consumer relations (CTA) (1994:1512) which makes reference to Art. 36 of the Contracts Act (CA) which has been in force unchanged since 1976. CA Art. 36(1), sent. 1 states very broadly: “A contract term may be adjusted or held unenforceable if the term is unreasonable with respect to the contract’s content, circumstances at the formation of the contract, subsequent events or other circumstances”. Good Faith, imbalance or other concepts do not form part of the law as far as unfair terms are concerned. Circumstances that occurred after conclusion of the contract can only be considered if this would not be to the disadvantage of the consumer (CTA Art. 11(2)). The overall level of protection for consumers is considered to be higher than prescribed by the Directive, not only since there are no
restrictions concerning the monitoring of adequacy of price, and subject matter of the contract, i.e. the Courts are entitled to adjust payment.

The above overview illustrates that the general clause has taken a number of very different forms in the member states. The requirement of “good faith” is only explicitly mentioned in thirteen member states in total, namely in CYPRUS, CZECH REPUBLIC, GERMANY, HUNGARY, IRELAND, ITALY, LATVIA, MALTA, POLAND, PORTUGAL, SLOVENIA, SPAIN and UNITED KINGDOM.

The following countries make direct reference to “significant imbalance” in their general clauses: BELGIUM, CYPRUS, DENMARK, ESTONIA, GREECE, FRANCE, HUNGARY, IRELAND, ITALY, LITHUANIA, LUXEMBOURG, MALTA, POLAND, PORTUGAL, SLOVAKIA, SLOVENIA, GREECE, SPAIN, UNITED KINGDOM. However seven of these countries do not mention (explicitly788) the additional criterion “good faith”: BELGIUM, DENMARK, FRANCE, GREECE, LITHUANIA, LUXEMBOURG, and SLOVAKIA. This legislative technique tends to result to a lowering of the burden of proof for consumers.

Another issue treated differently in the member states is whether the fairness test encompasses the subject matter of the contract and the adequacy of price. In AUSTRIA, DENMARK, GREECE, LATVIA, LUXEMBOURG, SLOVENIA, SPAIN and SWEDEN Art. 4(2), (1st alternative) has not been transposed, so that in principle the monitoring of the main subject matter of the contract and the adequacy of price is possible. However, in some member states (such as for example Greece and Spain), this silence has produced uncertainty in interpreting national law with the result that academia and case law use different approaches to solve the problem with contradictory solutions.789

788 The LITHUANIAN Law on Consumer Protection uses instead the expression “good will”.
789 For a comparative law perspective in this regard see Cámara Lapuente, El control.
3. Transposition of the Annex in the Member States

a. Legal nature of the Annex

According to Art. 3(3) of the Directive 93/13, the “Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.” Therefore, a contractual term corresponding to the Annex is not automatically unfair. In contrast to the preliminary drafts of the Directive 93/13, the Annex does not contain a so-called “black list” of terms which are always (per se) ineffective. Rather, the Annex – as the ECJ emphasised in C-478/99 – “is of indicative and illustrative value”. As stated in the opinion of advocate general Geelhoed – “The list thus offers the courts and other competent bodies, affected groups and individual consumers, sellers and suppliers – including those from another member state – a criterion for interpreting the expression unfair terms. By thus giving concrete form to the open provision contained in Art. 3(1), that is to say the first criterion for determining whether a contractual term is unfair, their certainty is reinforced.”

In this respect the Annex to the Directive 93/13 is usually referred to as a “grey list”.

b. Transposition of the Annex in the Member States

The following table indicates whether the provisions of No 1 lit. (a)-(q) of the Annex have been transposed (1) by a black letter rule according to which clauses are always considered per se unfair, (2) by a grey letter rule according to which clauses may be considered unfair, or, (3) whether the respective provisions of the Annex have not been transposed at all. The table cannot claim to mirror member states’ law exclusively as it reflects mainly written law, and not the case law, which can have wide ramifications and is difficult to outline. In

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790 See COM 90, 322 final and COM 92, 66 final.
792 At para. (29).
793 This is to be distinguished from the question of whether the consumer must assert that a clause is non-binding, see on this point Part 3 C.IV.4.b.
In AUSTRIA, BELGIUM, CZECH REPUBLIC, ESTONIA, GREECE, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, SLOVENIA\textsuperscript{794} and SPAIN the clauses in the Annex – insofar as they have been transposed – are always regarded as unfair (black list). In MALTA, the Minister responsible for consumer affairs after consultation with the Consumer Affairs Council is empowered to amend, substitute or revoke any of the terms in the black list. GERMANY, HUNGARY, ITALY, NETHERLANDS, PORTUGAL in contrast have opted for a combination of both black and grey lists. The blacklist in some member states such as for instance those of BELGIUM,\textsuperscript{795} ESTONIA, MALTA, PORTUGAL and SPAIN, contains more clauses than the Annex of the Directive 93/13.

In CYPRUS, FRANCE, IRELAND, POLAND, SLOVAKIA and UNITED KINGDOM on the other hand there are only non-binding grey lists. In special cases however other legislation (such as in the UNITED KINGDOM through the UCTA 1977) can result in certain clauses being rendered unfair per se. In FRANCE the Annex is by contrast only a “light” grey, as the list is not binding on the judge. The clauses contained in the Annex have an indicative function, as according to Art. L 132-1(3), sent. 2 of the Consumer Code. the consumer in a dispute is not relieved of the burden of proving a term is unfair. Moreover the judge must decide whether the criteria of unfairness are fulfilled on a case by case basis.

In DENMARK, FINLAND and SWEDEN, no part of the Annex is explicitly transposed, but the Annex to the Directive 93/13 was reproduced in the preparatory work for the Act implementing the Directive and according to well established legal tradition common to the Nordic countries, preparatory work constitutes an important aid to interpreting legislation. This legislative technique was accepted by the ECJ in C-478/99.\textsuperscript{796} However, for member

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\textsuperscript{794} The wording of the Slovenian Consumer Protection Act (“contract terms are regarded as unfair”) indicates a black list, however, until now there is no case-law nor literature confirming this interpretation.

\textsuperscript{795} See Art. 32 Trade Practices Act. The Liberal Professions Act on the other hand only blacklists the unfair contract terms mentioned in the Annex n° 1 of the Directive.

states in which certain parts of the Annex are transposed and others are not, it remains unclear whether this decision applies to them as well, since in those countries the danger exists, that the consumer will be mislead about his rights.

1st Table: Transposition of the Annex No 1 lit. a-q of the Unfair Contract Terms Directive

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797 See cases OGH 22 February 2001 6 Ob 160/00y; OGH 19 November 2002 4 Ob 179/02f; OGH 7 October 2003 4 Ob 130/03a; OGH 25 April 1995 4 Ob 522/95.
798 In contrast to the Directive the German provisions (CC Art. 309 No 7a, 276(3)) require fault/negligence of the user.
799 The IT black letter rule applies as well to individually negotiated terms.
800 See case STJ 6 May 1993 P. 83348.
801 Instead of “death of a consumer or personal injury”, the Spanish rule mentions “damages, death or injuries” (“por los daños o por la muerte o lesiones”), without any mention of “personal” or “physical” injury, therefore including non-pecuniary damages or non-material injuries (“daño moral”) and patrimonial damages.
802 Despite the adoption of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) the Unfair Contract Terms Act (UCTA) 1977 which is applicable also to B2B contracts and deals mainly with exclusion and limitation clauses remains in force. Section 2(1) of the UCTA 1977 renders ineffective a contract term which restricts liability for death or personal injury caused by negligence. Moreover UCTA 1977 sections 10 and 23 make it impossible to use a secondary contract to exclude/restrict liability which could not be excluded/restricted under the main contract. Therefore although the official transposition Act UTCCR 1999 contains solely a grey list identical to that of the Directive, on the basis of the UCTA any restriction of liability for death or personal injury is black-listed (i.e. automatically considered void).
803 Article CC 385.3 1st indent contains no express mention of death.
804 No direct reference – The list under Article 44 of terms that may be unfair is not exhaustive and includes terms which are not listed in the Annex to the EU Directive.
805 OGH 6 September 2001 2 Ob 198/01h; OGH 22 February 2001 6 Ob 160/00y; OGH 19 November 2002 4 Ob 179/02f; OGH 7 October 2003 4 Ob 130/03a; OGH 25 April 1995 4 Ob 522/95.
806 The TPA and LPA prohibit in a more detailed manner unfair terms which relate to specific consumer rights as a consequence of total or partial non- or inadequate performance.
807 This clause is transposed through numerous rules in the Consumer Protection Act (Art. 2 of Statute no. 2251-1994).
808 Partly transposed in CC Art. 309 No 7, 309 No 8, 307(2), 475; see case OLG Saarbrücken 29 August 2001 1 U 321/01.
809 The IT black letter rule applies as well to individually negotiated terms.
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<tr>
<th>Total or partial non-performance or inadequate performance</th>
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<th>PL, SK</th>
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<td><strong>ANNEX No 1c</strong></td>
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<td>Condition whose realisation depends on the seller’s own will alone</td>
<td>AT(^{816}), BE, CZ EE, LT, LU, MT, ES, SL(^{817})</td>
<td>CY(^{818}), FR, DE, HU, IE, IT, NL, PL, SK, UK</td>
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<td><strong>ANNEX No 1d</strong></td>
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<td>Permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;</td>
<td>AT, BE, CZ, EE, DE(^{819}), LV, LT, LU, MT, ES</td>
<td>CY, FR, DE, HU, IE, IT, NL, PL, SK, UK</td>
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<td><strong>ANNEX No 1e</strong></td>
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<td></td>
<td>AT, BE(^{820}), CZ, EE, EL, DE</td>
<td>CY, FR, HU, IE, IT(^{821}), NL</td>
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\(^{811}\) Transposed in a black letter rule (CC Art. 6: 236 c-d) and in a grey letter rule (CC Art. 6: 237 lit. (f)).

\(^{812}\) UCTA 1977 Section 3(2) lit. (b) prohibits the use of a contractual term allowing the seller/supplier to perform substantially different from that which was reasonably expected of him or not to perform at all, respectively. The classification as black letter rule is again based on the UCTA 1977 as already explained above.

\(^{813}\) Long before the transposition of the Directive the State Council (Conseil d’État) had enacted 2 decrees prohibiting particular types of contract terms; some parts of those decrees are still effective. According to Art. 2 of Decree 78-464 of 24 March 1978 in a sales contract any term which restricts the purchaser’s rights in case of non-performance is considered void.

\(^{814}\) Terms which exclude or limit the legal rights of the consumer are usually regarded as unfair (Art. 2 lit. (h) of the Government Decree 18/1999, II.5.). The right of the consumer to set-off can never be excluded (Art. 1 (1) lit. (f) Government Decree 18/1999, II.5.

\(^{815}\) Cf. HC 20 December 2001 Sp. 229 Applicant - The Director of Consumer Affairs.

\(^{816}\) See case OGH 26 January 1994 9 ObA 361/93.

\(^{817}\) A vague (inaccurate) transposition: Contract term is unfair if the seller may unilaterally alter the fundamental provisions of the contract.

\(^{818}\) Instead of referring to “making an agreement binding on the consumer”, the domestic provision refers to “excluding the right of a consumer to cancel a contract”.

\(^{819}\) Transposed in a black letter rule (CC Art. 309 No 5) and in a grey letter rule (CC Art. 308 No 7).

\(^{820}\) CC Art. 1231 gives the court the possibility to reduce the amount of compensation. The provisions of the TPA on unfair contract terms form a ‘lex specialis’ of the general provisions in the Civil Code; see cases: Hof van Beroep Gent 3 March 2004 Algemeen ziekenhuis Sint-Lucas v.z.w. / I. Bruynooghe; Hof van Beroep Gent 8 October 2003 Immostad b.v.b.a. / Van Ammel G.; Hof van Beroep Gent 4 March 2003 Algemeen Ziekenhuis St-Lucas VZW / R. Jonckheere.

\(^{821}\) See Tribunale Ivrea judgment of 11 July 2005.
| Disproportionately high sum in compensation | LV, LT, MT, ES, SL | PL, PT<sup>826</sup>, SK, UK |
| **ANNEX No 1f** | AT<sup>823</sup>, BE<sup>824</sup>, CZ, EE, EL, DE<sup>825</sup>, HU, LV, LT, LU, ES, SL<sup>826</sup> | CY, FR, DE, IE, IT, NL, PL<sup>827</sup>, PT, SK, UK |
| Right to dissolve the contract on a discretionary basis and to retain the sums paid for services not yet supplied in case of dissolving the contract by the seller | DK, FL, MT, SE |

| Termination of a contract of indeterminate duration without reasonable notice | AT, BE (LPA), CZ, EE, EL, HU, LV, LT, ES, SL | CY, FR, IE, IT, NL, PL, PT<sup>828</sup>, SK, UK |
| **ANNEX No 1g** | BE (TPA), DK, FI, DE, LU, MT, SE |

| Automatically extending a contract of fixed duration | AT<sup>829</sup>, BE<sup>830</sup>, CZ, EE, EL<sup>831</sup>, DE<sup>832</sup>, LV, LT, LU, NL, ES, SL | CY, FR, HU, IE, IT, PL, PT, SK, UK |
| **ANNEX No 1h** | DK, FL, MT, SE |

| Irrevocably binding the consumer | AT, BE, CZ, EE, EL<sup>832</sup>, DE, HU<sup>834</sup>, IT<sup>835</sup>, LV, LT, LU, SK, UK | CY, FR, IE, NL, PL<sup>836</sup>, PT, DK, FL, SE |
| **ANNEX No 1i** |

<sup>822</sup> Cf. STJ 6 October 1998 855/98.<br><sup>823</sup> See OGH 20 November 2002 5 Ob 266/02g.<br><sup>824</sup> In this regard it should be noted that the blacklist of the TPA considers unfair a clause that would permit the seller to retain sums paid by the consumer where the latter decides not to conclude the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller where the latter decides not to conclude the contract. Hence the requirement of reciprocity referred to in the annex was not transposed in the TPA as such.<br><sup>825</sup> Transposed in a black letter rule (CC Art. 309 No 5) and grey letter rules (CC Art. 308 No 3).<br><sup>826</sup> A vague transposition: Contract term is unfair if the seller may unilaterally dissolve the contract at any time.<br><sup>827</sup> Not following the text of the Annex precisely – the Code (indent 14) rather refers to clauses where only the consumer is deprived of the right to dissolve or withdraw from the contract. Indent 13 refers to dissolving the contract by either of the parties.<br><sup>828</sup> See case STJ 23 November 1999 99A796.<br><sup>829</sup> Cf. OGH 25 August 1998 1 Ob 176/98h.<br><sup>830</sup> See case Hof van Beroep Gent 3 March 2004 Algemeen ziekenhuis Sint-Lucas v.z.w. / I. Bruynooghe.<br><sup>831</sup> Greece classifies as unfair all clauses, which have as their consequence the extension or renewal of the contract for a disproportionately long period of time, if the consumer has not cancelled the contract before a specified point in time. (Art. 2(7) lit. (d) of Statute 2251-1994).<br><sup>832</sup> The term „unreasonably early“ in the Directive has been defined by the German legislator as “more than three months prior to the expiration of the initial or tacitly extended period of the contract”.<br><sup>833</sup> The requirement to ensure that the consumer has a genuine possibility to become acquainted with the content of the clauses before conclusion of the contract has been recognised in Greek law as a condition precedent for the incorporation of such terms into the contract.<br><sup>834</sup> See CC Art. 205/B: “Standard contract terms will become part of a contract, only if they have previously been made available to the other party for perusal and if the other party has accepted the terms explicitly or through conduct that implies acceptance.”<br><sup>835</sup> The black letter rule applies as well to individually negotiated terms.<br><sup>836</sup> The Code refers to terms being merely included in the contract, and not to terms, which ‘irrevocably bind the consumer’.
<table>
<thead>
<tr>
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<tr>
<th>consumer to terms with which he had no real opportunity of becoming acquainted</th>
<th>MT, ES, SL</th>
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<td>AT, BE, CZ, EE, EL, LV, LT, LU, MT, ES, SL</td>
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<tr>
<th>ANNEX No 1k</th>
<th>Unilateral alteration of characteristics of the product or service to be provided</th>
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<td>AT, BE, CZ, EE, EL, LV, LT, LU, MT, PT, SL</td>
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<tr>
<td>CY, FR, DE, HU, IE, IT, NL, PL, SK, UK</td>
<td>DK, FI, ES, SE</td>
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<th>ANNEX No 1l</th>
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<td>AT, BE, CZ, EE, DE, LV, LT, LU, MT, NL, ES, SL</td>
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<tr>
<td>CY, FR, IE, HU, IT, PL, PT, SK, UK</td>
<td>DK, FI, SE</td>
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<th>Right to determine whether the goods or services</th>
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<td>AT, BE, CZ, EE, EL, HU, LT, LU, MT, NL, PT, ES, SL</td>
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<tr>
<td>CY, FR, IE, IT, PL, SK, UK</td>
<td>DK, FI, DE, LV, SE</td>
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838 See case CA Luxembourg 27 February 1996.
839 Pursuant to Art. 3 of the Decree 78-464 of 24 March 1978 enacted by the State Council (Conseil d’État) a contractual term in a contract for sale, tenancy, services or manufacturing enabling the seller/supplier to unilaterally modify the terms or conditions of the contract is considered void.
840 Covered by general clause in CC Art. 307(2), sent. 1.
841 Cf. OGH 17 April 2002 7 Ob 287/01h.
842 The Trade Practices Act blacklists solely clauses allowing the unilateral alteration of characteristics which in the eyes of the consumer are essential (or under specific circumstances are essential for the product’s or service’s intended use). The Liberal Professions Act does not contain such limitation.
843 Not directly transposed. CC Art. 361 prescribes the principle of party autonomy, according to which every contractual amendment requires a new agreement of both parties. See also case A.P. 4 May 2001 A.P. 1030/2001.
844 Instead of ‘characteristics’ the Code refers to the ‘crucial characteristics’.
845 But probably encompassed in the broad wording of Additional Disposition number 1 of LGDCU 1984, part I, rule 2 (where rules g), j) and m) of Annex I of the Directive are transposed.
846 See cases OGH 17 November 2004 7 Ob 207/04y; OGH 24 June 2003 4 Ob 73/03v; OGH 17 December 2002 4 Ob 265/02h; OGH 20 November 2002 5 Ob 266/02g; OGH 22 March 2001 4 Ob 28/01y.
847 The TPA considers contracts with an open price unfair, when the determination of the price is dependant solely on the seller’s will whereas the Directive (annex no. l) considers open price contracts unfair also when the determination of the price is dependant on other events.
848 Greece classifies as unfair all clauses, which without important reason leave the consideration undetermined and which do not allow for their determination according to criteria specially provided for in the contract which are also reasonable for the consumer. Also unfair are clauses, which hinder the consumer from rescinding the contract, whereby the increase in price according to the terms of the contract is disproportionate for the consumer (Art. 2(7) cases k and r of Statute 2251-1994).
849 Only the first indent has been transposed.
850 See case CA Kummercjali 22 January 1992 Mario Bezzinavs Albert Mizzi et noe.
851 See cases Sad Antymonopolowy (PL) 30 September 2002 T XVII Amc 47/01 Head of the Office for the Protection of Competition and Consumers, Defendant – Powszechna Kasa.
852 Annex No 1m has not been transposed, but CC Art. 307(2), No 1 can be applied.
supplied are in conformity with the contract, or right to interpret any term of the contract;

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<th>Limiting of commitments undertaken by agents</th>
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<th>CY, FR, IT, NL, PL, PT, SK, UK</th>
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<td>ANNEX No 1p</td>
<td>Possibility of transferring his rights and obligations under the contract</td>
<td>AT(^{856}), BE, CZ, EE, DE, EL, HU, LV, LT, LU, MT, NL, PT(^{857}), ES(^{858}), SL(^{859})</td>
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<td>ANNEX No 1q</td>
<td>Excluding or hindering the consumer's right to take legal action; restricting the evidence available or imposing a burden of proof.</td>
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\(^{853}\) See case OGH 28. Apr 1999 3 Ob 246/98t.

\(^{854}\) Covered by general clause and various specific rules in commercial and insurance law (Art. 307(2) No 1 in conjunction with CC Art. 164(1), CommC Art. 56, Art. 43-47 of the Insurance Contract Act.

\(^{855}\) See case OGH 23. February 1999 1 Ob 58/98f.

\(^{856}\) See cases OGH 28 April 1999 3 Ob 246/98t; OGH 4 November 1997 10 Ob 367/97m.

\(^{857}\) See case STJ 6 May 1993 P. 83348.

\(^{858}\) The Spanish rule declares unfair, with different initial wording, “the freedom from liability following transfer of rights and obligations under the contract.” Therefore, a mere transfer (“cesión”) is not deemed unfair in itself. It is only caught by the rule when it encloses the limitation of liability for that transfer.

\(^{859}\) Possibility of transferring the rights and obligations to a third person, whose name is not specifically mentioned in the contract. The absence of the consumer’s consent is not a requirement under the Slovenian Consumer Protection Act.


\(^{861}\) No mention of the reduction of guarantees for consumer.

\(^{862}\) See case OGH 27 May 2003 1 Ob 244/02t.

\(^{863}\) Partly transposed since the Trade Practices Act does not prohibit arbitration clauses and prohibits only restriction of evidence but not the heightening of the burden of proof.


\(^{866}\) The reduction of evidence or burden of proof have not been mentioned.
Annex No. 2 of the Directive 93/13 establishes certain exceptions with regard to clauses used by suppliers of financial services. The following table indicates whether the member states explicitly made use of these exceptions or whether they provide a higher level of consumer protection by having not transposed Annex No. 2.

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<th>Article of Unfair Contract Terms Directive</th>
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<th>Annex not transposed</th>
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<tr>
<td><strong>ANNEX No 2b sent. 1</strong> Exception from No 1j for suppliers of financial services</td>
<td>BE, CY, CZ, EE, ES, FR, IE, IT, PT, SK, UK</td>
<td>AT, DK, FI, DE, EL, HU, LV, LT, LU, MT, NL, PL, SL, SE</td>
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<td><strong>ANNEX No 2b, sent. 2</strong> Exception from No1j where the consumer is free to dissolve the contract</td>
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<tr>
<td><strong>ANNEX No 2c</strong> Exception from No 1g, No 1j and No 11 in case of products or services where the price is linked to fluctuations in a stock exchange and in case of contracts for the purchase</td>
<td>BE, CY, CZ, ES, FR, IE, IT, LT, PT, SK</td>
<td>AT, DK, EE, FI, DE, EL, HU, LV, LU, MT, NL, PL, SE</td>
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867 The Trade Practices Act does not contain specific rules on this subject: the general rules of the Code Civil about termination of the contract when the other party does not fulfill his obligations apply. In the interpretation by the courts of those rules, clauses on the right of termination of the contract without prior notice may be allowed dependent on the circumstances. TPA Art. 32, No 22 prohibits the termination of a contract because of the introduction of the Euro.

868 Greek courts have rejected an application of the exception rule to achieve a high level of consumer protection (cf. Polimeles Protodikeio Athinon 1208/98).

869 Greek courts have rejected an application of the exception rule of Annex No. 2b to achieve a high level of consumer protection (cf. Efeteio Athinon 6291/2000). See also A.P. 1219/2001.

870 The exception in the TPA is confined to financial services contracts the price of which is unilaterally changed by the provider.

871 Reasons for alternation of terms have to be listed in the contract.

872 Greek courts have rejected an application of the exception rule of Annex No. 2b to achieve a high level of consumer protection (cf. Efeteio Athinon 6291/2000).

873 Completely transposed in the Liberal Professions Act. Partly transposed in the Trade Practices Act since this act does not exclude contracts for the purchase or sale of foreign currency.

874 The phrases “financial instruments” as well as “or index or a financial market rate” are omitted in the particular domestic provision.
4. Legal consequences of unfairness

a. Concept of the Unfair Contract Terms Directive

Art. 6(1) of the Directive 93/13:

*Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.*

Art. 6(1) envisages that unfair clauses are not binding whereas the remainder of the contract is usually preserved.

aa. Non-binding nature of unfair terms

The open wording of the Directive does not make clear how the member states shall establish the form of the non-binding nature. There are several possibilities, e.g.:

- The national legislators can declare the ineffectuality or absolute nullity of an unfair term *ex officio* or provide that the contractual term is regarded as not written in civil law (fiction of non-existence) and does not give rise to any legal consequences.

- In some member states however there also exists the more flexible concept of relative nullity, according to which the unfair term initially remains in force, so long as this suits the contractual partner of the user (i.e. generally the consumer), who alone can unilaterally assert its nullity.
• Other member states follow different concepts of nullity providing that the nullity of a clause can only occur to the advantage of the consumer, whereby the court has jurisdiction to declare the term void on its own motion (so called “protective nullity” – “nullità di protezione”).

The ECJ first addressed the legal consequences of unfairness in *Océano*. The case concerned the procedural issue of the reviewability of a jurisdiction clause disadvantageous to the consumer. In this decision the ECJ held, that

“the protection provided for consumers by the Directive entails the national court being able to determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts”. 

In *Cofidis* the ECJ further extended the competence to review and stated that the protection of the consumer precludes any national provision which prohibits the national court, on expiry of a limitation period, from finding that a term of the contract is unfair. In contrast to the *Océano* case the dicta of the ECJ is related not only to the issue of whether the member state court can review its jurisdiction “on its own motion”, but on the nullity of clauses generally. It is therefore to be assumed, that according to the view of the ECJ national courts must have the power to review the fairness of a clause on their own initiative generally (and not only for the special case of jurisdiction clauses).

In *Mostaza Claro* the court clarified that Art. 6(1)

“is a mandatory provision which, taking into account the weaker position of one of the parties to the contract, aims to replace the formal balance which the latter establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.”

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The concept of absolute nullity is in line with the requirements of the ECJ, whereas the concept of relative nullity as described above does not comply with Océano, Cofidis and Mostaza Claro. Other legal consequences – such as the concept of protective nullity – seem to be in accordance with ECJ case-law, provided that a consumer is even then protected, if he fails to raise the unfair nature of the term, either because he is unaware of his rights or because he is deterred from enforcing them.

Additionally, Océano, Cofidis and Mostaza Claro raise the question whether national courts are obliged to take evidence on their own initiative. The German and the French versions of the judgments use the expressions “Befugnis von Amts wegen zu prüfen, ob die Klausel missbräuchlich ist” and “pouvoir du juge d’examiner d’office le caractère abusif d’une telle clause”. Both language versions suggest that the court not only decides about the issue on its own initiative but also takes evidence on its own initiative based on the alleged facts. In contrast, the English language version (“to determine of its own motion”) sounds rather neutral and does not seem to affect evidence itself. Therefore it remains unclear whether Art. 6 of the Directive 93/13 in conjunction with the concept of effectiveness (effet utile) changes the national rules on burden of proof.878

**bb. Consequences for the contractual term and the contract as a whole**

The possibility of a so-called partial retention, i.e. a preservation of the unfair clause with a content which is still permissible, is not mentioned in the Directive. An argument against a partial retention is that the clause would thereby, contrary to the prescription in recital 21 and in Art. 6(1) of the Directive 93/13, not be rendered “non-binding” but merely “partly binding”. Additionally such a possibility would reduce the risk of use of unfair terms from the point of view of the business and thereby run contrary to consumer protection. It nonetheless remains unclear whether a partial retention is admissible.

The whole contract remains binding on both parties, so long as this is possible without the offending clause according to the purpose and legal nature of the contract. The nullity is thus

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878 Directive 93/13 explicitly allocates the burden of proof only regarding the question whether the term in issue has been individually negotiated, see Art. 3(2), sent. 3. But it is silent with respect to other issues.
as a rule limited to the unreasonable term. In \textit{Ynos}\textsuperscript{879} the ECJ was asked whether the hypothetical consideration, of whether the business/user would have concluded the contract without the corresponding term, is to be taken into account in Hungarian law, but as the facts occurred prior to Hungary’s accession to the European Union, the ECJ stated it lacked jurisdiction, without giving an opinion. However, it seems to be fairly clear from the Directive that the contract stays in force, and the trader has to live with the fact that the particular clause is no longer available.

\textbf{b. Transposition in the Member States}

\textbf{aa. Absolute nullity}

When transposing Art. 6(1) of the Directive 93/13 many member states have decided to adopt or maintain the concept of absolute nullity. In \textit{Estonia, Germany, Ireland, Portugal, Slovakia, Slovenia} and \textit{Spain} a contractual term considered unfair will be automatically deemed null and void. In \textit{Malta, France} and \textit{Luxembourg} unfair clauses are regarded non-existent or “\textit{non écrites}”, respectively. Apart from the wording and the creation of a legal fiction, no significant practical differences between nullity and non-existence can be identified.

\textbf{bb. Relative nullity}

The aforementioned concept of relative nullity can be found in the \textit{Czech Republic, Latvia} and the \textit{Netherlands} with different specifications. In the \textit{Czech Republic} an unfair term is according to CC Art. 55 only relatively ineffectual, i.e. ineffectual only upon assertion thereof by the consumer. According to the \textit{Latvian Consumer Rights Protection Law} Section 6(8) unfair terms included in a contract entered into between a seller or service provider and a consumer shall be declared, upon request of the consumer, null and void. As it can be seen, actually, the consumer shall be the one who needs to initiate particular actions in order to trigger the procedure that could ensure that the Consumer Rights Protection Centre (State Institution) or the court will declare the contractual term in question is unfair. Also in the

Netherlands CC Art. 6:233 provides that an unfair term is merely voidable (*vernietigbaar*). As explained above, this legal consequence contradicts the requirements of the ECJ.

**cc. Unclear legal situation**

In many member states it remains controversial whether or not the domestic provisions can be interpreted in such a way as to provide for relative nullity. In AUSTRIA it is recognised that the jurisdiction of the relevant court is in principle to be exercised on its own motion. The unfairness of other (substantial) clauses by contrast is in principle not assessed ex officio, but rather only on a plea raised by the consumer. Indeed it is unclear whether the principles from the *Cofidis* case can also apply. As to BELGIUM, prior to the amendments of the Act of 7 December 1998 the clauses listed in the black list of Art. 32 of the Trade Practices Act (TPA) were prohibited and void whereas the clauses which violated the general prohibition on unfair terms of TPA Art. 31 *could* be declared void by the judge- the formulation created the impression that the nullity was optional. Now after the amendment in both cases the nullity is compulsory. The TPA has stimulated a discussion on the nature of the nullity. In a case concerning an infringement of the general clause of former TPA Art. 31 the CA Mons\(^{880}\) pointed out that given the relative nullity it had no competence to assess the unfair character of terms on its own motion. Then again in a judgment of 3 March 2003 the CA Ghent\(^{881}\) stated that although most of the provisions on unfair contract terms only concerned private interests, and consequently are sanctioned by relative nullity, there are some provisions which do concern public policy and are therefore sanctioned by absolute nullity. There are also legal scholars proclaiming absolute nullity as a general consequence of unfairness.

In CYPRUS, the transposition law copies the Directive, thereby stating that an unfair term shall not bind the consumer. In POLAND, Art. 385.1(1) of the Civil Code stipulates that “prohibited contractual clauses” do not bind the consumer, no absolute nullity is expressly provided. Therefore it remains in both countries controversial whether or not the domestic provisions can be interpreted in such a way as to provide for relative nullity.

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According to Art. 2(8) of the Greek Consumer Protection Act (Law 2251/1994) the supplier cannot claim nullity of the contract as a whole, if one or more terms are unfair and therefore considered void. Some authors regard this provision as an argument for relative nullity, others argue that due to the public law character of the provisions and the lack of an explicit claim for damages of use of unfair terms then solely absolute nullity would match the intention of the domestic legislator. In Hungary, the legislator changed the consequences of unfairness in 2006, however without thereby clarifying whether the consumer can influence the validity of the term in question. Art. 209a(2) of the Hungarian Civil Code provides that unfair clauses in consumer contracts are void. On the other hand CC Art. 209a(2), one sentence later, states that the unfairness of a clause can only be asserted to the advantage of the consumer. In Italy, the new Consumer Code changed the legal consequences of the use of unfair terms by introducing the concept of protective nullity (nullità di protezione) in Art. 36(3). It provides that the nullity of a clause can only occur to the advantage of the consumer, whereby the court has jurisdiction to declare the term void on its own motion (Art. 36(3): “La nullità opera soltanto a vantaggio del consumatore e può essere rilevata d’ufficio dal giudice”). Against this background it remains unclear in Hungary and Italy whether according to the present state of the law the court can also declare nullity if the consumer expressly wishes to be bound by the clause.

As explained above, the concept of protective nullity seems to be in accordance with ECJ case-law provided that a consumer is even then protected, if he fails to raise the unfair nature of the term, either because he is unaware of his rights or because he is deterred from enforcing them. In other words Océano, Cofidis and Mostaza Claro do not completely outlaw the consumer’s decision whether the nullity of the unfair term will serve his interest.

**dd. Alteration, amendment and adjustments of terms and contracts**

The Nordic countries Denmark, Finland and Sweden traditionally apply a more flexible approach based on the vast usage of general clauses. The Courts are entitled not only to declare an unfair term null and void, but also to alter, amend and adjust the particular term, other terms or the entire contract, thereby taking into account circumstances that have arisen after the contract was entered into. Although there is no relative nullity in the strict sense, this discretionary power allows the Courts to decide in the interests of the consumer. In the course
of the implementation of the Directive DENMARK introduced a special provision enabling the consumer to demand that the remaining part of the contract is upheld without any amendment if it is possible. Similarly in PORTUGAL the consumer may choose to keep the contract itself in force, in accordance with the principle of conservation. Under LITHUANIAN Law the consumer is entitled to apply to court for invalidation or alteration of any unfair term. In MALTA, the Director of Consumer Affairs of his own initiative or at the request of a “qualifying body”, may issue a compliance order on any person requiring that person to delete or alter a term if the Director considers the term to be unfair to consumers. The Director may also require the incorporation of terms in a consumer contract if he considers that this is necessary “for the better information of consumers, or for preventing a significant imbalance between the rights and obligations of the parties, and this to the benefit of consumers” (Art. 94(1) lit. (a) of the Consumer Affairs Act).

**ee. Splitting terms into a valid and unfair part**

The question whether it is admissible – if possible – to split a contract term into a valid and an unfair part i.e. to reduce an unfair term to its legally permitted core, has been regulated and discussed only in a few member states. In SLOVAKIA the Civil Code establishes partial nullity of the contract, thus it is possible to split a contractual term into valid and void parts, in order to keep the valid parts. In ESTONIA, Art. 39(2), sent. 2 of the Law of Obligation Act states that if a term can be divided into several independent parts and one of them is void, the other parts remain valid. Similarly, under Art. 3:42 of the DUTCH Civil Code a contractual, invalid (annulled) term can be legally replaced by a contractual term that would have been agreed on by the parties. In AUSTRIA and the UNITED KINGDOM (see above) the legitimacy of such a “reduction” of an unfair term is still controversially discussed in legal literature whereas in GERMANY it is settled case law and established in legal literature that a reduction is inadmissible for it would stimulate the use of unfair terms and weaken consumer protection. The latter legal attitude applies also to GREECE.

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882 Art. 38c(1) referring to the general clause Art. 36(1) of the Formation of Contracts Act.
883 Vid. Art. 12(1) of the Law on Consumer Protection; CC Art. 6.188(6).
884 BGHZ 114, 342; BGHZ 120, 122 and NJW 2000, 1110.
ff. Consequences for the contract as a whole

As far as the consequences for the contract as a whole are concerned virtually all member states followed the prescriptions of the Directive upholding the entire contact if it is capable of continuing in existence without the unfair terms. Minor differences relate to the exact legal techniques applied. Some countries achieve the result via general contract law while others have inserted a specific provision in the relevant Act or Chapter dealing with unfair contract terms. Because of their more flexible approach as described above, FINLAND and SWEDEN have not explicitly regulated the consequences for the contract. Under ESTONIAN Law the remaining part of the contract is valid unless the party supplying the term proves that that the party would not have entered into the contract without the standard term which is void or is deemed not to be part of the contract. The same hypothetical assumption can be found in SLOVENIA.

c. Compensation and/or punitive damages

The Directive does not prescribe any further sanctions for the use of unfair terms such as damages, fines and criminal penalties. Nevertheless, a number of member states in using the minimum harmonisation (Art. 8 of the Directive 93/13) have provided for compensation for the use of unfair contract terms. In BELGIUM, CZECH REPUBLIC, ESTONIA, HUNGARY, GERMANY, ITALY, LATVIA, LITHUANIA, MALTA, PORTUGAL, SLOVAKIA, SLOVENIA, SPAIN and UNITED KINGDOM damages/compensation is available under general civil law/contract law (via breach of a contractual duty, tort or related concepts). Punitive damages however cannot be imposed under civil law in the member states, indeed there may be such provisions in competition law which is not examined within this study.
V. Principle of transparency according to Art. 5

The requirement of transparency laid down in Art. 5 of the Directive 93/13 constitutes – alongside the control of unfair terms in Art. 3 – the second primary pillar of the Directive 93/13. The principle of transparency is an essential part of the European information model and is closely related to the other consumer-protecting information requirements prescribed by Community law.885

1. Drafting of terms in plain and intelligible language

a. Requirements of the Unfair Contract Terms Directive

According to Art. 5, sent. 1 of the Directive 93/13 terms must always be drafted in plain, intelligible language. Recital 20 additionally makes clear, that the consumer should be given a genuine opportunity to examine all the terms.

The criteria “plain” and “intelligible” complement each other and are difficult to distinguish. Contractual terms are “plainly” drafted, when no ambiguities, misunderstandings or doubts exist in relation to the content of the terms. A contractual clause is “intelligible” when the consumer can understand the essential substance of the rules.

The general view is that the requirements of “plain and intelligible” drafting encompass both formal as well as substantive criteria: In terms of formal requirements the user has to ensure the drafting style of the terms is such that the consumer can comprehend the essential rights and duties. This is unlikely to be the case when the outward appearance of the document makes it difficult to get an overview of the terms or recognise a structure (e.g. frequent cross-referencing), is printed in a difficult to read type face or is disproportionately long in relation to the significance of the transaction. Furthermore there is a substantive, linguistic aspect to

885 See on this point this study, Part 4 D. as well as Grundmann/Kerber/Weatherill, Party Autonomy and Information; Schulze/Ebers/Grigoleit, Information Requirements and Formation of Contract in the Acquis communautaire; Howells/Janssen/Schulze, Information Rights and Obligations.
the requirement of plain, intelligible language. In this respect technical jargon, long convoluted sentences or imprecise, fragmentary statements are to be avoided as far as possible. To some extent it is furthermore inferred from the requirement of transparency, that terms must be drafted in comprehensible language from the consumer’s point of view.

b. Transposition of Art. 5, sent. 1 in the Member States

The vast majority of member states have transposed Art. 5, sent. 1 word for word. After the ECJ in its judgment C-144/99, clarified that to implement the principle of transparency in full “it is essential that the legal position under national law is sufficiently precise and clear that individuals are made fully aware of their rights” and that “even where the settled case-law of a member state interprets the provisions of national law in a manner deemed to satisfy the requirements of a Directive, that cannot achieve the clarity and precision needed to meet the requirement of legal certainty”, the principle of transparency was explicitly anchored in DUTCH and GERMAN law.

By contrast Art. 5, sent. 1 of the Directive 93/13 was not explicitly transposed in the CZECH REPUBLIC, ESTONIA, GREECE, HUNGARY, LUXEMBOURG and in SLOVAKIA. These countries do of course have rules on the incorporation and/or interpretation of pre-formulated terms, in the context of which the issue of whether the clause is formulated in plain, intelligible language also has a role to play. Whether this sufficiently accommodates the requirements of the ECJ is doubtful however, since in those countries the danger exists that consumers and consumer associations do not know that they can take actions against clauses which are intransparent. A difficulty in transposing the requirement of transparency exists above all in the qualification in Art. 5, sent. 1 of the Directive 93/13, that the requirement of transparency only applies in the case of contracts where all or certain terms are in writing. This formulation stands in contradiction to the recitals to the Directive: Apart from the fact that recital 20 does not contain any such limitation, it is expressly emphasised in recital 11, that consumers bound by an oral contract should be granted the same level of protection as consumers bound by a

written contract. This inconsistency casted doubt on the applicability of the transparency principle in those member states, which – for example BELGIUM – included this qualification.

c. Interpretation of the requirement of transparency in the Member States

The issue of whether a term is formulated in plain and intelligible language is assessed by reference to how it is understood. The Directive 93/13 does not contain any clear guidelines in this regard. It is also unclear, whether and to what extent the benchmark of the average consumer who is reasonably well informed and reasonably observant and circumspect, developed in the ECJ’s case law on the fundamental freedoms and interpreting directives of trade practices law, also applies in the context of control of unfair terms.

In this regard it is not surprising that the various benchmarks of consumer in the individual member states (a detailed exposition of which is beyond the scope of this study) deviate considerably from one another.

Clear differences in practice are above all evident in the extent to which legal terminology is permissible. In the UNITED KINGDOM there is a clear tendency that clauses must always be formulated in everyday layman’s terms. In the guidance on unfair terms in consumer contracts issued by the Office of Fair Trading it is laid down that expressions such as “indemnity” must always be avoided, since such references can have onerous implications of which consumers are likely to be unaware. In place thereof terms like “pay damages” are preferred. In GERMANY by contrast the case law in this respect is more generous, but the BGH is however ready and keen to emphasise in a number of judgments, that the duty of the user to formulate the content of the clause clearly and intelligibly only exists within the bounds of what is actually possible. Should various kinds of legal and factual difficulties exist for the drafter, the terms shall nonetheless binding even if the other party will have to make a certain effort in order to understand them rather than being able to understand at the very moment of reading.

889 BGH NJW 1998, 3114.
Uncertainties in the application of the requirement of transparency also relate to the extent to which the principle of transparency must reflect the individual prevailing circumstances at the time of conclusion of the contract. This concerns not only the general problem of whether the particular consumer in question is better or less informed than the average consumer, but also the issue of whether intransparent clauses can be “healed” by making specific reference to them. In Germany the case law assumes that an objective intransparency in an individual case can be overcome if the user informs the customer (which may even be only orally, dependent upon the circumstances). Whether this interpretation is compatible with the Directive appears doubtful, as the Directive aims not only at transparency in the individual case, but also the guarantee of the internal market through comparability of contractual conditions of domestic and foreign providers (market transparency). Contractual documents must therefore in principle be intelligible in themselves and not only after specific reference by the user at conclusion of the contract.

### 2. Consequences of intransparency

#### a. Requirements of the Unfair Contract Terms Directive

The wording of the Directive does not specify the legal consequences that apply where the transparency requirement has been breached in the individual case. The sole explicitly provided legal consequence of failure to fulfil the requirement of transparency is the interpretation rule in Art. 5, sent. 2 of the Directive 93/13. This interpretation rule however only applies to clauses not drafted in plain language and which are capable of interpretation. Not regulated however are the legal consequences for plain, but unintelligible clauses (an example would be where, due to legal terminology or insufficient command of the language in which the terms are drafted, the clause is unintelligible to the consumer).

Accordingly there are widely differing views on the legal consequences of a breach of the transparency imperative. Some assume that the member states are free to decide on the legal consequences. Others however see the requirement of transparency, by reference to recital 20,

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890 BGH WM 1997, 518 with further references.
as a condition for incorporation of terms. Finally there is the view that intransparent clauses are to be assessed according to Art. 3. If one follows this latter view, it is furthermore doubtful, whether the intransparency *per se* results in the term being rendered unfair or non-binding according to Art. 3(1) in conjunction with Art. 6(1) of the Directive 93/13 or whether there is a further condition that the content of the clause is disadvantageous, i.e. causes a considerable and unjustified imbalance in the contractual rights and obligations contrary to the principle of good faith.

The judgment of the ECJ in *Cofidis*[^891] has not brought any clarification in this regard. The case under dispute concerned an offer of credit with the words “Free application for money reserve” in large letters on the front, while the references to the contractual interest rate and a penalty clause were in small print on the reverse. The *Tribunal d’instance Vienne* was of the opinion, that “the financial clauses lack legibility”, which was likely to mislead the consumer. It accordingly reached the conclusion that “the financial clauses may be regarded as unfair”. The ECJ by contrast explained that[^892]

“To fall within the scope of the Directive, however, those terms must satisfy the conditions set out in Art. 3(1)of the Directive 93/13, that is, they must not have been individually negotiated and must, contrary to the requirement of good faith, cause a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer. Although the national court has not provided any information on the latter point, it cannot be excluded that that condition is satisfied.”

However, with this judgment the ECJ is giving an opinion only in relation to the admissibility of the complaint and not to the fundamental question of which legal consequences intransparency gives rise to.

b. Transposition of the contra proferentem rule in the Member States

The interpretation rule laid down in Art. 5, sent. 2 of the Directive 93/13, according to which any doubt on the meaning of a clause is always to be resolved in the manner most favourable to the consumer, has been transposed by all member states.

The implementation of the requirements of the Directive in ESTONIA however seems problematic. According to Art. 39(1), sent. 2 of the Law of obligations Act, “in the case of doubt, standard terms shall be interpreted to the detriment of the party supplying the standard terms.” The Directive 93/13 however goes beyond a mere interpretation to the detriment of the user, in that it requires not only an interpretation favourable to the consumer, but an interpretation “most” favourable to the consumer.

In AUSTRIA unclear contract terms are ineffectual according to Art. 6(3) of the Consumer Protection Act. This rule has resulted in a certain confusion, as some authors assume that intransparent clauses are to be assessed according to this rule alone, so that the consumer cannot rely on the contra-proferentem rule in CC Art. 915, 2nd alternative. The majority view by contrast however holds that the consumer, even in the case of mere intransparency, can rely on an interpretation favourable to him.

According to Art. 5, sent. 3 of the Directive 93/13 the contra proferentem rule applies only in individual proceedings, not in collective actions. This should prevent the rule on interpretation from allowing parties to evade orders to cease and desist using particular terms by simply stating that the clause cannot be regarded as unfair when interpreted in favour of the consumer. SPAIN has as yet not transposed Art. 5, sent. 3, but is required to do so according to the judgment of the ECJ in C-70/03.893

c. Further legal consequences according to Member State law

aa. Non-incorporation of intransparent terms

In many member states the transparency of a clause can only be assessed within a review of incorporation of terms. The review of incorporation of terms is based upon the notion that a contractual clause can in principle only become part of the contract through a legally binding declaration of consent by the other party. The aim and purpose of the review of incorporation of terms is to establish minimum conditions for a valid legally binding declaration of consent. Accordingly, most cases of review of incorporation of terms only apply formal requirements of transparency by a “broad brush approach”, in which it is assessed whether the consumer in general terms had the opportunity of becoming acquainted with the clause or could have reckoned with its true content. As a rule, only especially clear-cut cases of intransparency attract any sanction, i.e. when even a minimal measure of intelligibility, certainty or readability is lacking.

bb. Assessment of transparency within a content review

An assessment of transparency within a content review by contrast only occurs in very few member states: Besides the aforementioned rule in AUSTRIA (ante), GERMAN law, since the modernisation of the law of obligations, provides in CC Art. 307(1), sent. 2 that an unreasonable disadvantage may also result from the fact that the provision is not clear and comprehensible. This should make clear that in the context of a contents review intransparent clauses are per se regarded as non-binding, without an additional criterion of unreasonable disadvantage to the contractual partner. Legal consequences of a breach of the transparency imperative therefore include not only an interpretation favourable to the consumer and the non-incorporation into the contract, but also the ineffectuality of the clause within the content review. In relation to this point the German BGH has clarified that a clause declared unfair according to CC Art. 307(1) (Art. 6(1) of the Directive 93/13) cannot be replaced by one with identical content.\footnote{BGH, 12 October 2005 IV ZR 162/03.} As the Directive 93/13 contains no rules on how to replace non-binding terms, then it is – according to the BGH – for the national law to decide by means of judicial interpretation, how to fill a gap in a contract if the removal of non-binding term without substitution thereof would cause inequity. If the customer, in reliance on the binding nature of
the non-binding clause suffers financial loss, then according to German case law he additionally has the possibility of a claim for damages in an action for breach of pre-contractual duty of care culpa in contrahendo.

**cc. Unclear legal situations**

The state of the law remains unclear in Italy. Whereas some authors assume that intransparency implies nullity *per se*, for some commentators the infringements of the principle of transparency must be evaluated under Art. 36(2) lit. (c) of the Consumer Code (binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract).

In Latvia although the legal consequences are not regulated in the Consumer Protection Act, general norms of civil law could be nevertheless applied, particularly Art. 1506 of the Law of Obligations stating that absolutely disreputable and unintelligible and also contradictory terms shall not be interpreted at all, but shall be deemed null and void.

In Malta there are no express rules on the consequences of a lack of transparency for individual cases. However under general civil law rules, if the lack of transparency is such as to amount to fraud or bad faith on the part of a party to the contract then that contract may be annulled by the choice of the other party. Moreover, the Director of Consumer Affairs in accordance with his powers under Art. 94 of the Consumer Affairs Act may issue a compliance order under that article if he considers that the term used is unfair to consumers and is in breach of Art. 47 which requires that terms in a consumer contract are written in plain and intelligible language “which can be understood by the consumers to whom the contract is directed.”

Also in Spain the legal consequences are unclear, as the principle of transparency has been transposed into two different Laws with different consequences. Art. 10(1)(a) of the Law 26/1984 (General Consumer Protection) prescribes very generally the principle of transparency, without laying down specific consequences. In Art. 5(5) of the Law 7/1998 (standard terms) the consequences of lack of transparency are by contrast positively regulated in two articles. These have been criticised in academia because the respective sanctions partly
contradict each other: in Art. 7(2) the sanction against standard terms that are “illegible, ambiguous, obscure and incomprehensible” is non-incorporation into the contract, whereas Art. 8 declares null and void standard terms that infringe any rule of this Law (i.e. including the principle of transparency). Both laws can be applied alongside each other, when an unfair term in contracts concluded with consumers is at the same time a standard term. Case law, in a pragmatic (but not clarifying) approach, tends to use any of the cited norms to achieve a fair outcome in favour of the consumer; frequently through declaring the term null and void.

In UNITED KINGDOM, it is unclear whether a term can be capable of being found to be unfair principally or solely because it is not transparent, but the Law Commission and the Scottish Law Commission recommend in their final report on unfair contract terms that it should be possible for a contract term to be found to be unfair principally or solely because it is not transparent.895

3. Conclusions

The requirements of the Directive 93/13 in respect of the imperative of transparency have been transposed in most of the member states (with the exception of the CZECH REPUBLIC, ESTONIA, GREECE, HUNGARY, LUXEMBOURG and SLOVAKIA). It is doubtful whether a breach of the transparency imperative is sufficiently and effectively sanctioned. As the Directive 93/13 contains no explicit guidelines on this point, the vast majority of member states have also declined to regulate the consequences for breach of the transparency requirement in individual actions. In a reform of the Directive 93/13 the Community legislator should clearly lay down the legal consequences.

895 See the final report of the Law Commission and the Scottish Law Commission on unfair terms in contracts, LAW COM No. 292/SCOT LAW COM No. 199, paras. 3098-3102.
VI. Collective proceedings according to Art. 7(2)

1. Overview

According to Art. 7(1) of the Directive 93/13 member states shall ensure that adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers. The Directive largely leaves to the member states the choice of means which must be put in place. Community law aims to appropriately accommodate the existing systems which had already developed in the member states even before the coming into force of the Directive 93/13. Art. 7(2) of the Directive 93/13 thus only provides in general terms, that

“the means (...) shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.”

This rule is supplemented by the Directive 98/27 on injunctions for the protection of consumer interests (see esp. annex no. 7 to the directive).

All member states provide for collective court procedures, by which the use or recommendation of unfair terms in legal agreements shall be prohibited. In a number of member states the emphasis is on administrative proceedings (see 2.), in almost all member states it is furthermore possible to pursue collective court actions against unfair clauses (3.).

Some member states, such as e.g. FRANCE and SLOVAKIA, make additional provision for criminal proceedings to prohibit unfair terms. It appears however, that such kinds of proceedings play a subordinate role in practice, so a more detailed examination is not required here. In MALTA, where a person does not abide with a compliance order issued by the

896 On the transposition of this Directive cf. the report in this study, Part 3 G.
Director of Consumer Affairs, then such non-compliance is considered a criminal offence and punishable as such. However, it is suggested that these consequences should be re-evaluated and substituted by a more effective regime of administrative fines since the initiation of criminal proceedings is invariably time-consuming and since the burden of proof in such instances is that required in criminal cases – namely of proving beyond reasonable doubt.

Alongside the aforementioned collective proceedings, in respect of certain types of contracts, especially financial services contracts in the banking and insurance sector as well as dealings in stocks and shares, many member states make provision for specific monitoring by industry regulators governed by public law. The use and recommendation of unfair terms can in relevant cases be additionally regulated through antitrust measures. Since such proceedings only concern specialised questions, their relevant characteristics will not be addressed more closely either.

2. Administrative control of unfair terms

a. The role of public bodies in the Member States

Many member states use an administrative law based system of monitoring contract terms. These systems are characterised by the dominant position of public bodies responsible for protecting the collective interests of consumers. Such bodies exist especially in the Nordic countries (DENMARK, FINLAND, SWEDEN) with the Consumer Ombudsman, in CYPRUS with the Director of Competition and Consumers’ Protection Service, in ESTONIA with the Consumer Protection Board, in HUNGARY with the General Inspectorate for consumer protection, in IRELAND with the Director of Consumer Affairs, in LATVIA with the Consumer Rights Protection Centre, in LITHUANIA with the National Consumers’ Rights Protection Board, in MALTA with the Director of Consumer Affairs, in POLAND with the Director of the Office for the Protection of Competition and Consumers, in SLOVAKIA with the Slovak Trade Inspectorate as well as in the UNITED KINGDOM with the Office of Fair Trading.

897 On 24 August 2006, a new draft legislation, the Consumer Protection (National Consumer Agency) Bill, has been announced which will, inter alia, replace the office of Director of Consumer Affairs with a new administrative body, the National Consumer Agency.
Administrative elements can also be found in further countries, which admittedly do not have an extensive system of public control of contract terms, but administrative bodies do however at least have standing to apply for injunctions in court, e.g. in Belgium (Minister of Economic Affairs), Portugal (Public Prosecutor) and Spain (National Consumer Institute and the corresponding bodies or entities of the Autonomous Communities and their local authorities dealing with consumer protection; Public Prosecutor or Attorney General).

In Belgium, the King is empowered to impose or prohibit by Royal Decree certain clauses applicable to certain commercial sectors or to specific products or services.\textsuperscript{898} In France a special administrative body, the \textit{“Commission des clauses abusives”} has the power to issue statements on terms contained in standard contracts, but those statements are not legally binding.\textsuperscript{899} In Italy, the National Council of Consumers and Users (\textit{“Consiglio Nazionale dei Consumatori e degli Utenti – CNCU”}) represents the consumers’ and users’ associations nationwide. The Council is attached to the Ministry for Production Activities and its main duties are those of expressing opinions, where requested, on preliminary draft legislation produced by the Government or draft legislation produced by the members of parliament as well as on draft regulations that affect the rights and interests of consumers and users. In addition to its advisory function vis-à-vis the Parliament (at hearings), and vis-à-vis the Government (consultation sessions) the CNCU participates in other regular consultation processes with other authorities and bodies by being a signatory to memorandums of understanding as well as by attending hearings on specific topics. In Poland, Portugal and Spain, the Standard Terms register contains a list of clauses which are declared as unfair; the register has binding effects for administrative authorities e.g. registrars.

\textbf{b. Investigatory powers of public bodies}

The administrative law powers to monitor terms differ considerably between the member states. In many member states the competences of the public bodies far exceed the ability to bring an action in court. Moreover, through special legal provisions, the public bodies generally have a duty to investigate a complaint or to examine on their own initiative whether

\textsuperscript{898} See Part 3 C.II.2.
\textsuperscript{899} See Part 3 C.II.8.
a term is unfair. This corresponds with the power in many member states for the public body to demand that traders submit the relevant documents and information.

c. Negotiation and Guidelines

On this basis many public bodies work towards reasonable contractual conditions through negotiation. This procedure is above all characteristic in Denmark, Finland and Sweden as well as in the United Kingdom: in the Nordic States, according to the principle of negotiation the Consumer Ombudsman shall endeavour by negotiation to induce persons carrying on a trade or business to act in accordance with the principles of good trade practices. One of the ways in which the Consumer Ombudsman may try to influence business is by issuing guidelines within specified areas on the basis of negotiations with the relevant business and consumer organisations. In the United Kingdom, any complaints about unfair terms are usually resolved through negotiation with the trader concerned. The Office of Fair Trading, in particular, has been very active in approaching traders about terms which may be unfair and has successfully persuaded them to change their terms. It regularly publishes an “Unfair Contract Terms” Bulletin in which it provides details of the terms it has dealt with in this way.  

In Belgium, the legislator created a Commission on Unfair Contract Terms in 1993. It is an advisory organ that not only makes recommendations about clauses in contracts between businesses and consumers but also may give advice upon request and has the competence to submit proposals to the Minister of Economic Affairs. On a regular basis the Commission’s advice has been obtained by Ministers on a number of diverse subjects. The reports holding the Commission’s recommendations may be consulted on the internet. The Commission can act on its own initiative, or at the request of the competent minister, a consumer organisation or an association of traders.

901 See http://mineco.fgov.be.
d. Power of public bodies to issue orders

In some member states the powers of the public bodies are particularly wide. They encompass not only the right to litigate in court, but also the power to issue a compliance order.

In Denmark, the Consumer Ombudsman may issue orders in respect of conduct which is in clear contravention of the Marketing Practices Act and cannot be changed by negotiation. The party against whom an order is made may demand that the Consumer Ombudsman see to it that the order is brought before the courts. Non-observance of a prohibition or injunction imposed by a court/Ombudsman is punishable by a fine or imprisonment of up to four months. In Sweden where negotiations fail in cases of lesser significance the Ombudsman may likewise make a prohibitory order. If a prohibition is not observed or if the case is one of significant public interest, then the Ombudsman can apply for an injunction before the Market Court. Similar to this, in Finland the Consumer Ombudsman may impose an injunction in cases that are not of significant importance. The injunction becomes void in case the addressee objects to the injunction within 8 days. The Consumer Ombudsman may also impose a conditional fine, but the Market Court decides whether or not it is payable.

In Estonia, supervisory authorities engaging in consumer protection may issue a precept in which it demands that the offence desists and, if possible, that the initial situation is restored; the precept shall set out the penalty fine to be imposed upon failure to comply with the precept; contestation of a precept does not release the trader from the obligation to comply unless the court decides otherwise. The upper limit for a penalty payment is 10 000 kroons.

In Hungary the General Inspectorate for Consumer Protection is empowered by the consumer protection act to make an order to remedy the unlawful situation and prohibit the continuance of such conduct and impose a financial penalty (consumer protection fine). If the conduct of the user simultaneously constitutes an unfair trading practice, the competition authority can also prohibit the use of standard terms and impose a fine.

In Latvia, the Consumer Rights Protection Centre can require businesses to make changes in draft contracts and prohibit further use of unfair or ambiguous contract terms, both in respect of draft contracts and in contracts already entered into. The requirements set and instructions given by officials of the Consumer Rights Protection Centre are binding on the business. If a
violation of consumer rights has been found, which affects individual or group consumer interests (consumer association interests) and which may cause harm or losses to particular consumer rights, the Consumer Rights Protection Centre is entitled (1) to make an order requiring a business to cease the violation, and to perform specific activities to rectify the impact thereof and imposing a time limit for implementation of such measures and (2) to publish the decision taken either fully or partially in the official Gazette of the Government of Latvia.

In MALTA, the Director of Consumer Affairs either of his own initiative or at the request of a ‘qualifying body’ may issue a compliance order on any person requiring: (1) the deletion or alteration of terms in consumer contracts which the Director considers to be unfair to consumers, and/or (2) the incorporation of terms in consumer contracts which the Director considers to be necessary to ensure consumers are better informed or to counter a significant imbalance between the rights and obligations of the parties, and this to the benefit of consumers, and/or (3) require a person to comply with any measures specified in the order to ensure compliance. The trader against whom such an order is made then has the right of contesting such order before the Court of Magistrate (Civil Jurisdiction). If the order is not contested, or unsuccessfully contested by the trader and accordingly confirmed by the Court, and the trader notwithstanding fails to abide by the order, then the failure to comply is considered as a criminal offence. 902

In POLAND the Director of the Office for the Protection of Competition and Consumers likewise has the right to issue an injunction and set a fine for non-compliance. A precondition for such a measure however is that not only the individual interest of a particular consumer is affected, but that the general consumer interest so requires.

In SLOVAKIA, consumers have the right to file a complaint to the public control and market surveillance authority (Slovak Trade Inspectorate). The Slovak Trade Inspectorate is a state administrative body subordinate to Slovak Ministry for the Economy. The Public control and market surveillance authority is empowered to impose financial penalties for infringements, but it can not intervene in decision–making about rights and duties of contracting parties. Only the court has authority to make a decision.

902 See supra, Part 3 C.VI.1.
3. Judicial review of unfair terms

Court proceedings for prohibiting unfair clauses also vary across the member states.

a. Types of actions in the Member States

As a minimum standard almost all member states allow injunctions against persons who use or recommend unfair clauses. By and large it is also possible to obtain an interlocutory/interim injunction where urgent action is required.

An injunction generally aims to ensure that the business ceases the infringement and does not engage in similar conduct in the future. Most member states also provide for all or part of the relevant decision of the court or of a corrective announcement to be published, with the aim of terminating any continued effects of the use of the unfair term in question.

Alongside injunctions some member states also allow actions for damages: In FRANCE consumer associations have a right to collective damages where a misfeasance by a user of standard terms has caused damage to the collective consumer interest (Art. L. 422 et seq. of the Consumer Code). In GREECE also, consumer associations can bring actions for damages. The quantum of damages is determined by the court, taking account of the circumstances of the case and especially the intensity of the unlawful conduct, the size of the respondent company, its annual turnover and the necessity of a general or specific precedent. This sum is made available for the public benefit. In HUNGARY, if the consumer protection authorities issue an actio popularis pursuant to Art. 39 of the Consumer Protection Act, the infringer is required to compensate the consumer in accordance with the judgment; this is however without prejudice to the right of the consumer to bring an action according to the general civil law.

In SPAIN, consumer associations have a right to claim damages under Art. 12 of the Law 7/1998 on standard terms in contracts. Moreover, the Spanish Civil Procedure Act 1/2000
allows consumer associations to claim damages on behalf of unidentified classes of consumers.

In so far as the use of unfair terms also represents a breach of fair trading provisions, in certain circumstances additional sanctions can apply in the member states: Thus for instance in GERMANY according to the Act against Unfair Competition of 2004 competitors are entitled to claim damages, if the violating party has acted negligently. According to Art. 10 of the Act against Unfair Competition 2004 there is the further possibility of claiming restitution for the profits that a violating party has wilfully achieved by injuring a multitude of customers.

In ITALY, a new proposal of 26 June 2006 plans to introduce into the Consumer Code a provision providing that consumers’ associations are entitled to recover damages on behalf of one or more consumers.

b. Standing to apply for an injunction

The persons who can bring an action varies between the member states. Those member states which primarily prescribe administrative forms of control (see 2.), also give standing to the relevant public bodies.

Furthermore consumer associations in all member states have standing to bring collective proceedings. The exceptions are two member states: The LITHUANIAN implementing provisions do not provide that private organisations can employ appropriate and effective means to prevent the continued use of such terms. Only individual consumers whose interests have been infringed are entitled to apply to the board (see above) or to bring an action in an individual proceeding. In MALTA, under Art. 94 of the Consumer Affairs Act, a “qualifying body” (i.e. a registered consumer association and any other body whether constituted in Malta or otherwise as the Minister may, after consulting the Consumer Affairs Council, designate by notice in the Gazette) can only file a written application to the Director to issue a compliance order. According to Art. 95, it shall be at the discretion of the Director whether or not to issue a compliance order after a written request by a qualifying body has been made to him. If the Director decides not to issue a compliance order after an application has been made to him by
C. Unfair Contract Terms Directive (93/13)

a qualifying body, he shall, within seven days from the date of his decision, notify in writing the qualifying body and the persons against whom the compliance order was requested of his decision stating his reasons therefore. A qualifying body may, within fifteen days from the date of service on the decision of the Director not to issue a compliance order, bring an action before the Court of Magistrate (civil jurisdiction) for an order requiring the Director to make a compliance order. If one assumes, that the member states are obliged by Art. 7(2) of the Directive 93/13, to provide consumer associations with standing to bring collective proceedings against the user of unfair terms, then in LITHUANIA and MALTA an infringement of the Directive can be affirmed, since in both countries consumer associations do not have a right to proceed directly against the user of the clause.

In all other countries by contrast the right of consumer associations to litigate has been introduced, even though in some countries (IRELAND and UNITED KINGDOM) there was some delay in doing so. Alongside consumer associations, many countries have also extended the right to seek injunctions against unfair clauses to trade and professional associations. Such types of claim exist above all in AUSTRIA, BELGIUM, GERMANY, GREECE, HUNGARY, ITALY, NETHERLANDS, POLAND, PORTUGAL, SLOVENIA and SPAIN.

Finally, in some member states the right has been conferred on an individual consumer to seek an injunction, most notably in POLAND.

c. Effects of collective actions: Relativity of res judicata

Court or administrative decisions in the context of collective proceedings are in the vast majority of member states only binding on the businesses who are party to the case. The decision has no effect on other businesses who use identical terms. In derogation from these principles though, the relativity of court decisions has been eroded in some member states: In POLAND a legally binding decision, which prohibits the use of unfair terms, is published in the economic and court journal and entered into a register. With the registration the judgment acquires, according to Art. 479 of the civil procedure rules, erga omnes effect – a legal consequence, although this is questionable on principles of constitutional law in Poland. Court decisions, which in HUNGARY according to CC Art. 209/B are handed down in relation to the

903 See relevant country reports under Part 3 C.II.12 and 25.
actio popularis, likewise have erga omnes effect; only contracts, which have already been fulfilled before the action was lodged, are excluded. In SLOVENIA, only a sustaining judgment has a general erga omnes effect, such that any person may refer to a final judgment by which certain contracts, individual provisions of those contracts or the general terms and conditions of business incorporated in those contracts were declared null and void. However, a judgment of refusal only affects the parties concerned and does not prevent a new action in respect to the same claim. In SPAIN the Law on standard terms in contracts did originally prescribe in Art. 20 a rule according to which decisions of the Supreme Court have precedent value; this rule however was repealed and not replaced with the coming into force of the new civil procedure rules (Law 1/2000).

Decisions in collective proceedings are generally confined to the cases before them. But if the legal effect of a court judgment is restricted to the clause in question in its particular wording, then the judgment does not prohibit the user of the clause from replacing the term in question with other terms that are just as unfair but that are not covered by the judgment.

Some member states have introduced safeguards for this very eventuality in the interests of consumer protection: In the UNITED KINGDOM, according to UTCCR Art. 12(4) an “injunction may relate not only to use of a particular contract term drawn up for general use but to any similar term, or a term having like effect, used or recommended for use by any person.” Similarly, in CYPRUS injunctions can be filed against more than one seller or supplier of the same or different business domain who uses or recommends for general use, the same or similar contract terms. Accordingly in these countries provision is made to prevent businesses from circumventing the judgment by replacing the offending term by terms that have like effect.

It must finally be borne in mind that the associated disadvantages to the consumer of the principle of relativity of res judicata can be de facto avoided if public bodies, on the basis of a relevant judgment, proceed against other businesses and thus extend the effect of the judgment far beyond the particular proceedings.

904 Ley sobre condiciones generales de la contratación.
905 The Law 1/2000 on civil procedure now states in Art. 221.2 that in case of successful injunction, the judgment shall indicate “whether it will produce procedural effects not limited to the parties in the procedure”.

4. Conclusions

The implementation of the Directive 93/13 has not led to an approximation of enforcement mechanisms in the member states. Completely different systems of collective forms of action continue to exist, which place varying emphasis on administrative measures or collective court proceedings by consumer associations or other persons having a right to claim. With the accession of the ten new member states administrative proceedings have assumed greater significance in the European Community. This may be above all attributable to the fact that in the former communist-socialist countries, now as then, only few private consumer organisations exist, which in turn increases the need for administrative control.
VII. Practical impact of the Unfair Contract Terms Directive

1. Impact on the level of consumer protection

The practical effects of the Directive 93/13 have been differently assessed by national rapporteurs. In some of the “old” member states, and above all in the Nordic States (Denmark, Finland, Sweden) and also in Austria, Germany and Portugal it has been stressed that the Directive has not led to any noticeable increase in the level of consumer protection, since in these countries there was already far reaching legislation in place prior to transposition of the Directive and the (minimal) changes brought about by the Directives primarily consisted of inserting provisions in order to avoid possible gaps. For France, Luxembourg and the Netherlands it has been emphasised how difficult it is to assess the effects of the Directive, as an established system of monitoring terms already existed and very few changes were carried out as a result of the Directive. The transposition and application of the Directive in Belgium is subject to considerable criticism because of the great number of sector-specific Acts which each contained a number of unfair clauses which made it very difficult for legal practitioners to gain an overview of the applicable rules and also more generally because it undermines the coherence of the law. In Ireland, there is only one court case involving the Regulations and so it is arguable that their impact to date has been minimal. However, there is consistent evidence of soft enforcement by the Office of Director of Consumer Affairs, which each year reports of amendments to contractual terms, following dialogue with relevant interested parties. These relate to, for example, mobile ’phone contracts, airline ticket contracts, car hire contracts, house alarm contracts and buildings’ insurance contracts. For the United Kingdom it is stressed that consumers have clearly benefited by being able to challenge a greater range of terms than has previously been the case. Also for Greece, Italy and Spain it is accepted, that the level of consumer protection has been improved, even though in the case of Spain it is emphasised, that this is attributable not only to the Directive, but also because a new comprehensive regulation on standard terms (beyond the scope of the Directive) was approved.
The situation is different in the ten new member states. As all of the newly acceded States had no comparable system of monitoring terms in place prior to transposition of the Directive, many rapporteurs have emphasised, that the new rules concerning unfair contractual terms have undoubtedly been beneficial, even though many also point out that the practical effects cannot yet be assessed, as hardly any case law exists and no national reports have recently been made.

A fundamental problem that is seen in many member states, especially in Belgium, Poland and Malta, is that many traders have problems complying with the law on unfair terms. According to a recently conducted investigation by the Polish Office for the Protection of Competition and Consumers, that above all concentrated on the business practices of organisers of tourist events and language schools, around 95% of the examined brochures, leaflets and contracts used by the ‘organisers’ contained prohibited clauses.

Finally many correspondents complain that the limited success of the unfair terms provisions is caused by the ignorance of the consumers in the first place, and maybe also that of their lawyers. Another explanation might be that these lawyers prefer to combat unfair contract terms on the basis of the well-known concepts of general contract law with which they are more familiar, but – as emphasised by the Belgian Rapporteur – there is no evidence to support this statement.

2. Additional burdens or costs for traders

In those countries which prior to transposition of the Directive 93/13 did not have a comparable system for monitoring contract terms, i.e. especially in the new member states, it is partly assumed that traders have incurred additional burdens and costs as a result of the implementation of this Directive in that their business dealings may have to be cancelled as a result of imposing a term that is considered unfair under the current legislation but which was not regulated under the previous legal system. However, for other countries it is stated that traders do not incur additional burdens because of the lack of awareness among the business community of the applicable provisions and a lack of pro-active enforcement.
3. Particular difficulties with transposing the Unfair Contract Terms Directive

The transposition of the Directive 93/13 has evoked a series of problems in the member states, which are in part attributable to the fact that the legal orders of the member states have been confronted with unfamiliar rules and concepts (this concerns for example the concept of “good faith”, alien to the common law system and therefore causing uncertainty as to its meaning), but also partly due to an inconsistent legislative technique in transposition.

So for example in BELGIUM the law on Unfair Terms is regulated in both the Trade Practices Act and (for freelancers) in the Liberal Professions Act. This separate treatment of contracts concluded by practitioners of liberal professions was criticised, not only because of the adoption of a separate Act but most of all because of discrepancies between both Acts. Such inconsistencies are also present in SPANISH law. When a contract with standard terms is concluded with consumers, both the Law on General Consumer Protection and the Law on standard terms in contracts apply, with the indicated conflict of consequences. In IRELAND, it has been noted that there may be an incompatibility between the Unfair Terms in Consumer Contracts Regulation and the rules on exclusion clauses under the sale of goods legislation. Under sale of goods legislation a clause which excludes/limits liability for breach of the statutory implied terms is void – completely prohibited. Whereas, if such a clause passes the ‘fairness’ test it would appear to be enforceable under the Regulations. It is assumed that the consumer would be protected by the superior protection in this regard, i.e. the sales legislation. In CYPRUS, the same kind of difficulties exist, since the Sales of Goods law renders null and void any term excluding or rendering ineffective any of the statutory implied terms whereas the Unfair Terms in Consumer Contracts Act requires that such a term should pass the unfairness test and if it fails to do so then it will not be binding on the consumer. In the UNITED KINGDOM, as the UTCCR are now almost a “cut-and-paste” implementation of the Directive, there are no shortcomings in that sense. However, the retention of the parallel regime in UCTA 1977 has caused some confusion, and affected legal certainty. The Law Commission and Scottish Law Commission in February 2005 therefore published a draft Unfair Terms in Contracts Bill and proposed in its final report to clarify and unify the legislation on unfair terms presently contained in UCTA 1977 and UTCCR 1999.\textsuperscript{906}

\textsuperscript{906}See the final report of the Law Commission and the Scottish Law Commission on unfair terms in contracts, LAW COM No. 292/SCOT LAW COM No. 199.
D. Timeshare Directive (94/47)

Drafted by Hans Schulte-Nölke, Andreas Börger and Sandra Fischer

Executive Summary

1. Transposition Deficiencies

Although Directive 94/47\(^{907}\) has been transposed in all member states, the analysis has revealed some transposition deficiencies with regard to details. The following examples could constitute a transposition deficiency of at least some importance:

- The information document does not have to contain information on the right of withdrawal in LITHUANIA.
- The information stated in lit. (j)\(^{908}\) of the Annex is lacking in the transposition laws in the CZECH REPUBLIC and SLOVAKIA.
- No transposition of the language requirements of Art. 4 in LATVIA and LITHUANIA (only the national language).
- No language requirements for the information document e.g. in the CZECH REPUBLIC and SLOVAKIA.
- 90 days withdrawal period (instead of 3 months plus 10 days) in LATVIA in case of lack of information (Art. 5, 2\(^{nd}\) indent of the Directive).

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\(^{908}\) A clause stating that acquisition will not result in costs, charges or obligations other than those specified in the contract.
2. Enhancement of Protection

a) Extension of scope

Some national laws provide a wider scope of application in the field of timesharing, for example:

- Definition of “purchaser”: inclusion of legal persons.
- Extension of the scope of application to contracts where timeshare rights are resold by another consumer through a professional agent.
- Definition of “contract relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis”:
  - No minimum duration of 3 years.
  - No minimum duration for the annual use of the immovable property.
  - Inclusion of timeshare objects other than buildings (caravans, camping grounds).
- Extension of the scope of application to legal constructions which do not relate to a certain building or a group of specified buildings, but simply promise special rates on tourist services (“holiday clubs”).

b) Use of minimum clause

Most member states made use of the minimum clause. Major examples of such findings are:

- Additional requirements concerning the information document in Art. 3(1) (e.g. manifold additional information to be included, some of them taken from the Directive’s Annex, others additionally introduced by member states).
- Additional information items to be included in the contract.
- Additional formal requirements for the information on the right of withdrawal (standard form, graphic accentuation, etc.).
- Prolongation of the regular withdrawal period.
- Extension of the list of information duties stated in. Art. 5(1) 2nd indent (i.e. those information duties which lead to a prolongation of the withdrawal period, if infringed).
- Stricter language requirements
  - Also languages of EEA contracting states.
- More languages than stated in the Directive.
  - Additional right of withdrawal in other situations than granted in the Directive, e.g. in case of non-delivery of the information document or non-compliance with the formal and language requirements, or even if the vendor has received any advanced payments.
  - No costs for exercising the right of withdrawal can be burdened on the consumer.
  - More favourable provisions concerning the cancellation of related credit agreements.

c. Other instruments

Some member states have introduced protection instruments which are not foreseen in the Directive, e.g.
  - Introduction of licensing procedures for vendors
  - Specific provisions for timeshare objects under construction
  - Requirement of a financial guarantee to be provided by the vendor, securing the performance of the contract.

3. Use of options

  - Article 4, 2\textsuperscript{nd} indent, sent. 2 (language requirement of the member state where purchaser is resident): About half of the member states made use of this option.
  - Introduction of formal requirement for the exercise of the right of withdrawal by consumers: about two thirds of the member states have made use of this option.

4. Inconsistencies or Ambiguities

  - It is unclear whether “in writing” means text on paper or also includes, e.g., electronic text on a durable medium.
  - Different language versions of the Directive concerning the prohibition of advanced payment (the German version of the Directive refers to the regular withdrawal period
of 10 days; other language versions might also refer to the prolonged withdrawal period in case of a lack of information).

5. Potential Barriers to (Cross-Border) Trade

The following examples could likely cause barriers to trade in the European market:

- Additional elements to be included in the brochure (Art. 3(2)) or the contract (Art. 4(2)) diverging within the different member states.
- Different beginnings, lengths and computation methods of withdrawal periods and formal requirements for exercising the right of withdrawal (influencing also the duty to inform consumers on their right of withdrawal).

6. Conclusions and Recommendations

In order to remove ambiguities, incoherencies or barriers to trade, the following issues could be considered:

- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law.
- Definition of ‘vendor’: adaptation to a coherent definition of the ‘business’ in EC contract law.
- Extension of the scope of application to contracts where timeshare rights are resold by another consumer through a professional agent.
- Dropping or lowering the requirements of the minimum duration of 3 years and the minimum annual period of 7 days.
- Inclusion of timeshare objects other than buildings like camping grounds, caravans, boats, mobile homes and other movables, which can be used for the purpose of accommodation.
- Inclusion of holiday clubs.
- Reducing the detailed lists of information to be provided by using a general clause with an indicative list of core information, in particular on costs including maintenance costs.
- Provision of a standard form for the information on the withdrawal right.
• Clarification of whether “in writing” means text on paper or also includes, e.g., electronic text on a durable medium.
• Provision of some rules on computation of the withdrawal (or – perhaps better – a reference to Regulation 1182/71\textsuperscript{909}).
• Prolongation of the regular withdrawal period to 14 days (perhaps considering a longer period for up to three months or at least leaving discretion to the member states to fix a longer period).
• Prohibition of any formal requirement for the exercise of the withdrawal right.
• Clarification in Art. 5(1) 2\textsuperscript{nd} indent, that the information must be provided in writing.
• Clarification of whether the dispatch rule is also applicable when the consumer dispatches the declaration of withdrawal in time, but it does not reach the vendor.
• Introduction of a prolonged period of one year (instead of 3 month plus 10 days) in case information duties are not fulfilled.
• Clarification of whether the prohibition of advance payments is only applicable during the (10 days) regular withdrawal period or also during the prolonged period.
• Prescription of highly effective sanctions in order to enforce the prohibition of advance payments (penalties) on Community level.
• In case the planned Rome I Regulation deals with the issue, Art. 9 could be deleted.

In order to ensure that the member states cannot any more introduce or maintain additional protection instruments and thereby create barriers to trade, it could be considered envisaging full harmonisation in the most sensitive areas like pre-contractual information duties, in particular with regard to the prospectus and with regard to the information about the withdrawal right.

\textsuperscript{909} Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits; OJ L 124 of 8 June 1971, 1–2.
I. Member state legislation prior to the adoption of the Timeshare Directive

Before Directive 94/47 was transposed, there were no specific provisions on timeshare contracts in most of the member states’ laws. Some basic protection of purchasers of timeshare rights was provided primarily by general contract law and laws on unfair competition. Therefore, in the field of timeshare contracts, mainly general contract law applied, e.g. in Austria\(^{910}\), Belgium\(^{911}\), Cyprus\(^{912}\), Denmark\(^{913}\), Italy\(^{914}\), the Netherlands\(^{915}\), Poland\(^{916}\), Slovakia\(^{917}\) and Spain\(^{918}\).

In Germany\(^{919}\) and Portugal\(^{920}\) consumers were protected by the general regulations of good faith and wilful deceit and by the rules concerning the review of standard business terms and conditions if the vendor made use of these. In Hungary\(^{921}\) some regulations of competition acts were applicable. Various member states, having recently joined the European Union, for example, Estonia\(^{922}\), Hungary\(^{923}\), Latvia\(^{924}\), Lithuania\(^{925}\) and Slovenia\(^{926}\), had Consumer Protection Acts partially applying to timesharing contracts.

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\(^{910}\) Offence against public policy (Sittenwidrigkeitsregel) CC § 879(1); rescission of the contract because of error CC § 871 et seq.; in case of doorstep selling: rights provided in KSchG (Consumer Protection Act) § 3 and § 4.

\(^{911}\) General rules of contract law and the law of property in the Belgian CC applied.

\(^{912}\) Contract Law, Cap 149. The Hotel and Tourist Dwellings Law of 1969 (revoked in 2000) dealt with the licensing of immovable property intended to be used for residential purposes.

\(^{913}\) General clause of the Contract Act (principle of reasonableness or fair conduct). In addition, the general clause of the Marketing Practices Act (principle of good marketing practice) applied.

\(^{914}\) CC. Drafts of a ministerial commission in 1989 and a parliamentary bill of 1987 on the topic of time-shares have never been enacted.

\(^{915}\) E.g. general principle of good faith, CC Art. 6:2 and 6:248.

\(^{916}\) General principles of the law of contract as regulated in the CC.

\(^{917}\) CC.

\(^{918}\) Application of the Law 26/1984 on General Consumer Protection and the common law rules of the Spanish CC with respect to contracts (mainly vices of consent and actions of nullity and termination); norms on information in cases of sale and lease of immovable goods (Royal Decree 515/1989).


\(^{919}\) E.g. CC § 134, § 138; § 123, § 142. Review of contract terms according to the Act concerning the Regulation of Standard Business Terms.

\(^{920}\) Decree-Law 275/93 of 5 August. It also applied the 1966 Civil Code rules on good faith (e.g. 227 – pre-negotiation duty of care) and the unfair terms legislation.

\(^{921}\) Competition Act. The public administrative body (Hungarian Competition Authority) has been dealing with several complaints regarding this area of law, where case handlers have been applying the relevant section of the Competition Act (Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices).

\(^{922}\) The Consumer Protection Act (in force since 1 February 1994) contained general provisions concerning responsibilities and restrictions of the seller.

\(^{923}\) Act CLV of 1997 on Consumer Protection. The public administrative body, responsible for the enforcement on deceptive practices, namely the Hungarian Competition Authority has been dealing with several complaints regarding this area of law, where case handlers have been applying the relevant section of the Competition Act.
PORTUGAL\textsuperscript{927} and SPAIN\textsuperscript{928} had additional specific rules on time-sharing with, in the latter case, the regional administrative rules of the Autonomous Communities Canary and Balearic Islands. A FRENCH law from 1986\textsuperscript{929} regulated the functioning of the timeshare companies rather than protecting the consumers. Nevertheless, it obliged the seller to provide the purchaser of the immovable property with a description of the immovable property including the various parts of the building, information on the period within which the right that is the subject of the contract may be exercised and information on the conditions of the use of the common facilities. In the UNITED KINGDOM the Timeshare Act 1992\textsuperscript{930} existed, which remains in force supported by the introduction of statutory instruments\textsuperscript{931}.

**II. Scope of application**

**1. Personal Scope**

**a. Purchaser**

Directive 94/47 protects the purchaser of timeshare rights (rights to use immovable properties on a timeshare basis). A purchaser is defined by the Directive as “any natural person who, acting in transactions covered by this Directive, for purposes which may be regarded as being out of 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”.

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\textsuperscript{924} Consumer Rights Protection Law.
\textsuperscript{925} Law on Consumer Protection of the Republic of Lithuania.
\textsuperscript{926} The Consumer Protection Act of 26 February 1998. The Act (prior to its amendment according to the Directive) already included two provisions regulating the field of the Directive, however only regarding the substance of the contract and withdrawal from it.
\textsuperscript{927} Decree laws: 130/89 of 18 April 1989 regulating some contractual forms of “timeshare”, and 275/93 of 5 August 1993 regulating timeshares.
\textsuperscript{928} Related to the requisites of the commercial activity and insurance duties. With regard to civil aspects, the norms only refer to some advertising rules. Order of 25 August 1988, Law 7/1995 on Tourism in Canary Islands (Art. 46), Decree 272/1997 of November 27 on timesharing, Order of 15 January 1990 and Decree of 6 September 1997.
\textsuperscript{929} Loi du 6 janvier 1986 relative aux sociétés d’attribution d’immeubles en jouissance partagée.
\textsuperscript{930} In force since 12 October 1992.
\textsuperscript{931} Timeshare (Cancellation Notices) Order 1992, SI 1992/1942, regulating the requirements of appearance and content of a cancellation notice to be given to consumers; Timeshare (Repayment of Credit on Cancellation) Order 1992, SI 1992/1943, regulating the form that can be used to request the repayment of credit following a notice of cancellation; Timeshare (Cancellation Information) Order 2003 regulating additional cancellation rights introduced as a result of the implementation of the Timeshare Directive.
aa. Transposition technique

Nearly half of the member states have introduced a special definition in the field of timeshare (e.g. BELGIUM\textsuperscript{932}, GREECE\textsuperscript{933}, ITALY\textsuperscript{934} and SWEDEN\textsuperscript{935}) whereas about the same number of member states made reference to a general consumer definition (e.g. the CZECH REPUBLIC\textsuperscript{936}, FINLAND\textsuperscript{937}, GERMANY, HUNGARY\textsuperscript{938}, LATVIA\textsuperscript{939} and PORTUGAL\textsuperscript{940}).

No legal definition exists in FRANCE, SPAIN and the UNITED KINGDOM. FRENCH legislation uses the notion of consumer ("consommateur"\textsuperscript{941}), which is not defined by statutory provisions, but frequently used in French consumer law. SPANISH law does not provide an express transposition. However, in the Law 42/1998, different terms such as “titleholder of the right”\textsuperscript{942}, the “final consumer”\textsuperscript{943} and “purchaser”\textsuperscript{944} are used synonymously but not further clarified. SPANISH case-law has considered the purchaser of timeshare rights as a “consumer” in the sense of general legislation, and, therefore, deems applicable the Law 26/1984 on General Consumer Protection. In the UNITED KINGDOM, the person acquiring timeshare rights is introduced as the “offeree”, i.e. the “person on whom timeshare rights are conferred, or purport to be conferred”. Some provisions of the Timeshare Act only apply when the “offeree” is an individual not acting in the course of a business\textsuperscript{945}.

<table>
<thead>
<tr>
<th>Table: Transposition technique</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific definition</td>
</tr>
<tr>
<td>Reference to a general consumer definition</td>
</tr>
</tbody>
</table>

\textsuperscript{932} Article 2 no. 5 of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis.
\textsuperscript{933} Article 2(1)(d) of the Decree 182/1999.
\textsuperscript{934} Article 69(1)(b) of the Consumer Code uses the term “consumer” in the definition of the purchaser.
\textsuperscript{935} Section 2, 1\textsuperscript{st} indent of the Timeshare Contracts (Consumer Protection) Act 1997:218.
\textsuperscript{936} CC Art. 52(3)
\textsuperscript{937} Chapter 1 sec. 4 of the Consumer Protection Act of 20 January 1978/38.
\textsuperscript{938} CC Art. 685(d).
\textsuperscript{939} Article 1(3) of the Consumer Rights Protection Law.
\textsuperscript{940} CC Art. 874, Art. 2(1) of the Consumer Protection Act 24/96 of July 31.
\textsuperscript{941} Code de la consommation, Art. L. 121-60(1).
\textsuperscript{943} Article 1(4) of the Law 42/1998.
\textsuperscript{944} Article 9(1)(9)(c), Art. 10-13 of the Law 42/1998.
\textsuperscript{945} E.g. s.1A(4) of the Timeshare Act 1992.
Among the member states providing a definition, most member states have chosen to make use of the term ‘consumer’ whereas only some rest with the term ‘purchaser’ of the Directive. In MALTESE legislation, the notion of ‘buyer’ is known. In DENMARK, LUXEMBOURG, the NETHERLANDS and SWEDEN, a special definition for purposes of timeshare provisions exists, however using the term of ‘consumer’. Thus, confusion is likely to emerge as to other ‘common’ definitions of ‘consumer’ in different fields of consumer law.

**Table: Use of terms**

<table>
<thead>
<tr>
<th>Term</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Purchaser</td>
<td>BE, CY, EL, IE, IT, NL, PL, ES (8)</td>
</tr>
<tr>
<td>Consumer</td>
<td>AT, CZ, DE, DK, EE, FI, HU, LT, LV, LU, PT, SE, SK, SL, ES (15)</td>
</tr>
<tr>
<td>Buyer</td>
<td>MT (I)</td>
</tr>
<tr>
<td>Offeree</td>
<td>UK (I)</td>
</tr>
</tbody>
</table>

The transposition throughout the member states shows that nearly half of the national legislators opt for the solution of providing one general consumer definition being applicable in the field of consumer law. A general notion of ‘consumer’ on the level of Community law would allow for this development and not only contribute to greater legal certainty but also to a coherent use of terminology.

**bb. Content of the definitions**

As prescribed in Directive 94/47, the vast number of the transposition laws limits the scope of application to natural persons not acting within their professional capacity. Some national legislators have extended it to legal persons as well, provided that they do not act in their professional capacity. Among them, AUSTRIA, HUNGARY and LATVIA resort to general consumer definitions. In SPAIN, despite a lacking legislative transposition, the preponderant opinion in doctrine seems to also extend the scope of application to legal persons.

While the DUTCH definition of ‘purchaser’ applies – according to its wording – only to natural persons, it could possibly be applied per analogy to small businesses by case-law. In Dutch
case-law some examples of analogous application of comparable consumer protection measures, such as protection against unfair contract terms, exist.

In GREECE, the definition of the purchaser includes all natural persons, regardless of whether they act in their professional capacity or not. This extension of the scope may be unintended by the legislator as it seems unreasonable to exclude legal persons from the scope of application but to include natural persons acting in their professional capacity.

Under GERMAN law, companies, coming into existence without further requirements if two or more persons pursue a common purpose\textsuperscript{946}, are not treated as legal persons\textsuperscript{947} and may thus profit from the provisions of Directive 94/47 provided they do not act in their professional capacity.

<table>
<thead>
<tr>
<th>Table: Content of the definitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limitation to natural persons</td>
</tr>
<tr>
<td>Natural and legal persons</td>
</tr>
<tr>
<td>No requirement of acting within professional capacity</td>
</tr>
</tbody>
</table>

**b. Vendor**

The notion of ‘vendor’ in Directive 94/47 is defined as “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”. Again, similar to the definition of ‘purchaser’, more or less half of the member states have inserted a special definition of ‘vendor’ in the course of transposing the Directive (e.g. CYPRUS\textsuperscript{948},

\textsuperscript{946} «Gesellschaft bürgerlichen Rechts» CC § 705 et seq.
\textsuperscript{947} BGH judgment of 23 October 2001, XI ZR 63/01, NJW 2002, 368.
DENMARK\textsuperscript{949} and MALTA\textsuperscript{950}. In contrast, a little less than the other half resort to a general definition (e.g. AUSTRIA\textsuperscript{951}, LATVIA\textsuperscript{952}, POLAND\textsuperscript{953} and SLOVAKIA\textsuperscript{954}).

**Table: Legislative techniques**

<table>
<thead>
<tr>
<th>Special definition</th>
<th>BE, CY, DK, EE, EL, ES, HU, IE, IT, LU, MT, NL\textsuperscript{955}, SE (13)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reference to a more general definition</td>
<td>AT, CZ, DE, FI, LV, LT, PL, PT, SK, SL (10)</td>
</tr>
<tr>
<td>No legal definition</td>
<td>FR, UK (2)</td>
</tr>
</tbody>
</table>

Most of the member states having a general definition do, in consequence, not make use of the term ‘vendor’ but rather employ the terms of ‘professional’ (e.g. POLAND), ‘seller’ (e.g. MALTA) or ‘entrepreneur’ (e.g. GERMANY). FRENCH legislation does not provide a special definition but mentions the term ‘professional’\textsuperscript{956} which is neither concretised by statutory provisions nor seemingly specified by case-law. Moreover, in the UNITED KINGDOM, reference is made to a “person who proposes in the course of a business to enter into a timeshare agreement … as offeror”, sometimes being abbreviated as “operator”. SPANISH law provides a similar content of the definition, however using different terminology, such as “owner”, “developer” (promoter) or “any natural or legal person which participates professionally in the transmission or commercialisation of rights to use on timesharing basis”\textsuperscript{957}. Under PORTUGUESE law, rights may be exercised against the ‘vendors’ or the ‘owner’ of timeshare rights.

**Table: Use of terms**

| Vendor | BE, CY, DK, EE, EL, HU, IE, IT, LU, NL, |

\textsuperscript{949} Section 3(1), sent. 1 of the Act 234 of 2 April 1997 on Consumer Contracts Relating to the Purchase of the Right of Use to Real Estate on Timeshare Basis (the Timeshare Act).

\textsuperscript{950} Article 2(1) of the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000.

\textsuperscript{951} § 1(1) of the Timeshare Act.

\textsuperscript{952} Article 1(1) sec. 5 of the Consumer Rights Protection Law.

\textsuperscript{953} Article 4(1) of the Act on the Freedom of Economic Activity.

\textsuperscript{954} CC sec. 52(2) and sec. 55(1), sent. 1.

\textsuperscript{955} The definition of vendor is partly included into the definition of timeshare contract. Dutch CC 7:48a defines a contract of sale within the scope of chapter 7.1.10A as “any contract or group of contracts, concluded for the duration of at least three years, to the effect that one party – the vendor – shall, for the payment of a price, give, or undertake to give, to the other party – the purchaser – a right ad rem or a right ad personam to the use of one or more immovable properties, or parts thereof, for at least one week during each year.”

\textsuperscript{956} Code de la consommation, Art. L. 121-60(1).

\textsuperscript{957} Article 1(5) of the Law 42/1998.
Generally, the personal scope of the national provisions, as regards the counterpart of the consumer, is in accordance with the provisions of the Directive.

Under Latvian\textsuperscript{958} and Lithuanian\textsuperscript{959} law, the definitions of ‘seller’ include persons “selling or offering goods” which does not directly match to the field of timeshare, as here the seller may assign rights to immovable property.

Some countries however have extended the scope of application to contracts where timeshare rights are resold by another consumer through a professional agent (Denmark\textsuperscript{960}, Italy\textsuperscript{961}, Portugal). Italy\textsuperscript{962} and Portugal have consequently extended the purchaser’s rights and allow an exercise of all rights against professional agents who conclude a timeshare contract on behalf of a non-professional. The German statutory provisions on timeshare contracts do not extend the scope in such a way. However, it is being discussed whether a consumer who establishes or transfers a timeshare right to another consumer can be treated as a vendor if he makes use of an agent who acts in his professional capacity (e.g. a broker). In legal literature, it is argued that the party acquiring the timeshare right should be granted a right of withdrawal which can be exercised against the person (consumer) who establishes or transfers the right (not the agent)\textsuperscript{963}. In Ireland, the regulations impose obligations on vendors which would, according to the law of agency, include both the vendor himself and his agent.

\begin{table}[h]
\centering
\begin{tabular}{|l|l|}
\hline
Consumer Law Compendium & Comparative Analysis 430  \\
\hline
D. Timeshare Directive (94/47) &  \\
\hline
\end{tabular}
\end{table}

\begin{tabular}{|l|l|}
\hline
Professional & FR, SE (2)  \\
\hline
Trader & FI, PL, (2)  \\
\hline
Undertaking & SL (1)  \\
\hline
Offeror/operator & UK (1)  \\
\hline
Seller & MT, LV, LT (3)  \\
\hline
Supplier/entrepreneur & AT, CZ, DE (3)  \\
\hline
Others & ES, PT* (2)  \\
\hline
\end{tabular}

* more than one

\textsuperscript{958} Article 1(5) of the Consumer Rights Protection Law.
\textsuperscript{959} Article 2(2) of the Law on Consumer Protection of the Republic of Lithuania.
\textsuperscript{960} Article 3(2) of the Timeshare Act.
\textsuperscript{961} Article 70(2) of the Consumer Code.
\textsuperscript{962} Article 69(1)(c) of the Consumer Code.
\textsuperscript{963} Martinek, in: Staudinger, Teilzeit-Wohnrechtegesetz, § 1 no. 19; Saenger, in: Erman, BGB 1\textsuperscript{11}, § 485 no. 3.
Following such models, it could be considered tackling the phenomenon of consumers reselling their timeshare rights with the aid of professional agents or resale companies on the European level in order to grant a certain consumer protection against the selling methods of these agents, which are often identical to timeshare companies. In this context it could be thought about extending the application of the Directive’s regulations to such cases, however, without fully neglecting the protection of the selling consumer. A possible solution for the conflicting consumer interests might be to impose the sanctions like penalties only on the (professional) agent or resale agency, but to allow the purchaser a right of withdrawal against the consumer who sells the timeshare right.

2. Situations falling in the scope

a. Contracts

According to Art. 2, 1st indent of Directive 94/47 a 'contract relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis’, hereinafter referred to as 'contract’, shall mean 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.

It should be borne in mind that this bulky definition intends to cover a broad variety of rights allowing the rotating use of immovable property (including connected services) for the purpose of accommodation. The reason is that member states have developed very different legal constructions to allow for timeshare rights, namely real property rights (shared rights in rem), but also personal rights arising from various legal grounds (e.g. tenancy, partnership in a civil law association or shareholder of a company) and different sorts of trusts.
Some member states, namely IRELAND, ITALY, and MALTA have literally adopted the definition of timeshare contracts given in the Directive. The definition is substantially in line with the Directive in GREECE, SLOVENIA and in the NETHERLANDS.

In several member states contracts, which grant an annual use of the property for less than one week, are included into the scope, too. In BELGIUM the minimum duration of use must be two days. In AUSTRIA, CYPRUS, the CZECH REPUBLIC, ESTONIA, FINLAND, FRANCE, GERMANY, HUNGARY, LUXEMBOURG, POLAND, SWEDEN and the UNITED KINGDOM there is no minimum duration for the annual use of the building at all.

In PORTUGAL the definition of timeshare right foresees that the period of time in which such a right can be established may vary from 7 days to 30 days per year. As a consequence it is not possible for the parties to create a timeshare right in Portugal with an annual use of more than 30 days. The purchaser seems to be then protected insofar as he is not obliged by such an agreement due to invalidity. Furthermore, the timeshare right in Portugal is perpetual but a limit of not less than 15 years can be fixed.

Spanish law only differs on one essential point: it establishes two ways of creating the right: a right in rem, or as rent of a house for some seasons under some special conditions.

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964 Art. 2(1)(a) Decree no 182/1999 GREECE has omitted “real property”.
965 Article 59(1) of the Consumer Protection Act.
966 CC Art. 48a(a).
967 Article 2(1), sent. 1 of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis.
968 § 1(1), § 2 (1) of the Timeshare Act.
970 CC § 58(1), at least once a year.
971 Article 379(1) of the Law of Obligations Act.
973 Code de la Consommation, Art. L.121-60.
974 CC § 481(1).
975 § 2(a) of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.
976 Article 1(1) of the Timeshare Act of 18 December 1998.
977 Article 1(1) of the Act of 13 July 2000 on the Protection of Purchasers in Respect of the Right to Use Buildings or Dwellings During Certain Time Each Year.
979 Article 3(1) of the Decree-Law 180/99.
980 Art. 1(6) of the Law 42/1998; the latter for a period of at least 3 up to a maximum of 50 years.
Several member states have not transposed the minimum duration of the contract of three years, which is foreseen in the Directive. In CYPRUS, FINLAND and in HUNGARY there is no minimum duration of the contract at all. In BELGIUM the scope includes contracts of duration of more than one year and also contracts with duration of one year or less if they foresee a taciturn prolongation. In LUXEMBOURG a contract with a duration of less than three years is included if it contains a clause which determines a taciturn extension and/or the conditions for an extension of the contract. SPAIN and PORTUGAL have laid down provisions that the owner of the immovable property has to reserve a period of at least seven days per year for repairs, maintenance and cleaning.

In the definitions of timeshare contracts in the transposition laws of the CZECH REPUBLIC, DENMARK, FINLAND, LATVIA, LITHUANIA, SLOVAKIA and SWEDEN there is no requirement of a global price.

<table>
<thead>
<tr>
<th>Contracts falling in the scope</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Literally adopted</td>
<td>IE, IT, MT (3)</td>
</tr>
<tr>
<td>Substantially equivalent as in the Directive</td>
<td>EL, NL, SL (3)</td>
</tr>
<tr>
<td>Deviations concerning:</td>
<td></td>
</tr>
<tr>
<td>• Shorter or no period of use of property per year</td>
<td>AT, BE, CY, CZ, DK, EE, DE, FI, FR, HU, LU, PL, SE, UK (14)</td>
</tr>
<tr>
<td>• Shorter or no minimum duration of the contract</td>
<td>BE, CY, FI, HU, LU (5)</td>
</tr>
<tr>
<td>• No need for global price</td>
<td>CZ, DK, FI, LV, LT, SK, ES, SE (8)</td>
</tr>
</tbody>
</table>

In order to prevent escaping from the Directive by offering contracts with a duration of less than 36 months or with an annual period shorter than seven days, it could be considered following the model of several member states and dropping, or lowering, the requirements of the minimum duration of three years and the minimum annual period of seven days. However,

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981 Article 2(1), sent. 2 of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis.
983 CC §55(1), sent. 1, sent. 2, 1st part.
such an amendment must avoid simple rental agreements (in particular if repeatedly concluded in advance) falling under the definition.

**b. Immovable property**

Directive 94/47 defines the notion of immovable property as “any building or part of a building for use as accommodation to which the right which is the subject of the contract relates”. This definition of immovable property has been literally transposed in CYPRUS, IRELAND, MALTA and LUXEMBOURG. It is transposed closely to the Directive in AUSTRIA, ESTONIA, ITALY⁹⁸⁴ and SPAIN.

The BELGIAN⁹⁸⁵ definition only mentions buildings for accommodation, but leaves out “part of a building”. In the CZECH REPUBLIC⁹⁸⁶ and SLOVAKIA the term “immovable property or part thereof” is defined as a building intended for habitation and accommodation. FINLAND has two definitions, firstly “time share housing”, being a building or an apartment whose possession rotates among shares at defined or definable intervals, and, secondly, the “time-share object”, defined as an entity comprising timeshare housing and the common rooms available to the shareholders, as well as the services connected to it.

The PORTUGUESE⁹⁸⁷ legislator has created the term “accommodation units”, which are parts of apartment hotels, holiday resorts or holiday apartments. Moreover, the Portuguese transposition law contains a specific chapter on “holiday accommodation systems”, defined as accommodation rights in holiday developments which do not constitute timeshare rights, and contracts under which, by means of an advance payment, such accommodation rights are transferred. Thus, the mentioned chapter broadens the scope of application to rights not covered by the Directive in order to make some of the protective instruments of the Directive applicable also for such rights⁹⁸⁸.

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⁹⁸⁴ Art. 69(1)(d) of the Consumer Code (“immovable property shall mean any building, also used as a hotel...”).
⁹⁸⁵ Article 2(3) of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis.
⁹⁸⁶ CC § 59(2).
⁹⁸⁷ Article 1 of the Decree-Law 275/93 of August 5.
⁹⁸⁸ Article 45 of the Decree 180/99 of May 22.
In several member states there is no specific legislative transposition of immovable property. In Denmark, France, Germany, Hungary, and Lithuania\(^989\) and in the Netherlands\(^990\) the general definitions of immovable property are used. In the United Kingdom there is no specific transposition of the definition of immovable property. As the British definition of the contract is based on the term of “timeshare accommodation” the content of the Directive’s definition can partly be found in the British definition of accommodation, which means accommodation in a building or – insofar going beyond the Directive – in a caravan. In Slovenia\(^991\) the immovable property can be land, a building or a part of a land/building and must be destined for use as accommodation constantly or temporarily and be in legal commerce according to the law of the country where it lies. The mentioning of “land” could be interpreted as an inclusion of, for instance, camping grounds. If this understanding is correct, the Slovenian law goes beyond the Directive which is only applicable to buildings.

<table>
<thead>
<tr>
<th>Literally transposed</th>
<th>CY, IE, LU, MT (4)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantially equivalent as in the Directive</td>
<td>AT, EE, IT, ES (4)</td>
</tr>
<tr>
<td>Small deviations</td>
<td>BE, CZ, EL, FI, SK (5)</td>
</tr>
<tr>
<td>Inclusion of obligatory holiday accommodation rights (‘holiday clubs’)</td>
<td>PT (1)</td>
</tr>
<tr>
<td>Inclusion of caravans, camping grounds</td>
<td>SL, UK (2)</td>
</tr>
<tr>
<td>No specific legislative transposition, but general definitions or concepts used</td>
<td>DK, DE, FR, HU, LT, LV, NL, PL, SE (19)</td>
</tr>
<tr>
<td>No restriction of accommodation</td>
<td>EE (1)</td>
</tr>
</tbody>
</table>

The definitions of “contract” and “immovable property” provided by the Directive in principle seem to cover perfectly not only a ius in rem, but also the personal rights and trust constructions, as long as the right in question relates closely to a certain building or to a specified group of buildings, in the latter case combined with an exchange or point system. Only very few member states have extended their definitions to other objects than buildings like caravans or camping grounds. Nevertheless, it could be considered including camping

\(^{989}\) Art. 4.2(2) of the Civil Code.  
\(^{990}\) CC Book 3 Art. 3, Book 7 Art. 48a(a).  
\(^{991}\) Article 59(2) of the Consumer Protection Act. The Slovenian definition of the Directive’s “immovable property” is not clear, but since already the title includes words “dwelling building” and since according to Slovenian law a building is only a part/a component of land (land is immovable and a building on it is its part), it can nevertheless be deduced that the definition is in accordance with the Directive.
grounds, caravans, boats mobile homes and other movables, which can be used for the purpose of accommodation.

Other legal constructions which do not give rights to repeatedly use a certain building or a group of specified buildings, but simply promise special rates on tourist services (‘travel discount clubs’) do not fall under the definition of the Directive. Seemingly only one member state, PORTUGAL, has broadened its transposition of the Directive to such timeshare-like constructions.

III. Consumer Protection Instruments

1. Information duties, Art. 3

a. Information document (prospectus)

According to Art. 3 of the Directive, the vendor must be required to provide any person requesting information with a document, which contains a general description of the immovable property along with at least brief and accurate information on certain details listed in the Annex\(^\text{992}\) of the Directive, and on how further information may be obtained.

All member states have used the list of information duties provided in Art. 3 of the Directive as a model for their transposition legislation and have created a rather similar list. Some member states like e. g. CYPRUS, DENMARK, GREECE, IRELAND, MALTA, the NETHERLANDS\(^\text{993}\), IRELAND and the UNITED KINGDOM have used the same technique as in the Directive by implementing an annex containing all information obligatory for both the information document and the contract. These member states refer to the Annex when laying down the obligatory details for the information document and the contract. The other member states have split up the information for the information document and the contract by using two different lists of information duties for the contract and the information document, e.g. ESTONIA, GERMANY, ITALY.

\(^{992}\) Litera (a), (g), (i) and (l) of the Annex.

Many member states have added further information obligatory for the prospectus. Such additional information has been partially taken from the list in the Annex of the Directive (i.e. the items from the list that are just to be included in the contract under Art. 4, but not in the prospectus under Art. 3 like lit. (h) or lit. (k)). In CYPRUS 994 and in the NETHERLANDS 995 the information to be provided in the prospectus is the same as the information in the contract document. The following table shows which additional information duties the other member states have stated for the prospectus:

<table>
<thead>
<tr>
<th>Additional information duty</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lit (h) of the annex of the Directive 996</td>
<td>CZ, EE (partially), LT (3)</td>
</tr>
<tr>
<td>Lit. (k) of the annex of the Directive 997</td>
<td>AT, BE, CZ, EE, FI, DE, HU, LU, PL, SK, SL, ES, SE (13)</td>
</tr>
<tr>
<td>Information on whether the consumer becomes the owner of the building or not</td>
<td>EE, DE, HU (3)</td>
</tr>
<tr>
<td>Information on the prohibition of advanced payments</td>
<td>HU, SE (2)</td>
</tr>
<tr>
<td>Information on the distance to the next means of transport</td>
<td>DK (1)</td>
</tr>
<tr>
<td>Information that the written information shall become part of the contract</td>
<td>HU (1)</td>
</tr>
<tr>
<td>Information that joining an exchange system does not guarantee that an exchange can be realised</td>
<td>BE, LU (2)</td>
</tr>
<tr>
<td>Information on the payment method</td>
<td>CZ, SK (2)</td>
</tr>
</tbody>
</table>

Rather problematic is the transposition in LITHUANIA where the information document does not have to contain information on the right of withdrawal. FRENCH law refers only to the

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995 In Dutch law the vendor has to provide any person requesting information a draft of the purchase contract, cf. CC Book 7, Art. 48f.
996 Litera (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.
997 Litera (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.
information the offer has to contain but does not regulate anything about a possible prospectus\textsuperscript{998}. The reason seems to be that under French law a prospectus would be considered as an offer anyway.

**aa. Information provided in the information document (prospectus) forms an integral part of the contract**

Article 3(2), sent. 1 of the Directive states that the information provided in the information document forms an integral part of the contract. Except for FRANCE, all the member states have transposed this rule according to the Directive. In France, there has not been a specific legislative transposition of Art. 3(2), sent. 1 of Directive 94/47, but because of general rules a written offer as the information document becomes part of the contract. Therefore, the effect that Art. 3(2), sent. 1 is supposed to achieve is reached in France as well.

<table>
<thead>
<tr>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>As in the Directive</strong></td>
</tr>
<tr>
<td><strong>Variations</strong></td>
</tr>
</tbody>
</table>

**bb. Changes resulting from circumstances beyond the vendor's control**

Article 3(2), sent. 2, sent. 3 and sent. 4 of the Directive state that, unless the parties expressly agree otherwise, only changes resulting from circumstances beyond the vendor's control may be made to the information provided in the information document. Any changes to that information shall be communicated to the purchaser before the contract is concluded. The contract shall expressly mention any such changes.

More than half of the member states have transposed the rule similarly to the Directive. Additionally, in AUSTRIA and LITHUANIA, no specific transposition measure was used, but general law principles apply and cover this gap. Therefore, the same result is reached as if Art. 3(2), sent. 1, sent. 2 and sent. 3 were legislatively implemented. Nevertheless, it is

\textsuperscript{998} Code de la Consommation, Art. L.121-61.
questionable whether this way of transposition complies with the requirements of the ECJ rulings in the cases C-144/99 – *Commission v Netherlands* and C-478/99 – *Commission v Sweden*. According to these rulings it is essential that the legal situation resulting from national implementing measures is sufficiently precise and clear and that individuals (also from other member states) are made fully aware of their rights so that, where appropriate, they may rely on them before the national courts.

The transposition laws of several countries vary from the rule laid down in the Directive. In the **Czech Republic**, **Poland**, **Slovenia** and the **United Kingdom**, the vendor is obliged to inform the consumer about the changes in writing. In **Slovakia** and the **Czech Republic**, the consumer has to be informed about any changes at least ten days before the conclusion of the contract. Also the **Finnish** law is stricter than the Directive, as it does not only set the requirement that the changes were outside the vendor’s scope of control, but in addition to that, the vendor must not have been able to reasonably foresee the changes.

In **Austria** the contract may only deviate from the information document if the consumer and the vendor expressly agree upon it. There is no requirement that the changes result from circumstances beyond the vendor's control. The situation is similar in **Estonia** and **Germany**, where the transposition laws also do not fully comply with the Directive since they do not require that changes result from circumstances beyond the vendor's control. On the contrary, in **Poland** the document may only be changed if the amendment results from circumstances beyond the trader’s control. Due to the estimation that the parties are not in an equal position, the document may not be changed just by the agreement of the parties.

Moreover, in **Slovakia**, **Slovenia**, **Poland**, **the Czech Republic**, **Spain** and **Germany**, there is no rule that the deviation from the information document has to be expressly mentioned in the contract. **France** did not transpose Art. 3(2), sent. 2, sent. 3 and sent. 4 at all.

<table>
<thead>
<tr>
<th>Member States</th>
</tr>
</thead>
</table>

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999 § 4(2) of the Timeshare Act.
1000 Article 3(2) of the Act of 13 July 2000 on the Protection of Purchasers in Respect of the Right to Use Buildings or Dwellings During Certain Time Each Year.
As in the Directive | BE, CY, DK, EL, HU, IE, IT, LV, LU, MT, NL, PT, SE (13)
---|---
Variations | AT, CZ, EE, FI, DE, LT, PL, SL, SK, ES, UK (11)
Not transposed | FR (1)

**cc. Advertising shall indicate the possibility of obtaining the information document**

All member states seem to have transposed the obligation stated in Art. 3(3) of Directive 94/47 that advertising shall indicate the possibility of obtaining the information document referred in Art. 3(1) of the Directive. The Spanish provisions\(^\text{1001}\) refer to the duty of the vendor to inform the purchaser on how to obtain general information on rights and to inform the purchaser on organisations and professionals that may help him (instead of informing on how to achieve the document).

<table>
<thead>
<tr>
<th>Advertising</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, CZ, DK, EE, FI, FR, DE, EL, HU, IE, IT, LV, LT, LU, MT, NL, PL, PT, SK, SL, SE, UK (24)</td>
</tr>
<tr>
<td>Variations</td>
<td>ES (1)</td>
</tr>
</tbody>
</table>

It has been criticised that the Directive does not regulate the time when the document should be given to a possible purchaser\(^\text{1002}\). As a consequence it might happen that the consumer receives the information document too shortly before he signs the contract, so that he cannot take note of the information. This could be avoided by inserting a provision similar to Art. 4 (1) of Directive 97/7\(^\text{1003}\) (“in good time prior to the conclusion of any contract”), perhaps clarified along the model of Directive 2002/65\(^\text{1004}\).

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\(^{1001}\) Mainly Art. 8(3) of the Law 42/1998.

\(^{1002}\) Howells/Wilhelmsson, EC Consumer Contract Law, 252.


b. Information duties in the contract

Article 4, 1st indent of Directive 94/47 states that the contract must include the items referred to in the Annex. Again, the vast numbers of member states have transposed this provision closely to the Directive. GREECE, MALTA, the NETHERLANDS, IRELAND and the UNITED KINGDOM have used the copy and paste method. Member states like e.g. FINLAND, GERMANY, ITALY, LATVIA, POLAND, and SLOVENIA have transposed this provision and the items listed in the Annex with some slight variations in the wording.

Some member states have stated - besides the information provided in the Annex of the Directive - additional information duties which have to be part of the contract. This additional information is often the same these member states already regulate in the provisions for the information document according to Art. 3(1) of the Directive (cf. above under III.1.a.). The following chart gives a short overview on some of these additional information duties:

<table>
<thead>
<tr>
<th>Additional information duty to be included in the contract</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Information on whether the consumer becomes the owner of the building or not</td>
<td>EE, DE, HU</td>
</tr>
<tr>
<td>Information on the prohibition of advanced payments</td>
<td>HU</td>
</tr>
<tr>
<td>Information on the distance to the next means of transport</td>
<td>DK</td>
</tr>
<tr>
<td>Information that the written information shall become part of the contract</td>
<td>HU,</td>
</tr>
<tr>
<td>Information that joining an exchange system does not guarantee that an exchange can be realised</td>
<td>BE, LU, PT</td>
</tr>
<tr>
<td>Information on the payment method</td>
<td>CZ, SK</td>
</tr>
</tbody>
</table>

Further additional information duties are only regulated with regard to the contract. For instance, the AUSTRIAN provisions concerning the list of information that has to be given,  

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1005 Art. 11(2)(g) of the Decree-Law 180/99.
also include the year of construction of the building, reserves for maintenance and repair or restrictions concerning the conveyance of the right. In PORTUGAL the vendor is obliged to provide the purchaser with additional information concerning the administration, the value of the immovable property, a description of the furniture and the confirmation that the immovable property is in conformity with the national building laws. In BELGIUM, the contract has to state all particulars on the mortgage situation of the immovable property or on any existing rights in rem that might directly influence its use. Furthermore, in BELGIUM the information about the right of withdrawal and the text of provision stating the right of withdrawal must be given in bold letters and in a separate frame on the first page of the contract. Also in LUXEMBOURG, this information has to be provided in bold. According to CYPRiot law the purchaser has to receive a form for the notification of withdrawal and an information document containing the purchaser's rights and the vendor's obligations. Also the GERMAN Regulation on duties to supply information in civil law contains in its Annex 2 a standard form, which suppliers can use in order to fulfil the obligation to inform the consumer on the existence, the exercise and the effects of the right of withdrawal.

Some member states have not transposed all items of the Annex. In LITHUANIA, the information stated in lit. (j), (k) and (l) of the Directive’s Annex have not been transposed, neither for the prospectus nor for the contract. The seller is only obliged to inform the consumer more generally of his rights. It is questionable whether this transposition is sufficient, especially with regard to the information on the right of withdrawal. In the CZECH REPUBLIC, in SLOVAKIA and in SPAIN, the contract also does not have to contain the information referred to in lit. (j) of the Annex. However, the impact of these lacks of transposition may be rather limited as this information needs to be provided in the information document anyway, which finally becomes part of the contract.

The overall picture shows extremely detailed information obligations, which are probably rather burdensome to the vendor. At the same time it can be doubted whether such catalogues

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1006 Section 3(1), No. 1 of the Timeshare Act.
1007 Art. 7(1) of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Timeshare Basis.
1008 Article 7(1)(3) of the Timeshare Act of 18 December 1998.
1010 BGB-Informationspflichten-Verordnung (BGB-InfoV).
1011 Article 9(1) of the Law 42/1998 which, nevertheless, states expanded information duties. Most of them have a more detailed structure than those stated in the Directive.
1012 A clause stating that acquisition will not result in costs, charges or obligations other than those specified in the contract.
lead to effective consumer protection instead of simply overloading the consumer with more information he can make use of in a sensible way. It might be rethought whether it is really useful to give the consumer most of the information twice.

From the viewpoint of a vendor who wants to undertake cross-border business lawfully, the actual situation in the member states must be seen as a substantive barrier to trade. As most member states have made use of the minimum clause, it is rather costly to find out what information has to be given under the law of a certain member state (as to the formal and language requirements to be fulfilled see below in the next chapter).

In the course of the review of the Directive, it could be considered identifying some items of core information which must be provided in any case. The starting point could be a general clause, saying that the vendor has to provide such information concerning the goods or services to be provided as the average consumer can reasonably expect and as he needs in the given context to take an informed transactional decision. Such a general clause could be supplemented by an indicative list of core information which must be provided, if appropriate, in the case of timeshare contracts.

2. Requirements with regard to form and language of the information document and the contract

a. Formal requirements for the contract

Article 4, 1st indent of Directive 94/47 states that the contract must be concluded in written form. Almost all member states have implemented this obligation very closely to the Directive. Only GREECE sets out a stricter requirement in the written form, namely the deed. In POLAND, the contract does not have to be in written form whenever a different specific form for the conclusion of a contract has been laid down. Regarding this different specific form, there is no explicit requirement that it must be stricter than the written form. But this should follow from the rule that member state law has to be interpreted in the light of the Directive.

In ESTONIA and GERMANY the transposition laws conform to the Directive, but also set out the possibility that more stringent requirements concerning the form of a contract can be provided
by law. In Germany, for example, it does often not suffice that the contract is in writing (CC § 126). It also requires authentication by a public notary in accordance with CC § 128 and § 311b. This applies, for instance, to timeshare contracts through which the purchaser acquires joint ownership of a property. In Spain, the purchaser has the right to demand the conclusion of the contract in a notarial deed and he has to be informed of this option.\footnote{1013}

<table>
<thead>
<tr>
<th>Formal Requirements</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, CZ, DK, FI, FR, HU, IE, IT, LT, LV, LU, MT, NL, PT, SK, SL, ES, SE, UK (21)</td>
</tr>
<tr>
<td>Variations</td>
<td>DE, EE, EL, PL (4)</td>
</tr>
</tbody>
</table>

b. Language of the contract and the information document (Art. 4, 2\textsuperscript{nd} indent)

According to Art. 4, 2\textsuperscript{nd} indent of the Directive the contract and the information document must be drawn up in the language or in one of the languages of the member states in which the purchaser is resident or in the language or one of the languages of the member state of which he is national which shall be an official language or official languages of the Community, at the purchaser’s option.

Most of the member states have transposed this provision. Rather problematic are the provisions in Latvia and Lithuania where the contract has to be drawn up in the official language of the state, thus in Latvian and Lithuanian respectively.

Malta\footnote{1014} offers the consumer an even wider choice than the Directive requires. He can choose between the language of the member state where he is resident, the language of the member state of which he is national and any official language of the Community that he understands. In Estonia, the purchaser can choose between the language of the state where he is resident, the language of the state of which he is a national and the Estonian language. In Finland\footnote{1015}, Denmark and Sweden (in Sweden only for the information document) the

\footnote{1013} Art. 9(1) no. 11 lit. b of the Law 42/1998.
\footnote{1014} Regulation 6(1)(3) of the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000.
\footnote{1015} Chapter 10 sec. 6(2) of the Consumer Protection Act of 20 January 1978/38.
consumer can choose not only one of the official languages of the EEC, but also Norwegian or Icelandic. SLOVENIAN law rules that a contract or an information document referring to a property in the Republic of Slovenia, or one given to a citizen of the Republic of Slovenia or an individual with permanent residence in the Republic of Slovenia must also be available in the Slovene language\textsuperscript{1016}. The CZECH REPUBLIC and SLOVAKIA have not stated language requirements for the information document. FINNISH law only rules that for promotional events the information document shall be at least available in the language used in the invitation\textsuperscript{1017}. This seems to be an infringement of the Directive. However, according to the preparatory works, this provision (Chapter 10 sec. 6(2) of the Consumer Protection Act) is meant to correctly transpose the language requirements also with regard to the information document. This might at least partially be true because of an indirect effect of the FINNISH provisions on the language of the contract. According to these provisions in Chapter 10 sec. 7 of the Consumer Protection Act, the prospectus automatically becomes part of the contract. The effect is that a trader cannot enter into contracts at all unless complying with the language provisions in the information document.

In SPAIN foreign purchasers may request a translation in an EC language of their choice. Furthermore consumers’ organisations and tourist bodies can require a translation.

<table>
<thead>
<tr>
<th>Language</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, DE, FR, EL, HU, IE, IT, LU, NL, PL, PT, ES, UK (15)</td>
</tr>
<tr>
<td>Variations</td>
<td>CZ, DK, EE, FI, MT, SK, SL, SE (8)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>LV, LT (2)</td>
</tr>
</tbody>
</table>

It is evident, that the language provisions can become very burdensome for the vendor. This can even increase, because also the necessary content of the information document depends on the applicable law. In theory, a vendor could be obliged to provide up to 25 different types of information documents (one for each jurisdiction) and to translate these documents in all the (not only official) languages a consumer may be entitled to choose. However, is has to be considered that timeshare contracts are complicated and that the timeshare objects are often located in a country other than the consumer’s home country and frequently sold to tourists

\textsuperscript{1016} Article 60(4) of the Consumer Protection Act.
\textsuperscript{1017} Chapter 10 sec. 6(2) of the Consumer Protection Act of 20 January 1978/38.
during their holiday. It would invalidate the information duties if the consumer did not have the possibility to obtain a version in a language he could understand. It follows from the idea of an EU-wide internal market that all possible consumers should be enabled to participate. Therefore, it would be difficult to find reasons for lowering the language requirements. The solution should be sought by simplifying the long lists of the information items to be given. If, for instance, the EU legislation provides for a standard form for the information on the withdrawal right, it is easy for the vendors to provide it in all official languages.

c. Option stated in Art. 4(1) 2nd indent, sent. 2

Article 4(1) 2nd indent, sent. 2 of Directive 94/47 states that the member state in which the purchaser is resident may, however, require that the contract has to be drawn up in any case in its language or languages. 9 countries have made use of this option, whereas 8 member states did not (cf. the table enclosed). Some legislations have also laid down some provisions varying from the Directive. In GREECE, LATVIA, LITHUANIA and PORTUGAL the contract has to be written in the official language of the respective state in any case. The FRENCH Code de la Consommation states the contract has to be drawn up in French if the purchaser is resident in France or if the immovable property is situated in France. In IRELAND the seller is required to provide at the purchaser’s request, in the case of a purchaser residing within Ireland, a version of the contract in English, or in English and Irish (which has become an official language). MALTA goes further because the seller shall provide the buyer with a certified translation of the contract in Maltese or in English if the buyer so requests, irrespective of whether the buyer’s residence is in Malta. In SPAIN the contract has to be drawn up in Castilian or in any other of the official Spanish languages as chosen by the purchaser. These can be languages other than the official languages of the Community. SLOVENIAN law rules that a contract or an information document referring to a property in the Republic of Slovenia, or one given to a citizen of the Republic of Slovenia or an individual with

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1018 Code de la Consommation, Art. L121-68.
1020 Regulation 6(2) of the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000.
1021 According to Spanish doctrine this deviation is deemed to be legitimate; Lete Achirica, La configuración de la multipropiedad en España, 125, 149; Munar Bernat, La regulación española de la “multipropiedad”;, 205.
permanent residence in the Republic of Slovenia must also be available in the Slovenian language\footnote{Article 60(4) of the Consumer Protection Act.}. 

<table>
<thead>
<tr>
<th>Option stated in Art. 4 (1), 2nd indent</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option used</td>
<td>CY, CZ, FR, HU, IT, LU, PL, SK, UK (9)</td>
</tr>
<tr>
<td>Option not transposed</td>
<td>AT, BE, DK, EE, FI, DE, NL, SE (8)</td>
</tr>
<tr>
<td>Variations</td>
<td>EL, IE, LV, LT, MT, PT, SL, ES (8)</td>
</tr>
</tbody>
</table>

**d. Certified translation of the contract in the language of the member state in which the immovable property is situated**

A great majority of member states has transposed the vendor’s obligation to provide a certified translation of the contract in the language of the member state in which the immovable property is situated (cf. the table enclosed). There are only a few deviations in some member states. MALTESE law states that the seller shall provide the buyer with a certified translation of the contract in Maltese or in English as the buyer may so request, but not referring to the location of the immovable property\footnote{Article 6(2) of the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000.}. In GERMANY\footnote{CC § 484(2)(3).}, SLOVENIA\footnote{Article 60a(3) of the Consumer Protection Act.} and HUNGARY\footnote{§ 5(3) of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.} the obligation to give to the consumer a certified translation of the contract in the language of the country where the residential property is located, does not apply if subjects of a timeshare contract are parts of residential properties located in two or more countries. In FINLAND\footnote{Chapter 10 sec. 6(2) of the Consumer Protection Act of 20 January 1978/38.} the translation has to be authenticated by a licensed translator, in POLAND by a “sworn translator”\footnote{Article 5(3), sent. 2 of the Act of 13 July 2000 on the Protection of Purchasers in Respect of the Right to Use Buildings or Dwellings During Certain Time Each Year.}. In some member states the official version of the Directive does not request a “certified translation” so that the national legislation does not contain this requirement, e.g. ITALY, SPAIN.
e. Sanctions for non-compliance with the form and language requirements

Most transposition laws lay down sanctions for not complying with the Directive regarding the written form and the language obligation. Hereby nullity of the contract, right of the consumer to cancel or withdraw from the contract or fines are popular sanctions.

Regarding non-compliance with the obligation to conclude a timeshare contract in written form, in Austria, Belgium, Cyprus, France, Greece\textsuperscript{1029}, Germany, Italy, Luxembourg, the Netherlands and Poland, for instance, the contract is void. In the Czech Republic, Estonia, Denmark, Finland, Spain and Sweden, for example, if the contract is not set up in writing, the consumer is not bound by that agreement and can terminate or withdraw from the contract within specified periods.

In Cyprus, for instance, administrative fines can additionally be imposed on the vendor. In Belgium a vendor can only be sanctioned to pay a fine from EUR 150 up to 10 000, if he did not respect any of the provisions in the Timeshare Act. Furthermore, his registration can be revoked. In Slovenia, vendors who do not meet the obligation of concluding contracts in written form are sanctioned by fines. The law distinguishes between different kinds of vendors. Whereas a natural person can be sanctioned to pay a fine between 1.000.000 SIT – 5.000.000 SIT, a fine between 3.000.000 SIT – 10.000.000 SIT can be imposed on a legal person and, additionally, on the accountable person of the undertaking this figure is between 300.000 SIT – 1.000.000 SIT. In Ireland, a vendor or his agent who fails to comply with Regulation 4, 5 (on information), 6 (on withdrawal) or 8 (prohibition on advance payments) is guilty of an offence and liable on summary conviction to a fine not exceeding £1,500 [€1,904.61], to be prosecuted summarily by the Director of Consumer Affairs\textsuperscript{1030}.

\textsuperscript{1029} Deed as formal requirement.
\textsuperscript{1030} Regulation 16 of the European Communities (Contracts for Time Sharing of Immovable Property—Protection of Purchasers) Regulations 1997 and 2000.
Concerning the obligation to set up the contract in a specific language, the same kinds of sanctions as mentioned above have been chosen to punish the vendor for not complying with the Directive. For instance, in AUSTRIA and FRANCE, the timeshare contract is void, if it is not set up in the required language. In AUSTRIA, the purchaser has to claim the nullity of the contract within two years of the beginning of the contract. In the CZECH REPUBLIC, ESTONIA, FINLAND, SPAIN and SWEDEN, if the timeshare contract has not been set up in the required language, the consumer has the right to terminate or withdraw from the contract. BELGIUM, CYPRUS and DENMARK, for instance, lay down that the vendor shall be fined. In HUNGARY the withdrawal period is prolonged up to 30 days if the information document was not provided in the correct language\(^{1031}\). In GERMANY the withdrawal period is one month, if the information document is not provided at all or not provided in the correct language\(^{1032}\).

### 3. Right of withdrawal

#### a. Information duty

According to lit. (l) of the Annex in conjunction with Art. 3 and 4 of the Directive the information document and the contract must include information on the right to withdraw from the contract and must indicate the person to whom any letter of withdrawal should be sent […]. Thus, the information document and the contract have to contain information on the right of withdrawal and how to exercise it. This provision has been transposed closely to the Directive by most of the member states. Different from all the other member states LITHUANIA does not oblige the vendor to indicate the right of withdrawal to the consumer, neither in the information document nor in the contract.

Many member states have additionally laid down precise provisions on how to inform the purchaser, e.g. by standard forms or precise wordings to be used. Such countries are, e.g., BELGIUM, CYPRUS, FRANCE, GERMANY, GREECE, LATVIA, LUXEMBOURG, the UNITED KINGDOM\(^{1033}\) and MALTA. In MALTA\(^{1034}\) a clause with the following wording must be included in the contract:

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\(^{1031}\) § 8(2) of the Government Decree 20/1999. (II. 5.) on contracts for the purchase of the right to use immovable property on a timeshare basis.

\(^{1032}\) CC. § 485 (3).

\(^{1033}\) Art. 3(5) of the Timeshare (Cancellation of Information) Order 2003.

\(^{1034}\) Reg. 4.4 Timeshare Regulations.
“You as the buyer have the right to withdraw or cancel such a contract in accordance with ‘The Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations, 2000’. These Regulations provide that a buyer may withdraw, without giving any reason, from such a contract within ten days from when the parties sign the contract.”

If the clause is missing, the buyer may claim that the contract is null and void.

In Belgium\textsuperscript{1035} and Luxembourg the information about the right of withdrawal must be given in bold letters and in a separate frame. German law also foresees that the vendor must formally inform the consumer about the right of withdrawal. For this purpose the vendor can use an information form of withdrawal designed by the legislator. This information does not necessarily have to be in written form, but be sufficiently provided in text form (email, fax, CD-ROM). Some authors assume that this is an infringement of EC law because Art. 4 states that the contract with the information referred to in the Annex including the information on the right of withdrawal needs to be in writing\textsuperscript{1036}. In the course of a review of the Directive it could be made clear whether “in writing” means text on paper or also includes, e.g., electronic text on a durable medium.

In Cyprus\textsuperscript{1037} and Latvia traders also have to inform consumers about their right of withdrawal by a separate written notice and in France\textsuperscript{1038} the vendor must provide the consumer with a special form which the consumer can use for exercising his right of withdrawal. In Greece the consumer has also to be given a separate form containing information about the right of withdrawal and its exercise and a specimen/sample of the explanation of withdrawal.

As already said, it might really be helpful for improving cross-border trade if a standard form for the information about the withdrawal right were provided on a European level.

\textsuperscript{1035} Art. 7 \S\ 1 in fine TA.
\textsuperscript{1036} Kelp, Timesharing-Verträge, 63; Mankowski, VuR 2001, 364.
\textsuperscript{1037} Art. 6(a) of the Timeshare Contract Law of 2001, L.113(I)/2001.
\textsuperscript{1038} Article L. 121-63.
b. Withdrawal period

aa. Right of withdrawal within 10 calendar days of both parties signing the contract

The Directive states in Art. 5(1) 1st indent a period of withdrawal of 10 calendar days after the signature of the contract by both parties or the signature of a binding preliminary contract. If the last day of the period is a Sunday or a holiday, the period is prolonged to the next working day.

The ten calendar days period has been adopted by Denmark, Estonia, Finland, France, Greece, Ireland, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Slovakia, Spain and Sweden. Many member states have used the minimum clause to prolong the withdrawal period. The period lasts for 10 working days in Portugal and Italy, 14 calendar days in Austria, Latvia and the United Kingdom, two weeks (in some cases one month) in Germany, 15 calendar days in Cyprus, the Czech Republic, Hungary and Slovenia and even 15 working days in Belgium.

<table>
<thead>
<tr>
<th>Withdrawal Regular Period</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>10 calendar days</td>
<td>DK, EE, FI, FR, EL, IE, LT, LU, MT, NL, PL, SK, ES, SE (14)</td>
</tr>
<tr>
<td>10 working days</td>
<td>IT, PT (2)</td>
</tr>
<tr>
<td>14 calendar days</td>
<td>AT, LV, UK (3)</td>
</tr>
<tr>
<td>Two weeks</td>
<td>DE (one month, if the necessary information is provided after conclusion of contract) (1)</td>
</tr>
<tr>
<td>15 calendar days</td>
<td>CY, CZ, HU, SL (4)</td>
</tr>
<tr>
<td>15 working days</td>
<td>BE (1)</td>
</tr>
</tbody>
</table>

In Cyprus, Finland, Ireland, Luxembourg, Malta and Spain (Finland, Spain and Lithuania not referring to the preliminary contracts) the beginning of the withdrawal period is regulated as in the Directive. Many member states do not refer to the signing of the contract but to the conclusion of the contract. They are the Czech Republic, Denmark, Italy, Latvia, Lithuania, Portugal, Slovakia, Slovenia and the United Kingdom. In Belgium and Sweden the period begins the day after the signature of the contract by both parties. In French law the 10 day period starts when the purchaser sends the accepted offer to
the professional. In addition to that, France attempts to improve the protection of the consumer by requiring that the offer should be maintained for at least 7 days\textsuperscript{1039}. However, this provision just regulates the period during which the vendor is bound by his offer\textsuperscript{1040}. The consumer is not detained from accepting the offer before the 7 day period expires.

In Austria, Greece, Germany, Estonia, the Netherlands, Hungary and Poland the withdrawal period starts running from the day when the contract document was delivered to the purchaser. In Germany, the period does not start running before the vendor additionally has informed the purchaser on the right of withdrawal and provided some further information\textsuperscript{1041}. These provisions improve the position of the consumer and are therefore in accordance with the Directive.

Only some member states have seen the necessity to include an explicit provision on the signature of a binding preliminary contract in their national law, e.g. Cyprus, Greece, Hungary, Ireland, Luxembourg, Malta and Slovenia.

Table: Start of the withdrawal period

| After the signature of the contract | CY, FI, IE, LU, MT, ES (6) |
| After the conclusion of the contract | CZ, DK, IT, LT, LV, PT, SK, SL, UK (9) |
| Day after the day of signature of the contract | BE, SE (2) |
| Delivery of the contract copy | AT, EL, DE\textsuperscript{1042}, EE, HU, NL, PL (7) |
| Day of sending the offer to the vendor | FR (1) |

Article 5(1) 1\textsuperscript{st} indent, sent. 2 of Directive 94/47 states the extension of the period in case of Sundays or public holidays. This is an odd provision because the EEC-Regulation 1182/71 determining the rules applicable to periods, dates and time limits, regulates rule in its Art. 3(4) that, where the last day of a period is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day. Therefore, the only function

\textsuperscript{1039} Code de la Consommation, Art. L. 121-63.
\textsuperscript{1040} Cf. Calais-Auloy, Steinmetz, Droit de la Consommation, no. 483.
\textsuperscript{1041} Stated in § 2 BGB-InfoV.
\textsuperscript{1042} The period does not start running before the vendor additionally has informed the purchaser on the right of withdrawal and provided some further information stated in § 2 of the Regulation on BGB - Information Duties.
of Art. 5(1) 1st indent, sent. 2 of Directive 94/47 is to amend the general rule in Art. 3(4) of Regulation 1182/71 in the sense that periods shall end on Saturdays. It is doubtful that this was meant. The issue should be clarified, preferably by striking out Art. 5(1) 1st indent, sent. 2 of Directive 94/47 and referring to Regulation 1182/71. This would also make clear that the period has to be calculated according to the rules laid down in this Regulation.

Several member states, for instance Italy, Germany, Lithuania, Malta, Poland and Slovenia, have transposed Art. 5(1) 1st indent, sent. 2 of Directive 94/47 by referring to pre-existing provisions in their civil law. In Portugal and Italy the withdrawal is 10 working days, Belgium 15 working days, so that the period always expires on a working day.

The overall picture shows a great variety between the member states. It is obvious that the differences of the length and the beginning (also of the rules on calculation) of the withdrawal period can make cross-border business difficult and therefore may amount to a barrier to trade. This is in particular true with regard to the information of the consumer about his right of withdrawal. For this reason a (full) harmonisation of the regular period seems desirable. A 14 day period would not substantially deprive consumers from the rights they are actually enjoying under the national laws.

But it should be borne in mind that the period of withdrawal provided for in Directive 94/47 may be considered as being too short for fulfilling its purpose. This might be the case, especially, when a consumer signs a contract at the beginning of his holidays, and may need to exercise his right of withdrawal during the holidays, but has no possibility to speak to a lawyer in his home country. Moreover, timeshare contracts are often rather complicated and difficult to compare; in particular in cross-border cases it may also be difficult and time consuming to get competent legal advice. Much more than in case of the withdrawal periods granted under Directives 97/7\textsuperscript{1043} and 85/577\textsuperscript{1044}, it could be considered as problematic to prohibit longer periods the member states may want to provide. Therefore, it might also be considered leaving some discretion to the member states. Potential barriers to trade could perhaps be avoided by prescribing a maximum (regular) period. It is a political decision as to

\begin{footnotes}
\item[1043] Directive 97/7 on distance selling.
\item[1044] Directive 85/577 on doorstep selling.
\end{footnotes}
how long such a regular maximum period could be. The considerations made here would lead to a duration of the withdrawal period from one month, up to about three months.

**bb. Right of withdrawal in case of lack of information**

According to Art. 5(1) 2\textsuperscript{nd} and 3\textsuperscript{rd} indent of Directive 94/47 the member states shall make provisions in their legislation to ensure that:

“in addition to the possibilities available to the purchaser under national laws on the nullity of contracts, the purchaser shall have the right:

- […]
- if the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, at the time of both parties’ signing the contract or of both parties’ signing a binding preliminary contract, to cancel the contract within three months thereof. If the information in question is provided within those three months, the purchaser's withdrawal period provided for in the 1\textsuperscript{st} indent, shall then start,
- if by the end of the three-month period provided for in the second indent the purchaser has not exercised the right to cancel and the contract does not include the information referred to in points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, to the withdrawal period provided for in the 1\textsuperscript{st} indent from the day after the end of that three-month period;”

The provisions of Art. 5(1) 2\textsuperscript{nd} and 3\textsuperscript{rd} indent of Directive 94/47 have not been transposed at all in FRANCE. The French legislator only transposed a right of withdrawal within 10 days. In addition to that, it is stipulated in the French transposition law that in consequence of a failure to give the necessary information in the contract the contract shall be null and void\textsuperscript{1045}.

In the other member states the non-compliance with information duties leads to a prolongation of the withdrawal period. However, the lists of information duties which have this effect in case of non-compliance by the vendor, considerably vary in the member states. For the general transposition of Art. 4 of the Directive, which regulates the information to be included in the contract, see above under point D III 1 b.

It should be noted that the non-compliance with information duties does not lead in any case to a prolongation of the withdrawal period. The Directive and several member states

\textsuperscript{1045} Code de la Consommation, Art. L. 121-76, L.121-61.
distinguish between information duties which, if infringed, have the effect of prolongation of the withdrawal period, and others, which do not have this effect (but may lead to other sanctions if breached).

For instance, GREECE, IRELAND, MALTA, and the UNITED KINGDOM make the same distinction as the Directive, i.e. only the information items listed in Art. 5(1) 2nd and 3rd indent have the effect of prolongation. In contrast to this, many other member states do not differentiate between the information items they prescribe to be included in the contract and grant a prolonged right of withdrawal if any of the obligatory information is lacking in the contract, e.g. AUSTRIA, BELGIUM, the CZECH REPUBLIC, ESTONIA, FINLAND, GERMANY, LATVIA, LITHUANIA, LUXEMBOURG, THE NETHERLANDS, PORTUGAL, SLOVAKIA, SLOVENIA, SWEDEN and SPAIN.

Some member states differentiate between the information duties, but they grant a prolongation of the withdrawal period also for some more information items than stated in Art. 5(1) 2nd indent of the Directive, but not for their whole catalogue of information duties. Such countries are e.g. CYPRUS and HUNGARY (information on prohibition of advanced payments), DENMARK (information about the guarantee regarding the completion of the immovable property and the person where the consumer may address complaints) and POLAND (lit. (j) of the Directive’s Annex).

ITALIAN law seems to infringe the Directive, because a breach of the information duties listed in lit. (d)(2) and lit. (m) (concerning the parties) of the Directive’s Annex does not lead to a prolongation of the withdrawal period.

**Table: Information duties sanctioned by a prolongation of the withdrawal period**

<table>
<thead>
<tr>
<th>Incomplete transposition of Art. 5(1) 2nd and 3rd indent</th>
<th>IT (lit. (d)(2), and lit. (m) are missing)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Substantially equivalent to Art. 5(1) 2nd and 3rd indent</td>
<td>EL, IE, MT, UK (4)</td>
</tr>
<tr>
<td>All information items to be included in the contract (NB: differing in the member states)</td>
<td>AT, BE, CZ, EE, FI, DE, LV, LT, LU, NL, PT, SK, SL, ES, SE (15)</td>
</tr>
</tbody>
</table>
Some variation could also be observed with regard to the length of the prolonged period. Most of the member states have adopted a period of 3 months in line with the Directive. In Lithuania the period is prolonged to 4 months. In Germany in case of missing information the purchaser is entitled to revoke the contract even until up to 6 months after the conclusion of the contract. The withdrawal-period of 2 weeks does not start until the purchaser receives all the necessary information in written form. In the event of an ongoing lack of information concerning the right of revocation the withdrawal period is unlimited. Problematic is the transposition in Latvia where the period is 90 calendar days instead of 3 months. The French legislator has not specifically transposed these provisions (see above).

**Table: Withdrawal period in case of lacking information (Art. 5(1) 2nd indent)**

<table>
<thead>
<tr>
<th>Period</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>Period of 3 months</td>
<td>AT, BE, CY, CZ, DK, EE, FI, EL, HU, IE, IT, LU, MT, NL, PL, PT, SK, SL, ES, SE, UK (21)</td>
</tr>
<tr>
<td>Period of 4 months</td>
<td>LT (1)</td>
</tr>
<tr>
<td>Period of 90 calendar days</td>
<td>LV (1)</td>
</tr>
<tr>
<td>Period of up to 6 months; if information on withdrawal is incomplete or missing, even unlimited</td>
<td>DE (1)</td>
</tr>
<tr>
<td>No period, contract is void</td>
<td>FR (1)</td>
</tr>
</tbody>
</table>

**cc. Withdrawal period, if the information is provided within the 3 months**

Article 5(1) 2nd indent, sent. 2 of the Directive states that, if the information in question is provided within those three months, the purchaser's “regular” withdrawal period shall then start. It should be borne in mind that the length of the regular period is different in the member states (for details see above). In Germany an extended withdrawal period of one month starts to run if the missing information is provided subsequently.

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1046 Article 22(2), sent. 2 of the Law on Consumer Protection of the Republic of Lithuania.
Regarding the beginning of the period, most member states have adopted the starting point as foreseen in the Directive. The POLISH and the DUTCH law extend the regular period of withdrawal by the period between the provision of a copy of the contract and the provision of the missing data. Some member states lay down explicitly that the missing information must be provided in writing, e.g. in DENMARK, GERMANY, HUNGARY, the NETHERLANDS, POLAND and SLOVENIA. This could be clarified in the Directive. In BELGIUM AND SWEDEN the period starts on the day following the day on which the missing information was provided. In AUSTRIA and FINLAND the purchaser has to receive a corrected version of the contract. FRANCE has not stated any provisions similar to that in the Directive because the contract is void if the offer does not contain all obligatory information.

Table: Start of regular period after provision of missing information

<table>
<thead>
<tr>
<th>After the provision of the information</th>
<th>CY, CZ, DK (1047), EE, DE (1048), EL, HU (1049), IE, IT, LV, LT, LU, MT, NL, PL, PT, SK, SL, ES, UK (20)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Explicitly in writing: DK, DE, HU, NL, PL, SL</td>
<td></td>
</tr>
<tr>
<td>Day following the day on which information is provided</td>
<td>BE, SE (1050) (2)</td>
</tr>
<tr>
<td>Delivery of a copy of the contract</td>
<td>AT (&quot;Ergänzungsurkunde&quot;), FI (1051) (&quot;rectified contract&quot;) (2)</td>
</tr>
<tr>
<td>No specific legislative transposition</td>
<td>FR (1)</td>
</tr>
</tbody>
</table>

**dd. Withdrawal period, if missing information is not provided within 3 months**

According to the Directive, 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 points (a), (b), (c), (d) (1), (d) (2), (h), (i), (k), (l) and (m) of the Annex, the consumer has the

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1047 Section 9(2) of the Timeshare Act.
1048 In GERMANY, instead of the regular 2 week period, an extended period of one month starts running, when the information is provided subsequently.
1049 The day when information provided in written form and becomes part of the contract by agreement, cf. § 8(3) of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.
right to withdraw from the contract within the regular (in the Directive: 10 days) withdrawal period from the day after the end of that three-month period.

The transposition in the member states varies considerably, partially also because the length of the regular withdrawal period is different in the member states. For instance, in LITHUANIA the period is 4 months counting from the conclusion of the contract. In BELGIUM the period of withdrawal is one year, counting from the day following the day on which the contract was signed, if the missing information has not been provided within 3 months. In GERMANY, the length of the period depends on the kind of the information that is lacking. If the information about the right of withdrawal is lacking or incomplete, there is no period for the withdrawal at all. In this case, the consumer has in effect an eternal right of withdrawal. If other necessary information is lacking, the extended withdrawal period is 6 months\textsuperscript{1052}. Also in AUSTRIA, the withdrawal period does not begin before the purchaser is informed of his right of withdrawal.

**Table: Period of withdrawal if information is not provided**

<table>
<thead>
<tr>
<th>Period of withdrawal if information is not provided</th>
<th>Countries</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 months plus ten days</td>
<td>DK, EE, FI, EL\textsuperscript{1053}, LU, IT\textsuperscript{1054}, IE, MT (working days), NL\textsuperscript{1055}, PL, PT (working days), SK, ES, SE, UK (15)</td>
</tr>
<tr>
<td>3 months plus 14/15 days</td>
<td>CZ, CY, HU, SL (4)</td>
</tr>
<tr>
<td>90 calendar days plus 14 days</td>
<td>LV</td>
</tr>
<tr>
<td>4 months</td>
<td>LT\textsuperscript{1056}</td>
</tr>
<tr>
<td>1 year</td>
<td>BE\textsuperscript{1057}</td>
</tr>
<tr>
<td>3 months plus 14 days or unlimited</td>
<td>AT\textsuperscript{1058}</td>
</tr>
<tr>
<td>6 months or unlimited</td>
<td>DE\textsuperscript{1059}</td>
</tr>
<tr>
<td>No specific legislative transposition</td>
<td>FR</td>
</tr>
</tbody>
</table>

\textsuperscript{1052} CC § 355(3)(1).  
\textsuperscript{1053} Article 4(1)(c) of the Decree 182/1999.  
\textsuperscript{1054} Article 73(2) and (4) of the Consumer Code.  
\textsuperscript{1055} CC Book 7 Art. 48c(1), sent. 2.  
\textsuperscript{1056} Article 22(2), sent. 1 Law on Consumer Protection of the Republic of Lithuania.  
\textsuperscript{1057} Article 9(1)(3) of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis.  
\textsuperscript{1058} § 6(2) of the Timeshare Act.  
\textsuperscript{1059} CC § 355(3) and § 485(3).
In general, the Directive’s provisions on the prolongation of the withdrawal period in case of lacking information are rather intricate. With regard to the case that the information about the right of withdrawal is lacking, they are not in coherence with the ECJ case C-481/99 – *Heininger*. It can also be doubted whether a 3 month plus 10 days period is long enough. A possible way to simplify the provisions could be to follow the model of Belgium and to introduce a prolonged period of one year, starting from the point the contract is concluded. It would then have to be considered, whether this period shall also be applicable in *Heininger* cases.

**ee. Additional right of withdrawal**

Some member states have additionally granted a right of withdrawal in situations not foreseen in the Directive. Many member states grant a right of withdrawal if the formal and language requirements have not been observed. In Poland\textsuperscript{1060} the consumer can withdraw within three months from delivery of the contract document if the prospectus was not delivered to the purchaser or if the prospectus or the contract were not written in the correct language. In Slovenia\textsuperscript{1061} the withdrawal is also possible within maximum 3 months and 15 days, if a prospectus was not presented, or if the contract was drawn up in a language not compliant with the provisions of the Consumer Protection Act. In Hungary\textsuperscript{1062} the consumer can exercise the right of withdrawal within 30 calendar days in case of missing information form or if the latter does not meet the language requirements. In Estonia\textsuperscript{1063} the consumer has the right to withdraw within one month after receipt of the signed contract, if an information document is not submitted to the consumer before entry into a contract or if the document is not submitted in the prescribed language. In Sweden\textsuperscript{1064} the right to withdraw within a period of three months also applies if the provisions concerning the language of the contract are not fulfilled.

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\textsuperscript{1060} Article 6(3) of the Act of 13 July 2000 on the Protection of Purchasers in Respect of the Right to Use Buildings or Dwellings During Certain Time Each Year.

\textsuperscript{1061} Article 60c(2) of the Consumer Protection Act.

\textsuperscript{1062} § 8(2) of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.

\textsuperscript{1063} Section 383(3) of the Law of Obligations Act.

\textsuperscript{1064} Article 11(1) of the Timeshare Contracts (Consumer Protection) Act 1997:218.
In the CZECH REPUBLIC\textsuperscript{1065} the consumer can additionally withdraw from the contract within 3 months counting from the date of the agreed completion of the building, if it is not properly completed by that date. In SPAIN the purchaser has a right of withdrawal if the prohibition of the label \textit{multipropiedad} ("shared property", "joint ownership")\textsuperscript{1066} has been disregarded\textsuperscript{1067}.

\textbf{c. Formal requirements for exercising the withdrawal}

The Directive does not stipulate any formal requirements for the exercise of the right of withdrawal and only states in its Art. 5(2) that the consumer has to notify the recipient appearing in the contract by a means that can be proven. The result is that the member states have discretion to regulate formal requirements for the exercise of the withdrawal.

AUSTRIA, CYPRUS, FINLAND\textsuperscript{1068}, GREECE\textsuperscript{1069}, HUNGARY\textsuperscript{1070}, LITHUANIA\textsuperscript{1071}, LATVIA, POLAND, SLOVENIA\textsuperscript{1072} and the UNITED KINGDOM\textsuperscript{1073} have regulated that the withdrawal must be notified to the vendor by a written notice. In SLOVENIA the purchaser can also implicitly express his withdrawal. In IRELAND\textsuperscript{1074} the notice can, but need not be in writing. In CYPRUS\textsuperscript{1075} the consumer must complete and send a written notification of withdrawal which

\begin{itemize}
\item \textsuperscript{1065} CC § 63(1)(d).
\item \textsuperscript{1066} Article 10(2) and Article 8(1) of the Law 42/1998.
\item \textsuperscript{1067} See also the CA Alicante judgment of 19 September 2002, no. 545/2002, “Sain 333 S. L.” v Francisco Javier G. B. and Amparo M. G. The Court sanctioned the use of this label with the nullity of the contract due to the infringement of a mandatory rule (Art. 6(3) of the CC).
\item \textsuperscript{1068} 10:11 CPA stipulates that a written informal notice must be sent and that there is no need to use a means which can be proved.
\item \textsuperscript{1069} Although the wording „declaration in writing“ is unambiguous, in Greek legal literature Art. 4(2) of Decree 182/99 is seen as a burden of proof provision only. As a consequence, the purchaser could also withdraw from the contract by other means if the purchaser can prove it. The jurisprudence is inconsistent in this point but tends to interpret this provision as a formal regulation.
\item \textsuperscript{1070} § 10(1) of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.
\item \textsuperscript{1071} CC Art. 6.370(1)(1).
\item \textsuperscript{1072} Article 60c(1) of the Consumer Protection Act.
\item \textsuperscript{1073} Reg. 12(6) Timeshare Act 1992.
\item \textsuperscript{1074} Article 8 of the European Communities (Contracts for Time Sharing of Immovable Property—Protection of Purchasers) Regulations 1997 and 2000.
\item \textsuperscript{1075} Article 9 (1), sent. 1 of The Timeshare Contract Law of 2001, L.113(I)/2001.
\item \textsuperscript{1076} CC § 55(1)(o), § 48 para. (1) and (2), § 49.
\item \textsuperscript{1077} § 6(3), sent. 1 and sent. 2 of the Timeshare Act.
\item \textsuperscript{1078} Article 8(1) of the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations 2000.
\item \textsuperscript{1079} Article 10(2), sent. 1 of the Timeshare Act of 18 December 1998.
\item \textsuperscript{1080} Article 73(5) of the Consumer Code.
\item \textsuperscript{1081} Article L. 121-63.
\end{itemize}
has to contain the purchaser’s decision to withdraw, the date at which the notice is given and
the name and address of the recipient of the notice according to the recipient named contract.
In SLOVAKIA the notice of withdrawal needs to meet the form in which the contract was
agreed. As the contract has to be concluded in writing the notice of withdrawal must be in
writing, too.

In AUSTRIA the withdrawal can be exercised by a written notice to which the fax is
equated. Additionally the consumer can place back the contractual document with a notation
that indicates that the consumer does not want to draw up or to maintain the contract.

In BELGIUM, MALTA, LUXEMBOURG the notification of the withdrawal must be in
writing and sent by registered letter. In FRANCE, ITALY and PORTUGAL the consumer has to
send a signed registered letter with return receipt. In ITALY, it is also possible to use telegram,
telex or fax to meet the period of withdrawal, if they are confirmed by a registered letter with
return receipt within the following 48 hours.

In FRANCE the vendor is also obliged to fix a form of withdrawal to the contractual
document given to the consumer. The consumer can use this form to exercise his right of
withdrawal. In CYPRUS the purchaser can use the notification form, too.

In the CZECH REPUBLIC, the consumer has to indicate the reason for exercising the right of
withdrawal in case of the prolonged withdrawal period because of lack of information.

<table>
<thead>
<tr>
<th>Withdrawal</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Formal Requirements</td>
<td>CZ, DK, EE, IE, NL, ES (6)</td>
</tr>
<tr>
<td>None</td>
<td>AT, CY, FI, EL, HU, LT, LV, PL, SL, UK (10)</td>
</tr>
</tbody>
</table>

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1082 Art. 9(3) provides that the purchaser can use any other written form that satisfies the requirements of Art.
9(1) and (2) of the Timeshare Act No 113(I)/2001.
1083 CC § 63(1) lit. (b) and (c).
1084 By any means which guarantee the proof of the communication, the reception and the date of sending.
1085 Fax is equated. Additionally the consumer can place back the contractual document with a notation that
indicates that the consumer does not want to draw up or to maintain the contract.
1086 Or by any other means which can be proved.
1087 Informal written notice, 10:11 CPA.
Such formal requirements for the exercise of the withdrawal right might cause a barrier to trade, because, if the vendor is obliged to inform the consumer also about formal requirements, it is impossible to draft such information which can be used in all member states. Therefore, it could be considered harmonising the national laws in the way that formal requirements must not be introduced by the member states.

d. Dispatching rule

According to Art. 5(2), sent. 2 of the Directive the deadline of withdrawal is observed if the consumer dispatches the notification before the deadline expires.

This provision has been transposed by the vast majority of the member states. Only the CZECH REPUBLIC, FRANCE, HUNGARY, LATVIA and SLOVAKIA have no specific legislative transposition. Some of these member states may achieve the same result acquired by the Directive with the application of their general rules on the computation of periods. ITALY has not laid down a dispatch rule, but the purchaser has to send a registered letter with advice of delivery and may therefore prove that the notice was sent within the withdrawal period. The

1088 Unless agreed otherwise, the notice of withdrawal must be written in case of written contract.
1089 Registered letter with advice of delivery. It is also possible to use telegram, telex or fax to meet the period of withdrawal, if they are confirmed by a registered letter with advice of delivery within the following 48 hours, cf. Art. 73(5) of the Consumer Code.
1090 Art. L. 121-64(1) of the Code de la consommation states that if the consumer doesn’t send a letter with a return receipt, he can use any other means that provide for the same guarantees as to the determination of the date.
legislator in the UNITED KINGDOM has chosen a different wording. If the notice is sent by post in a properly addressed and pre-paid letter, it is to be treated as given at the time of posting.

| Substantially equivalent as in the Directive | AT, BE, CY, DK, EE, FI, EL, DE, IE, IT, LT, LU, MT, NL, PL, PT, SL, ES, UK (19) |
| No specific legislative transposition         | CZ, FR, HU, LV, SK, (5) |
| Transposition not entirely clear             | SE (1) |

It is unclear whether the dispatch rule is also applicable, if the consumer dispatches the declaration of withdrawal in time, but it never reaches the vendor. This could be clarified.

e. Costs

aa. Art. 5(3)

According to Art. 5(3) of Directive 94/47 the purchaser may, where he exercises the right of withdrawal provided for in the 1st indent of paragraph 1, be required to defray, where appropriate, only those expenses which, in accordance with national law, are incurred as a result of the conclusion of, and withdrawal, from the contract and which correspond to legal formalities which must be completed before the end of the period referred to in the 1st indent of paragraph 1. Such expenses shall be expressly mentioned in the contract.

Member states like the CZECH REPUBLIC, GREECE, LUXEMBOURG\(^\text{1091}\) and SWEDEN have transposed Art. 5(3) of the Directive by using nearly exactly the Directive’s wording. GREECE has furthermore stated that the costs must not exceed 3% of the purchase price.

A remarkable group of member states has increased the consumer protection level by ruling that no costs and damages can be charged on the consumer, e.g. BELGIUM\(^\text{1092}\), CYPRUS\(^\text{1093}\), DENMARK\(^\text{1094}\), the NETHERLANDS\(^\text{1095}\), PORTUGAL\(^\text{1096}\), SPAIN\(^\text{1097}\) and the UNITED KINGDOM\(^\text{1098}\).

\(^{1091}\) Article 10(3) of the Timeshare Act of 18 December 1998.
\(^{1092}\) Article 9(2), sent. 3 of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis.
\(^{1094}\) Section 10 of the Timeshare Act.
\(^{1095}\) CC Art. 48c(3).
\(^{1096}\) Article 16(1) of the Decree-Law 275/93 of August 5.
The ITALIAN\textsuperscript{1099}, POLISH\textsuperscript{1100}, HUNGARIAN and the SLOVENIAN\textsuperscript{1101} laws only allow imposing the costs of entering into the contract on the purchaser, but not of the costs of withdrawal. Contrary to these countries in SLOVAKIA, the vendor can only request reimbursement of “demonstrably expended unavoidable costs connected with withdrawal from the contract”\textsuperscript{1102}. Some member states have specified which costs the purchaser has to defray e.g. AUSTRIA\textsuperscript{1103} (the costs of a notarisation or necessary translation of the contract and the duties and taxes that result from agreeing on the contract, if the purchaser has been informed of this possibility in the contract), ESTONIA\textsuperscript{1104} (the costs for notarisation and attestation of the contract), FINLAND\textsuperscript{1105} (costs that must be paid before the end of the cooling-off period and because of formal requirements “or are otherwise of a public nature”), GERMANY\textsuperscript{1106} (the costs for a necessary notarisation of the contract) and HUNGARY\textsuperscript{1107} (costs for preparation and translation of the contract). In AUSTRIA, GERMANY, HUNGARY and SLOVENIA the legislator explicitly stated that the vendor cannot demand interest for the use of the immovable property.

In IRELAND and MALTA this provision has not been transposed. In MALTA the intention was to maintain the more favourable rights the purchaser has under the general rules.

<table>
<thead>
<tr>
<th>Table: Costs in case of withdrawal within cooling-off period</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cost Provisions</strong></td>
</tr>
<tr>
<td>---------------------</td>
</tr>
<tr>
<td>Substantially equivalent to the Directive</td>
</tr>
<tr>
<td>Expressly: no costs for use of the residential property</td>
</tr>
<tr>
<td>No costs and damages</td>
</tr>
</tbody>
</table>

\textsuperscript{1097} Article 10(1), sent. 3 of the Law 42/1998.
\textsuperscript{1098} Section 5(8) of the Timeshare Act 1992.
\textsuperscript{1099} Article 73(1) of the Consumer Code.
\textsuperscript{1100} Article 7(2) of the Act of 13 July 2000 on the Protection of Purchasers in Respect of the Right to Use Buildings or Dwellings During Certain Time Each Year.
\textsuperscript{1101} Article 60c(3), sent. 3 of the Consumer Protection Act.
\textsuperscript{1102} CC § 59(3), sent. 1.
\textsuperscript{1103} § 6(4) of the Timeshare Act.
\textsuperscript{1104} Section 383(5) of the Law of Obligations Act.
\textsuperscript{1105} Chapter 10 Section 14 of the Consumer Protection Act of 20 January 1978/38.
\textsuperscript{1106} CC § 485(5), sent. 1 and sent. 2.
\textsuperscript{1107} § 10(2) of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.
\textsuperscript{1108} CC § 63(2), sent. 1.
\textsuperscript{1109} § 14(2) of the Timeshare Contracts (Consumer Protection) Act 1997:218.
\textsuperscript{1110} As in the Directive, but costs may in any case not exceed 3 % of the price.
Costs and defrayal specified

<table>
<thead>
<tr>
<th>Costs</th>
<th>AT, EE, FI, DE, HU (5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unavoidable costs connected with conclusion of the contract necessary to enter into the agreement</td>
<td>IT, SL, PL (3)</td>
</tr>
<tr>
<td>Unavoidable costs connected with withdrawal</td>
<td>SK, LV (2)</td>
</tr>
<tr>
<td>Fees necessarily incurred</td>
<td>FR (1)</td>
</tr>
<tr>
<td>No specific legislative transposition</td>
<td>IE, MT (2)</td>
</tr>
</tbody>
</table>

**bb. Art. 5(4)**

According to Art. 5(4) of the Directive the purchaser shall not be required to make any defrayal where he exercises the right of cancellation provided for in the 2nd indent of paragraph 1 (in case of missing information).

**AUSTRIA, THE CZECH REPUBLIC, GREECE, IRELAND, ITALY, LUXEMBOURG, POLAND, SLOVAKIA, SPAIN and SWEDEN** have transposed Art. 5(4) of the Directive. In the **GERMAN and HUNGARIAN national laws** it is additionally stated that the consumer can claim damages from the vendor. In **BELGIUM, CYPRUS, DENMARK, LITHUANIA, MALTA and THE NETHERLANDS** the general rule on costs for every case of withdrawal is applicable (see above). In **PORTUGAL and the UNITED KINGDOM** the Directive’s provision is transposed indirectly, as all sums paid by the consumer must be refunded by the vendor. So in consequence no costs are left with the consumer.

In **SLOVENIA** the provision is not explicitly transposed, but can be deduced from the general provision\(^{1114}\). According to the **LATVIAN regulation** the consumer shall not pay any costs except those for returning the goods to the vendor. In **FINLAND** the provision, which also transposes Art. 5(3) of the Directive, applies. According to this provision the costs which must be paid before the end of the cooling off period are imposed on the consumer. In

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\(^{1110}\) Article 60c(3), sent. 2 of the Consumer Protection Act.

\(^{1111}\) Art. 12(4) of the Consumer Protection Act. Only costs for the return of goods, general rule for all rights of withdrawal.

\(^{1112}\) Code de la Consommation, Art. L.121-64(2).

\(^{1113}\) Art. 60 c(3)(2) of the Consumer Protection Act.
France the provision is not specifically transposed, but as the contract is void anyway, the result should be the same.

Table: Costs in case of withdrawal within prolonged period

| Substantially equivalent to the Directive | AT\(^{1115}\), CZ\(^{1116}\), EE\(^{1117}\), EL\(^{1118}\), IE\(^{1119}\), IT\(^{1120}\), LU\(^{1121}\), MT, PL\(^{1122}\), SK\(^{1123}\), ES\(^{1124}\), SE\(^{1125}\) (12) |
| General exclusion of costs and damages for all rights of withdrawal granted in Art. 5 of the Directive | BE, CY\(^{1126}\), DK\(^{1127}\), LT, NL (5) |
| Refund all sums received from the consumer | PT\(^{1128}\), UK (2) |
| Expressly mentioned that consumer can claim damages | DE\(^{1129}\), HU\(^{1130}\) (2) |
| Deviances | LV\(^{1131}\), FI (2) |
| Not expressly transposed | FR (1) |

4. Prohibition of advance payments before the end of the withdrawal period

According to Art. 6 of the Directive the member states shall make provision in their legislation to prohibit any advance payments by a purchaser before the end of the period during which he may exercise the right of withdrawal. Although not entirely clear, this

\(^{1115}\) Section 6(4), sent. 3 of the Timeshare Act.
\(^{1116}\) CC § 63(2), sent. 2.
\(^{1117}\) Section 383(5) of the Law of Obligations Act.
\(^{1118}\) Article 4(4) of the Decree 182/1999.
\(^{1119}\) Article 9 European Communities (Contracts for Time Sharing of Immovable Property—Protection of Purchasers) Regulations 1997 and 2000.
\(^{1120}\) Article 73(2) of the Consumer Code.
\(^{1121}\) Article 10(4) of the Timeshare Act of 18 December 1998.
\(^{1122}\) Article 7(1) of the Act of 13 July 2000 on the Protection of Purchasers in Respect of the Right to Use Buildings or Dwellings During Certain Time Each Year.
\(^{1123}\) CC § 59(3) sent. 2.
\(^{1124}\) Article 10(2) in fine of the Law of the Law 42/1998.
\(^{1125}\) § 14(1) of the Timeshare Contracts (Consumer Protection) Act 1997:218.
\(^{1127}\) Section 10 of the Timeshare Act.
\(^{1128}\) Article 16(7) of the Decree-Law 275/93 of August 5.
\(^{1129}\) CC § 485(5), sent. 3.
\(^{1130}\) § 10(3) of the Government Decree 20/1999 (Il. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.
\(^{1131}\) Article 12 (1) and (4) of the Consumer Rights Protection Law.
wording probably covers also the prolonged three months plus 10 days period provided for in Art. 5(1) 2nd and 3rd indent of the Directive. If so, the German version of the Directive has a different content as it only refers to the 10 day period prescribed in Art. 5(1) 1st indent. This discrepancy should be clarified, preferably in the sense of the English version as understood here.

a. Prohibition of advanced payments

All member states have transposed the prohibition of advanced payment provided in Art. 6 of the Directive.

In Belgium, Finland, France and Portugal the prohibition only applies to the regular period of withdrawal (which is 15 days in Belgium and 10 days in the other countries mentioned), but not to the longer periods (e.g. 3 months plus X days) in the case of non-compliance with information duties. According to the wording of the Estonian regulation, payments must not be received within 10 days after the submission of the signed contract to the consumer. In Slovenian law any contract clause stipulating that the consumer must pay a partial amount of the price or costs before the expiry of the cancellation period (usually 15 days) is void.

In Sweden advanced payments are prohibited during the normal period of withdrawal and in the time until a surety is provided in the case that the property is still under construction.

In Austria, the Czech Republic, Cyprus, Denmark, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the

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1132 Article 9(3) of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis).
1133 Code de la Consommation, Art. L121-66.
1134 Article 53 and 14 of the Decree-Law 275/93 of August 5.
1135 Section 385 of the Law of Obligations Act.
1136 Article 60 of the Consumer Protection Act.
1137 Article 60c(3), sent. 1, Art. 45d of the Consumer Protection Act.
1139 § 7(1) of the Timeshare Act.
1140 Article 61 of the Act of 15 April 2002 amending the Act 40/1964 (CC).
1142 Section 12 of the Timeshare Act.
1143 Article 5 of the Decree 182/1999.
1144 § 11(1) of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis. Cf. also the CA Budapest (Fővárosi Ítéltábla) judgment of 1 December 2004, 2.Kf.27.379/2003/3. The Court held that the vendor must not claim any payments - even payments held in trust – within the withdrawal period.
payments are prohibited for the duration of the normal and of the prolonged period of withdrawal in the case of missing information, which can amount up to 3 months and 10 days. In Lithuania\textsuperscript{1154} and in Germany\textsuperscript{1155} the prohibition applies within the whole period of withdrawal, too, which can in the case of missing information be up to 4 months in Lithuania and up to 6 months in Germany. In Greece the prohibition of advanced payment does not apply to the costs of the contract, the costs of withdrawal and the cost of acts which have to take place within the cooling-off period of 10 days (which may be a maximum 3 \% of the agreed price). In Spain\textsuperscript{1156} the parties can make appropriate agreements to guarantee the payment. These must not be contrary to the prohibition of advanced payments and not mean a direct or indirect compensation for the vendor in case of withdrawal.

b. Table: Prohibition of advanced payments

<table>
<thead>
<tr>
<th>Prohibition for normal period of withdrawal</th>
<th>BE (15), FI (10), FR (10), EE (10), PT (10), SE (10; cooling-off period) (6)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prohibition also for prolonged period of withdrawal (3 months plus 10 days, if not agreed otherwise)</td>
<td>AT*, CZ, CY, DK, DE (up to 6 months), EL, HU, IE, IT, LV*, LT (up to 4 months), LU*, MT, NL, PL*, SK, SL*, ES, UK (19)</td>
</tr>
<tr>
<td>*The transposition laws just read „withdrawal period“. It is assumed that this has to be interpreted in line with the Directive and therefore means for the full duration of the...</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{1145} Article 10(1) of the European Communities (Contracts for Time Sharing of Immovable Property—Protection of Purchasers) Regulations 1997 and 2000.

\textsuperscript{1146} Article 74 of the Consumer Code.

\textsuperscript{1147} Article 11(3) of the Consumer Rights Protection Law.

\textsuperscript{1148} Article 10(6) of the Timeshare Act of 18 December 1998.

\textsuperscript{1149} CC Book 7 Art. 48d.

\textsuperscript{1150} Article 8(1) of the Act of 13 July 2000 on the Protection of Purchasers in Respect of the Right to Use Buildings or Dwellings During Certain Time Each Year.

\textsuperscript{1151} CC § 57(b).

\textsuperscript{1152} Cf. also the CA Cantabria judgment of 24.05.2004, no 196/2004, Sergio and Carmela v “Free Enterprise S. L.”. The CA held that the prohibition of advanced payment also applies to the prolonged withdrawal. Furthermore, the Court ruled that it does not suffice to make general references to appendixes since that information has to be inserted in the contract.

\textsuperscript{1153} Article 5B(1) Timeshare Act 1992.

\textsuperscript{1154} Article 22(5), sent. 1 of the Law on Consumer Protection of the Republic of Lithuania.

\textsuperscript{1155} CC § 486.

\textsuperscript{1156} Article 11(1) of the Law 42/1998.
Prohibition also for period until a surety is provided in case of property under construction

<table>
<thead>
<tr>
<th>Country</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>SE</td>
<td>Exemption: costs of the contract and of withdrawal</td>
</tr>
<tr>
<td>EL</td>
<td>Exemption: appropriate agreement to guarantee payment, provided it is not contrary to the prohibition</td>
</tr>
<tr>
<td>FI</td>
<td>Also no payment on credit agreement</td>
</tr>
</tbody>
</table>

Such differences show that the Directive has been differently understood in the member states and, therefore, clarification is still required on this point.

c. Refund of sums paid

It goes without saying, that, if any advanced payments have been made by the consumer, the vendor has to return the sum. Many member states rely on their general rules (e.g. Germany, where the refund has to be made immediately). Others have specific rules, for instance, Lithuania (refund within a period of 10 days) or Slovenia. In some member states the obligation to return the amount, which has already been paid, is aggravated. In Austria the vendor is obliged to pay interest on the sum amounting to 6 percentage points above the base rate (which means a total of about 8% at the moment). In Hungary the vendor has to pay additional default interest, too. The interest on the sums...

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1157 Article 60c(3), sent. 1, referring to Art. 43d of the Consumer Protection Act.
1158 Interdiction of advanced payment in § 7(1) of the Timeshare Act.
1159 § 7(2) of the Timeshare Act.
1160 § 11(2) of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.
starts with the day of their payment. In Spain the vendor is obliged to return the double amount of the sum which the consumer has paid in advance. In addition, the consumer is given a period of 3 months within which he can choose, if he wishes, to terminate the contract or to claim its performance.

Some member states have established fines, if the vendor infringes upon the interdiction of demanding and receiving any advanced payment. In Sweden a person is liable to a fine in case of a deliberate infringement of the prohibition of advanced payment. In Austria the obligation to pay an interest described above is combined with a fine because of an administrative offence amounting up to EUR 7,260. In France, Art. L. 121-71 of the Code de la consommation states that if the seller asks or receives any payment before the 10 day withdrawal period ends, he will have to pay a fine of EUR 30,000. Greece states fines between EUR 1,467 and EUR 58,694 and other public law sanctions. In Portugal the fine is between ca. EUR 10,000 and ca. 100,000. In the Italian law a penalty between EUR 500 and 3,000 is foreseen. In case of repeated infringements an additional administrative penalty or a suspension of pursuit of business between 15 days and 3 months can be imposed. In the United Kingdom the infringement constitutes a criminal offence, as well as in Ireland where the fine amounts to EUR 1,904.61 (1500 pounds). In Malta any violation of the regulation that prohibits advanced payment is an offence, too. A person who

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1162 See also the CA Las Palmas judgment of 22 November 2003, no. 682/2003, Benedicto and Margarita v “Palm Oasis Maspalomas S. L.”. The Court ruled that the refund of the double amount of the sum that was paid in advance constitutes the legal compensation for the purchaser for the abuse of rights carried out by the seller. Therefore, Article 11(2) of the Law 42/1998 can also be applied to contracts which are invalid due to the omissions and negligence of the vendor.
1164 § 12(2) of the Timeshare Act.
1165 Article 54(1), Art. 55 of the Decree-Law 275/93 of August 5.
1166 Article 81 of the Consumer code.
1167 Article 5B(2) of the Timeshare Act 1992.
1168 Article 16(1) and 2 of the European of the Communities (Contracts for Time Sharing of Immovable Property – Protection of Purchasers) Regulations 1997 and 2000.
1169 Reg. 10(1) and 10(2) of the Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations, 2000.
1172 Art. 17 Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis.
committed an offence will be liable on conviction to a fine (*multa*) of not less than one hundred Liri but not exceeding one thousand Liri, and to a fine (*multa*) of not less than twenty-five Liri and not exceeding fifty Liri for every day during which the offence continues. In LUXEMBOURG, in the case of infringement the vendor is fined with a sum between 10 001 and 1 000 000 –Flux. In BELGIUM a similar regulation exists with fines between EUR 150 and EUR 10 000.

In CYPRUS it is the Competition and Consumers’ Protection Service in the Ministry of Commerce, Industry and Tourism that can take measures, for example confirm a contravention, recommend to the offender to cease the infringement, impose an administrative fine (up to 10% of the offender’s annual turnover; or in case of repetitive infringement 50 to 1 000 pounds per day of continuation of the infringement) or apply to the Court and ask for a prohibitory, mandatory or interim order.

As the prohibition of advance payments seems to be a rather effective consumer protection instrument, it could be considered prescribing certain sanctions, in particular criminal sanctions, on Community level.

5. Credit agreements

According to Art. 7 of the Directive the member states shall make provisions in their legislation to ensure that:

- if the price is fully or partly covered by credit granted by the vendor, or
- if the price is fully or partly covered by credit granted to the purchaser by a third party on the basis of an agreement between the third party and the vendor,

the credit agreement shall be cancelled, without any penalty, if the purchaser exercises his right to cancel or withdraw from the contract as provided for in Art. 5. The member states shall lay down detailed arrangements to govern the cancellation of credit agreements.

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These provisions have been transposed close to the Directive by AUSTRIA\textsuperscript{1174}, BELGIUM\textsuperscript{1175}, CYPRUS\textsuperscript{1176}, CZECH REPUBLIC\textsuperscript{1177}, DENMARK\textsuperscript{1178}, ESTONIA\textsuperscript{1179}, FINLAND\textsuperscript{1180}, GERMANY\textsuperscript{1181},

\textsuperscript{1174} § 8 of the Timeshare Act.
\textsuperscript{1175} Article 10 of the Act of 11 April 1999 on the Purchase of the Right to Use Immovable Properties on a Time-Share Basis.
\textsuperscript{1176} Article 12(1) of the Timeshare Contract Law.
\textsuperscript{1177} CC Article 58, 62, 63.
\textsuperscript{1178} Section 11 of the Timeshare Act.
\textsuperscript{1179} Section 384 of the Law of Obligations Act.
\textsuperscript{1180} Chapter 10 sec. 12 of the Consumer Protection Act of 20 January 1978/38.
\textsuperscript{1181} CC § 358.
\textsuperscript{1182} Article 6 of the Decree 182/1999.
\textsuperscript{1183} § 12 of the Government Decree 20/1999 (II. 5.) on Contracts for the Purchase of the Right to Use Immovable Property on a Timeshare Basis.
\textsuperscript{1184} Article 77 of the Consumer Code.
\textsuperscript{1185} Cabinet Regulation 325.
\textsuperscript{1186} 10 November 1994 Law No. I-657 of the Republic of Lithuania “On Consumer Protection”.
\textsuperscript{1187} Article 11 of the Timeshare Act of 18 December 1998.
In France it seems that only a credit agreement which has been announced to the vendor can be cancelled with the timeshare contract. In Slovakia the purchaser is obliged to inform the third party about the withdrawal. In Austria and in Germany the purchaser also has the possibility to withdraw from contracts concluded with a third party which are related to the timeshare contract. This can be more favourable to the consumer, as there does not need to be an “agreement” (cf. Art. 7, 2nd indent) between the third party and the vendor.

6. Provisions transposing this Directive shall be binding

All member states have foreseen provisions in their national law that the provisions transposing Directive 94/47 are binding.

7. Private International law

Article 9 states that, regardless of the law that is applicable to a specific contract, if the immovable property is situated within the territory of a member state, each country must take

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1189 CC Book 7, Art. 48e(2).
1190 Article 8(2) of the Act of 13 July 2000 on the Protection of Purchasers in Respect of the Right to Use Buildings or Dwellings During Certain Time Each Year.
1191 Article 16 (6), Art. 49 (2) of the Decrease-Law 275/93 of August 5.
1192 Article 60d(1)(2) of the Consumer Protection Act.
1194 Art. 12 of Law 42/1998 forbids the imposition of clauses containing sanctions or penalties on the purchaser in case of withdrawal or termination.
1195 Section 6A of the Timeshare Act 1992
1196 Code de la Consommation, Art. L. 121-67. This regulation is seen as a possible breach of EC Law.
1197 CC § 58. Termination of the loan contract cannot be connected with any sanctions exerted by the supplier or third party.
1198 § 9(1) of the Timeshare Act.
1199 CC § 358.
the necessary measures in order to ensure that the consumer is not deprived of the protection afforded by Directive 94/47.

Because of the overlaps with the general rules on International Private Law, the transpositions to be found in the member states vary considerably. However, at least BELGIUM, CYPRUS, the CZECH REPUBLIC, HUNGARY, IRELAND and ITALY have transposed the provision closely to the Directive.

Many other countries have tried to reach the aims of the Directive by other means. As the number of possible constellations is very high, the following reference concentrates on some significant examples. For instance, AUSTRIA, ESTONIA and POLAND, require that the timeshare contract is somehow linked to the territory of these countries. The required relation between the country and the contract can result from the fact that, for example, an offer was made by an entrepreneur to a consumer or vice versa in that specific member state. Furthermore, concerning ESTONIA and POLAND, the timeshare contract shall be deemed as linked to the country, if the purchaser is a resident of that country or if the immovable property is located in that member state.

In SLOVENIA, domestic law is applicable on a contract concluded on the basis of business activity managed by a Slovenian enterprise and if the consumer is a current resident of Slovenia, then the immovable property does not even have to be situated within the territory of a member state of the European Union. The laws of MALTA, PORTUGAL and SPAIN require that the concerned building is located within the territory of their countries in order for the respective Maltese, Portuguese or Spanish consumer protection law to be applicable.

DENMARK, the NETHERLANDS, SWEDEN and the UNITED KINGDOM have expressly regulated that the immovable property does not necessarily have to be situated within a member state of the European Union, but can also be located within the territory of a member state of the EEA. In order for the consumer protection laws of the UNITED KINGDOM to apply, either the parties of the timeshare agreement must to some extent be subject to the jurisdiction of any court in the United Kingdom in relation to the agreement or the offeree must ordinarily reside in the United Kingdom. SWEDISH law, however, sets out that consumers will only be granted protection by Swedish rules, if the law which is actually applicable to the contract, is the law of a country which is not a member of the EU or the EEA. Similarly, in FINLAND: if the
immovable property is located in an EEA state and the law of a non-EEA state would apply, FINNISH consumer protection law applies to timeshare contracts insofar as it offers more effective consumer protection than the law that would be applicable otherwise.

GERMANY applies its domestic consumer protection laws to cases where the applicable law is not the one of an EU member state or EEA contracting state and the immovable property is situated either within the territory of the EU or of the EEA. This is considered to be contrary to the Directive, because the obligatory application of German law may deprive the consumer from a more favourable law. In other cases, German International Private Law makes the law of the member state which is the most closely related to the case, applicable, if there is a relation between the timeshare contract and one of the member states. Such a specific relation is deemed to be given, if the contract is concluded due to business activities in a member state of the EU or within the EEA. Furthermore, the contract is linked to the member states, if the consumer is a resident of one of these states.

In FRANCE and LUXEMBOURG, domestic consumer protection rules are also applicable to contracts where the concerned building is situated in a non-EU member state. But in this case, the consumer will only be granted protection, if the timeshare contract was concluded in a country, in which he normally is a resident or if the contract was preceded in that country by a specially drawn up offer or by an advertisement or an action carried out by the consumer. Furthermore, the consumer protection law of France and Luxembourg will apply if the contract has been concluded in a country that the consumer has travelled to on the grounds of an offer of travel or accommodation made to him by the professional with the intention to induce him to sign the contract.

Under AUSTRIAN law, the application of Austrian consumer protection law to timeshare contracts is restricted to certain Articles, if the immovable property is situated in another EEA-State. The consumer is only provided with protection measures that are regulated in Art. 6, Art. 7(2), Art. 8 and Art. 9 of the Timeshare Act. These Articles deal with the right of withdrawal from the timeshare contract (Art. 6) and from any relating agreements (Art. 9). Furthermore, it contains rules regarding the effect of the exercised right of withdrawal of Art. 9

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1200 Article 29a(3) of the Introductory Act to the CC (EGBGB); for more details see also Art. 29 and Art. 29a(1) of the same Act.
6 on other contracts (Art. 8) and regarding the right to reclaim payments that the vendor has already taken illegally.

In Latvia, Art. 9 has been transposed in a way that is not quite clear. It is laid down that when a timeshare contract is concluded and the immovable property is located in a foreign country, then the law in force in that particular state shall apply insofar as it complies with the provisions of the Latvian Consumer Rights Protection Law. Neither does this regulation state whether or not the building needs to be situated within the territory of a member state of the European Community, nor does it say how the case, that the law of the foreign state does not comply with Latvian law, should be handled. Lithuania does not seem to have transposed Art. 9 of Directive 94/47 at all.

It is highly questionable whether such a punctual provision on International Private Law should be located in individual consumer protection directives like Directive 94/47. This may lead to interferences and confusion with the Rome Convention and the planned Rome I Regulation. Therefore, it could be considered leaving the question to the Rome I Regulation. It should also be borne in mind that the lines of the C-381/98 – Ingmar ruling of the ECJ could lead to the result that a choice of law clause which deprives the consumer from his rights granted under the Directive is contrary to mandatory law and, therefore, void.

8. Other consumer protection instruments

Some member states provide for further consumer protection instruments. Only some instructive examples shall be pointed out here. For instance, in Malta the seller (and any salespersons acting on his behalf) is obliged to be licensed and to use a distinctive identification document. There are also stringent provisions prohibiting the excessive selling techniques and harassment of prospective timeshare buyers. The seller has to ensure that a period of at least seven consecutive days in a calendar year is reserved for repairs, maintenance, cleaning and other purposes related to the upkeep of the property; a person who fails to abide with this requirement is guilty of an offence. Also Belgium and Spain require a licence.

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1203 See Reg. 6 of the Timeshare and Timeshare-like Products Promotion (Licensing of OPC Representatives) Regulations.
In Italy\textsuperscript{1204} the vendor is required to provide a bank or insurance guarantee for the execution of the contract, if it is not a company with share capital, or if it is a company without a capital of at least EUR 5 164 569 and without the head office registered, or other offices in the territory of the State. In any case the vendor is required to provide a bank or insurance guarantee for the completion of the property, when the property is under construction. If the guarantees are not expressly mentioned in the contract, the contract is void. In Spain the creator of a timeshare right that needs to be registered has to conclude an insurance contract to cover the risks until the transfer of the right is completed. The owner of the building is obliged to conclude an insurance contract to cover the liability for torts caused by the titleholders of the timeshare rights. Additionally the Spanish law states a duty for the seller to terminate any contracts with suppliers of the services in case of non-performance of the services related to the right.

Some member states stipulate more specific provisions for the marketing of timeshare contracts. In Belgium advertisement for timesharing contracts has to mention in a clear way, that it is a direct or indirect promotion for the sale of rights concerning the use of immovable property on a timesharing base. Assuming that timeshare objects are often promoted by inviting consumers to sales promotion events by sending marketing letters or by giving leaflets in the streets, often strengthened with promises of free gifts, the Finnish law stipulates that if the time-share housing is to be offered to a consumer in person at a promotion or sales event, the business shall, in the invitation, clearly indicate the nature of the event and supply the most significant information on the nature of the time-share right, the selling prices the other costs and the time-share object. The marketing document shall be available to the consumer at any time during the event, at least in the language used in the invitation to the event.

\textsuperscript{1204} Article 76(1), Art. 76(2), Art. 76(3) of the Consumer Code.
E. Distance Selling Directive (97/7)

Drafted by Hans Schulte-Nölke and Andreas Börger

Executive Summary

1. Transposition Deficiencies

Despite many variations of the wording in the national transposition laws, the number of substantial transposition deficiencies to be found throughout the EC does not seem to be very high. Examples of at least some importance are:

- The total (not only partial) exemption of contracts in the sense of Art. 3(2) 1st indent (regular roundsmen) or 2nd indent (accommodation, transport, catering or leisure services) from the scope of application of the Directive by some member states.

- No general obligation to confirm the prior information according to Art. 5(1) sent. 1 in the CZECH REPUBLIC, LITHUANIA and SPAIN.

- The withdrawal period of seven “jour francs” in FRANCE (cf. Art. 6(1)).

- The lack of duty to inform the consumer that goods or services ordered are unavailable (Art. 7(2)) in GERMANY, GREECE and LITHUANIA.

2. Enhancement of Protection

a. Extension of scope

Some member states have broadened the scope of application of their national laws on distance selling, for instance, by:

- Broadening the notion of consumer (e.g. legal persons).
- Broadening the notion of distance selling contract (e.g. no organised distance selling scheme required).
- Not transposing exceptions provided in Art. 3

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b. Use of options

The member states have made different use of the options the Directive offers:

- Article 7(3) (allowance to deliver goods or services of equivalent quality and price) has been transposed by about half of the member states.
- Article 11(3)(a) (burden of proof concerning the existence of prior information, written confirmation, compliance with time-limits or consumer consent) has also been transposed by about half of the member states.
- Article 11(4) (self-regulatory bodies) has only been transposed by 6 member states.
- Article 14, sent. 2 (ban of marketing of certain goods or services, particularly medicinal products) has only been transposed by 2 member states.

c. Use of minimum clause

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

- Article 4: additional pre-contractual information duties (e.g. suppliers address, telephone number; non-existence of withdrawal right)
- Article 5(1):
  - additional information to be confirmed in good time during the performance of the contract
  - fixing an earlier point of time when this confirmation is due
  - additional formal requirements: not transposing the term “another durable medium available and accessible to the consumer” and thereby obliging the supplier to always provide confirmation of the information in written form.
  - duties to use a certain wording or form to inform the consumer (in particular a standard notice on the right of withdrawal)
  - language requirements
- Article 6(1):
  - prolongation of withdrawal period
  - introduction of formal requirements for the exercise of the withdrawal right by the consumer
- not transposing exceptions provided in Art. 6(3).

3. Inconsistencies or Ambiguities

Some major inconsistencies or ambiguities of the Directive are:

- It is unclear whether mixed purpose cases fall under the notion of ‘consumer’ (Art. 2(2)).
- It is unclear whether non-profit organisations can fall under the notion of ‘supplier’ (Art. 2(3)).
- It is unclear whether the so-called Ebay auctions fall under the notion of ‘auction’ (Art. 3(1) 5th indent).
- The requirement that certain information has to be provided ‘in good time’ (Art. 4(1); Art. 5(1)) seems to have created some ambiguities.
- The length of the withdrawal period (7 working days) is difficult to handle (in particular in cross-border cases where different days may be public holidays) and not in coherence with the withdrawal periods provided for in other directives.
- It is unclear whether Art. 6(1), sent. 3 and 4 prolong the withdrawal period up to 3 months or up to three months plus 7 working days.
- The prolongation of the withdrawal period up to the 3 months (probably plus 7 working days) maximum period is not in coherence with other directives and the ECJ Heininger ruling.
- Article 7(1) does not mention the – necessary – prerequisite that the obligation created there only comes into force if the contract is concluded.
- The Directive does not contain any rules on the computation of time, which leaves some ambiguities, e.g. with regard to the notion of ‘working day’ or to time limits ending on a Sunday, other public holidays, or Saturdays.

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1206 ECJ judgment of 13 December 2001 C-481/99 - Georg Heininger et Helga Heininger v Bayerische Hypo- und Vereinsbank AG.
4. Gaps in the Directive

The analysis did not reveal many gaps in the Directive. Examples of at least some importance are:

- The absence of provisions on whether it suffices for the consumer to dispatch the notice of withdrawal before the end of the withdrawal period
- An express provision clarifying to what extent the Directive applies to digital content, such as computer software, music or games, supplied online.

5. Potential Barriers to (Cross-Border) Trade

Obvious barriers to trade in the field of the Directive are:

- The differences of the information obligations, also the differences with regard to formal requirements for the provision of information.
- The different withdrawal periods, the formal requirements imposed on the consumers when exercising their withdrawal rights, and the differences with regard to the unravelling of the contract after withdrawal (because such differences hamper the information of consumers on their withdrawal right).

6. Conclusions and Recommendations

In order to remove ambiguities, the following issues could be tackled:

- Definition of consumer (with regard to mixed purpose cases)
- Definition of supplier (with regard to non-profit organisations)
- New definition of goods (with regard to digital content)
- (New) Definition of auction (with regard to Ebay auctions)
- Clarification of ‘in good time’ (Art. 4(1); Art. 5(1)) along the model of Directive 2002/65, perhaps also following the example of some member states
- Provision of some rules on computation of time (or – perhaps better – a reference to Regulation 1182/71)
- Clarification whether Art. 6(1), sent. 3 and 4 prolong the withdrawal period up to 3 months or up to three months plus 7 working days
Clarification in Art. 7(1) that this obligation only comes into force if the contract is concluded.

Introduction of a dispatch rule, which also clarifies its applicability in case the consumer dispatches the declaration of withdrawal in time, but it never reaches the supplier.

Moreover, in order to remove at least the most obvious barriers to trade the following measured could be considered:

- At least the pre-contractual information (Art. 4) duties could be brought in line with Directive 2002/65 and the law of those member states which made use of the minimum clause (e.g. supplier’s address, non-existence of withdrawal right).
- Provision of a (EC law) standard notice informing the consumer of his right of withdrawal.
- The withdrawal period could be changed into 14 (calendar) days, also following Directive 2002/65.
- Any formal requirement for the exercise of the withdrawal right could be prohibited.
- The (3 month) prolongation of the withdrawal period in case of non-fulfilment of information duties could be reviewed in the sense that the lack of information about the withdrawal right is exempted. For this type of information, a more intensive sanction could be envisaged, be it the eternal period along the lines of the Heininger\(^{1207}\) case, or a much longer maximum period (e.g. one year, as is the case in Finland).

In particular, it will have to be considered whether at least some of these provisions could be exempted from the minimum clause and thereby made maximum in order to avoid member states creating new barriers to trade.

\(^{1207}\) ECJ judgment of 13 December 2001 C-481/99 - Georg Heininger et Helga Heininger v Bayerische Hypo- und Vereinsbank AG.
I. Member state legislation prior to the adoption of the Distance Selling Directive

Prior to the adoption of the Directive 97/7, consumer protection in the field of the Directive 97/7 was rather different. This may be illustrated by three groups of examples:

1. Some member states had already enacted consumer protection legislation comparable to the protection provided by the Directive. For instance: BELGIUM in the Trade Practices Act of 1971 and the Act of 14 July 1991 on trade practices and consumer information and protection which both contained a provision on inertia selling. DENMARK with its Act No. 137 of 29 March 1978 on consumer contracts, which included provisions on distance selling, PORTUGAL with its Decree-Law 272/87 of July 3, which imposed duties of information on the trader and gave the consumer a right of withdrawal comparable to that in the Directive, and FRANCE with its “Law of 6 January 1998” which stated some rules for home shopping, had established a rather high level of consumer protection in the area of distance selling at a relatively early stage. Other member states like SPAIN and GREECE adopted legislation on the background of the Commission proposals for a Directive 97/7 in the early 1990s.

2. Member states like the UNITED KINGDOM, IRELAND, ITALY, SWEDEN, FINLAND and the NETHERLANDS had no specific legislative acts dealing with distance selling, except for some provisions on inertia selling as in the UNITED KINGDOM and IRELAND and selling via telephone and post in FINLAND. Nevertheless, consumers were protected by codes of conduct and other self-regulatory instruments.

3. A third group of member states had no comparable protection in the field of distance selling before the transposition of the Directive. In GERMANY and AUSTRIA no specific legislative protection of consumers existed in civil law. Only a small selection of commercial practices were considered as unfair and, thus, sanctioned by the UWG (Act against Unfair Competition). Furthermore, in the new member states (e.g. ESTONIA, HUNGARY, LITHUANIA, SLOVENIA, SLOVAKIA, POLAND, CZECH REPUBLIC, MALTA, CYPRUS) no comparable protection existed.

1208 Grabitz Hilf/Micklitz, Haustürwiderrufsrichtlinie, „Nach A3“, Rn 17.
II. Scope of application

1. Consumer

In Article 2(2) of the Directive, a consumer is defined as a “natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession”.

a. Legislative techniques

Some member states have implemented a general definition of a consumer being applicable to many consumer contracts. They are e.g. AUSTRIA, BELGIUM, CZECH REPUBLIC, ESTONIA, FINLAND, GERMANY, GREECE, ITALY, LATVIA, LITHUANIA, MALTA, the NETHERLANDS, POLAND1209, SLOVENIA and SPAIN.

DENMARK1210, PORTUGAL1211, SLOVAKIA1212 and SWEDEN have established the same definitions for doorstep and distance selling contracts. Other member states have transposed the Directive 97/7 in a separate legislative act and, therefore, stipulated a separate definition in the corresponding acts, e.g. the UNITED KINGDOM, IRELAND, CYPRUS and LUXEMBOURG. In FRANCE, case-law has developed a notion of consumer because there is no explicit transposition of this definition in the national law.1213 In HUNGARY, the transposition law of the Directive 97/7 does not contain an express definition. It is unclear whether the definition of the Hungarian CC § 685(d) or the definition in § 2(e) of the Consumer Protection Act is applicable. With the future planned integration of the distance selling regulation into the Civil Code this question could be cleared up.

Transposition of Art. 2(2) of the Directive 97/7: Definition of Consumer

| Reference to a more general definition | AT, BE, CZ, EE, EL, ES, DE, FI, HU, IT, LT, LV, MT, NL, PL, SL (16) |

1209 The POLISH CC Art. 22 (applicable to doorstep and distance Selling and to unfair terms).
1210 § 3(1) of the Act No. 451 of 9 June 2004 on certain consumer contracts.
1212 § 1 of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling.
1213 See for example Cass. civ., chambre civile 1, judgment of 5 March 2002, Bulletin 2002 I no. 78, 60.
**Definition for purposes of both doorstep and distance selling provisions**

DK, PT, SK, SE (4)

**Definition for purposes of distance selling provisions**

CY, IE, LU, UK (4)

**Not transposed expressly**

FR 1214 (I)

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**b. Content of the definitions**

Though generally the member states have properly implemented the definition of a consumer set by the Directive, a huge number of variations can be noticed. This is due to the fact that most member states did not transpose the definition word for word. As a result, the differences mainly consist in details only. A broad overview is given in the general chapter on the notion of consumer 1215. With regard to distance selling, some major variations can be outlined as follows:

**aa. Inclusion of certain legal persons**

As in the Directive, the CYPRiot, DutcH, ESTONian, FinniSH, GermaN, iRish, iTalian, LAtvian, LITHUAniAn, LuxemBOuRgiAn, MalteSe, PorTuguese, SloVeNiAn, SlovAkian, Swedish, and UK Regulations are in the scope of distance selling expressly limited and only apply to natural persons. In LatviA, there has recently been a reform, so that from now on legal persons are excluded from the notion of consumer 1216.

In some countries, however, certain legal persons (e.g. private associations) are treated as consumers on the condition that they act for private purposes. Such member states are AuSTriA, BelgiUm1217, the czech Republic, DenmarK, FrAnce, gReece1218, HungarY, iReland, PoLanD, and SpaiN.

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1214 Case-law has developed a notion: See for example Cass. civ., chambre civile 1, judgment of 5 March 2002, Bulletin 2002 I no. 78, 60.

1215 See Part 4. A.

1216 Amendment of the Consumer Law Protection Law, which came into force on 11 November 2005.

1217 Art. 1 No.7° of the TPA: “act for exclusively private purposes”.

1218 In greece legal persons are treated as consumers even if they act for professional purposes, provided that they are the end recipients of the products or services.
Overview: Inclusion of legal persons

<table>
<thead>
<tr>
<th>Limitation to natural persons</th>
<th>CY, DE, EE, FI, IE, IT, LT, LU, LV, MT, NL, PT, SE, SL, SK, UK (16)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inclusion of certain legal persons</td>
<td>AT, BE, CZ, DK, EL, ES, FR, HU, PL (9)</td>
</tr>
</tbody>
</table>

**bb. Clarification of ‘mixed’ purpose cases**

The definition of Consumer in Art. 2(2) of the Directive 97/7 does not clarify expressly whether a person who concludes a contract intended for a ‘mixed’ purpose falls under the notion of consumer (e.g. a purpose which is in part within and in part outside his trade or profession like the purchase of a car for both private and professional use). In applying the rather similar definition in Art. 13 of the Brussels (I) Convention, the ECJ (C-464/01 – *Gruber*) has held that in such a case the person may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose “is so limited as to be negligible in the overall context of the supply”. The fact that the private element is predominant has been considered to be irrelevant in that respect. It is an open question whether this ruling is also applicable in the field of distance selling.

Some member states have tried to clarify when a person concluding such a contract for a ‘mixed’ purpose is a consumer. **Denmark**, **Finland**\(^ {1219}\) and **Sweden**\(^ {1220}\) have expressly stated that in such cases the preponderant purpose prevails. According to the preparatory works, in **Finland**, as a guideline, the professional purpose is at question when a person is accountable according to the Accounting Act\(^ {1221}\). In **Germany**, the courts would probably also focus on the question of whether the private or business purpose is predominant\(^ {1222}\). In **Italy**, the definition is rather similar to the Directive in this respect. But in the case where a small tobacconist concluded a contract for the hire of a vehicle, which was for both private and business use, he was held to be a consumer\(^ {1223}\). It is not clear from that decision whether the private use was predominant. Mixed purpose transactions are not a problem in **Greece**, as

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\(^{1219}\) Chapter 1 Section 4 of the Consumer Protection Act of 20 January 1978/38.

\(^{1220}\) Chapter 1 Section 2 of the Law (2005:59) on Consumer Protection on Distance Contracts and Doorstep Selling Contracts.

\(^{1221}\) Kirjanpitolaki 1336/1997.


according to the notion of consumer, a professional might also be treated as a consumer. In GREECE the only criteria is whether the consumer is the end recipient of the product or service or not.

In AUSTRIA\textsuperscript{1224} and BELGIUM\textsuperscript{1225} the consumer needs to acquire or use goods or services for purposes which fall outside his professional activity. As a consequence, a person is considered to be a consumer only if he or she has concluded the contract for a purely private purpose. Although the definition of some other member states reads rather similarly, it cannot be discerned how the courts would decide on the matter.

\textbf{Overview: ‘Mixed’ Purpose Transactions as Consumer Contract}

<table>
<thead>
<tr>
<th>Purely private purpose</th>
<th>AT, BE (2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Also ‘mixed’ purpose,</td>
<td>DE, DK, FI, SE (4)</td>
</tr>
<tr>
<td>preponderant purpose prevails</td>
<td></td>
</tr>
<tr>
<td>Also ‘mixed’ purpose – unclear whether private purpose must preponderate</td>
<td>IT (1)</td>
</tr>
<tr>
<td>No clear rule on ‘mixed’ purpose transactions discernible</td>
<td>CY, CZ, EE, EL, ES, FR\textsuperscript{1226}, HU, IE, LT, LU, LV, MT, NL, PL, PT, SL, SK, UK (18)</td>
</tr>
</tbody>
</table>

\textbf{cc. Extension to certain professionals}

Some member states have broadened the notion of consumer in a way that it also covers certain professionals. This is the case in FRANCE, where, according to well-established case-law, a consumer is a (natural or legal) person concluding contracts which are not directly

\textsuperscript{1224}§ 1(1)(1) and § 1(1)(2) of the Consumer Protection Law: § 1(1) Dieses Hauptstück gilt für Rechtsgeschäfte, an denen
1. einerseits jemand, für den das Geschäft zum Betrieb seines Unternehmens gehört, (im folgenden kurz Unternehmer genannt) und
2. andererseits jemand, für den dies nicht zutrifft, (im folgenden kurz Verbraucher genannt) beteiligt sind.


\textsuperscript{1226}In lower jurisdictions’ case-law, there can be found some examples of application of the unfair terms’ legislation in cases of mixed purpose, where private purpose preponderates.
related with his or her profession\textsuperscript{1227}. Hence, a business will be protected like a consumer if it concludes an atypical contract. In such a case the business will be considered a non-professional\textsuperscript{1228}. In \textsc{poland} the seemingly rather similar definition of the \textsc{cc} is applicable so that a person who is acting indirectly for his professional purposes is also considered to come under the definition of a consumer. Also the \textsc{latvian}\textsuperscript{1229} law provided for a similar definition: a natural or legal person who expresses a wish to purchase, purchases or might purchase goods or utilises a service for a purpose which is not directly related to his or her entrepreneurial activity. In \textsc{greece}, where in contrast to other member states a limitation to private purposes does not exist, a consumer is any individual or legal entity for whom goods or services on the market are intended, or who makes use of these goods or services, provided that this individual or legal entity constitutes the end recipient of the goods or services. The recipient of advertisements is equally regarded as a consumer. In practice such a broad definition can lead to difficulties in applying the law, so that in academic literature a necessity for a teleological reduction is considered. The condition for being qualified as an end consumer is a need for protection which must be verified in each case. The \textsc{maltese} law refers to the general definition of the consumer in the \textsc{consumer affairs act}, which contains the most detailed rule of all member states. Under the relevant law a consumer is:

(i) any individual who in transactions and other matters is acting for purposes which are not related to his trade, business, craft or profession; and

(ii) any other individual not being the immediate purchaser or beneficiary, and whether or not a member of the consumer’s household, who having been expressly or tacitly authorised or permitted by the consumer, may have consumed, used or benefited from any goods or services provided to the consumer by a trader acting in the course of a trade, business, craft or profession, including goods or services provided as part of gift schemes and similar or analogous inducements; and

(iii) any other class or category of persons whether natural or legal as may, from time to time, be designated as "consumers" for all or for any of the purposes of the \textsc{consumer affairs act} by the \textsc{minister} responsible for consumer affairs after consulting the \textsc{consumer affairs council}.

\textsuperscript{1227} See for example \textsc{cass. civ., chambre civile 1}, judgment of 5 March 2002, \textsc{bulletin} 2002 I no. 78, 60.
\textsuperscript{1228} See for more details the general chapter on the notion of consumer, Part. 4. A.
\textsuperscript{1229} Since 27 October, 2005 when the changes in Consumer Rights Protection Law were made, definition of consumer applies only to any natural person.
At least no. iii allows that professionals also fall under the Maltese definition of consumer\textsuperscript{1230}.

The Spanish law does not use the terms of the Directive but instead - partly - introduces the notion of a “buyer”. Nevertheless, in other articles the “consumer” is mentioned. The notion includes legal persons and focuses on the concept of “final addressee”. This term seems to include any buyer, that is the public in general, and not necessarily the “consumer”, as Spanish law does not refer to the terms “acting for purposes outside of his trade”. The scope of application of the Spanish law is much broader than in the Directive on the one hand. On the other hand it could be doubted that the Spanish law covers a buyer who wants to use a good for a private purpose but who intends to resell it afterwards. It is disputed in Spanish legal literature whether this can be brought in line with the Directive.

In Germany, the relevant definition of the term consumer clarifies that an employee, who concludes a contract for a purpose in relation to his job, is protected as a consumer (e.g. a worker buying workwear). Accordingly, the German Bundesarbeitsgericht (Federal Labour Court) considered an employee to be a consumer\textsuperscript{1231}. It is possible that some other member states also protect professionals up to some extent as consumers.

**Overview: Extension to certain professionals**

<table>
<thead>
<tr>
<th>Extension to certain professionals</th>
<th>EL, FR, MT, LV, PL (5)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clarification that employees are consumers</td>
<td>DE (1)</td>
</tr>
</tbody>
</table>

**dd. Examples for variations in wording**

The variety of national transpositions can be exemplified by some further national laws. Most follow the wording of the Directive 97/7 rather closely. Examples are, besides many others, Cyprus, Portugal or Luxembourg (e.g. « toute personne physique qui, dans les contrats relevant de la présente loi, agit à des fins qui n'entrent pas dans le cadre de son activité »)

\textsuperscript{1230} It is to be noted that the Minister has to-date not specifically designated professionals as a class or category to be included within the definition of consumers.

\textsuperscript{1231} Bundesarbeitsgericht, judgment of 25 May 2005, 5 AZR 572/04, NJW 2005, 3305; cf. also Part 4. A of the study “Definition of consumer”.
professionnelle »). In ESTONIA, the term is much the same (“purposes not related to his or her business or professional activities”). This applies also to the NETHERLANDS, where a consumer constitutes a natural person who is acting for purposes which are outside his trade, business or profession. In the UK it is any natural person who, in contracts to which these Regulations apply, is acting for purposes which are outside his business. A similar definition is given by the CZECH legislation: Consumer means any person who, when concluding and performing a contract, does not act in his commercial or entrepreneurial capacity. The SLOVAKIAN law considers a natural person as a consumer when he or she buys the goods or a material performance or deed from the service provided and they are not used to perform that person’s trade, profession or business. The SLOVENIAN definition resembles this. A consumer is any natural person who acquires or uses goods or services for purposes which are outside his professional or profit-making activity. Likewise in LITHUANIA, where a consumer means a natural person, who expresses the intention to buy, buys and uses goods or services for a purpose that can be regarded as outside his trade or profession: to meet his own personal or household needs. The AUSTRIAN law approaches the notion of a consumer in a negative way: a consumer is someone who is not a trader. A trader is in turn someone for whom the transaction belongs to the business of his enterprise. Although different in wording, such definitions seem to transpose the Directive properly or can at least be interpreted in accordance with the Directive.

2. Supplier

Under the terms of the Directive 97/7, a supplier is “any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity”. The wording of this definition slightly varies from the respective definitions in the other consumer protection directives. Nevertheless, it can be assumed that these definitions are generally to be interpreted similarly.

It might be useful to have in mind that the main purpose of the definition of the supplier is simply to clarify that the Directive is only applicable for B2C situations, but not in C2C relations. Therefore, variations in the transposition laws of the member states are not very relevant for the proper functioning of the law, as long as the definition of consumer is precise.
and the respective definition of its counterpart does not exclude persons who come under “supplier” in the sense of the Directive.

From this starting point the differences to be found in the member states do not seem to be far-reaching. Some member states have used the copy and paste technique transposing the definition into national law, e.g. DENMARK, IRELAND, ITALY, THE NETHERLANDS and PORTUGAL. However, not all member states have explicitly adopted this definition. In the CZECH REPUBLIC the general definition of supplier applies also to distance selling situations. In ESTONIA, FINLAND, MALTA, POLAND AND SWEDEN, the term “trader” is used, whilst in ITALY and LUXEMBOURG it is the “professional” against whom the consumers can exercise their rights. In SLOVENIAN legislation the term “undertaking” is used, whilst in GERMANY it is “entrepreneur”. Many member states have tried to clarify details or to give examples. The LATVIAN and the LITHUANIAN law list the “seller” of goods and the “service provider”. BELGIUM uses the notion of “seller”, focusing on the activity of selling goods or services and not – slightly different from the Directive - on the contract itself. This seems to be similar in ESTONIA and FINLAND where - besides selling – offering and marketing of goods and services are enumerated. Moreover, the BELGIAN legislator has explicitly included traders and artisans. The HUNGARIAN legislator has enumerated certain business enterprises in its transposition law.

Further examples of additions are revealed in the GERMAN legislation, where partnerships with legal capacity (meaning those who are capable of acquiring rights and entering into engagements) are expressly mentioned (CC § 14), or the CYPRiot notion where the supplier acts “either personally or through his representative”. MALTA expressly makes reference to corporate and incorporated bodies as well as to commercial partnerships. Among others,

1233 CC § 52(2) applicable for all consumer contracts: “… a person who concludes and fulfils a contract within the framework of his commercial or other business activity.
1234 In Luxemburg “professionel”, in Italy “professionista”.
1235 Art.1 CRPL defines “service provider” as a natural or legal person who provides a service to a consumer. The definition does not include any reference to the entrepreneurial or professional activity of person.
1236 Under the terms of the Lithuanian Law on Consumers Protection the Seller means a person who sells the goods on the premises intended for business purposes or outside them, and Service provider means a person who supplies services to the market.
1237 Only the provision of services which constitute acts of commerce (as referred to in Art. 2 - 3 Commercial Code) or artisanal activities fall under the scope of the Act of 14 July 1991 on Trade Practices and Consumer Information and Protection.
1239 Article 2 of the Law for the Conclusion of Consumer Distance Contracts of 2000.
AUSTRIA, GREECE, MALTA and FINLAND have made clear that legal persons of public law are also covered. In other member states like Germany the same would follow from the general definition of legal person.

Some member states have tried to clarify whether a person who does not intend to make a profit is included. In AUSTRIA, the legal transaction has to belong to the undertaking of the business. The term ‘business’ is defined as an organisation of independent commercial activity, even if it does not have the aim of making a profit. In GREECE non-profit-making organisations or institutions as well as public corporations and local authorities can also act as suppliers. The GERMAN courts also seem to interpret the definition in a way that an intention to make profit is not a prerequisite to qualify a person who regularly and steadily sells goods, as an entrepreneur. In contrast to that, the SLOVENIAN and the FINNISH law expressly regulate that the purpose of making profit or other economic gain is necessary in order to qualify as a professional.

In two member states though, no explicit definition of “supplier” exists. The SPANISH implementing legislation relates to the term “retail trade” (in Art. 1(2) of the Law 7/1996) and sometimes characterises the supplier as an “enterprise of distance selling” while other provisions refer to the “seller”. It cannot be assessed to what extent such a variety of terms causes difficulties in the application of the Spanish law. In FRANCE, however, where also no explicit definition exists, a considerably wide application has been favoured by the legal literature and the courts.

3. Contracts falling within the scope of the Directive

a. Definition of "distance contract"

According to Art. 2(1) of the Directive, the term ‘distance contract’ means any contract:

- concerning goods or services

1240 Article 1(4)(b) and Art. 1(3) of the Consumer Protection Act.
1241 BGH judgment of 29 March 2006, VIII ZR 173/05, NJW 2250.
1242 Calais-Auloy, Steinmetz, Droit de la consommation, 4 propose to include all kinds of professionals such as private or public institutions/ co-operations, irrespective of a purpose of gaining profit and stress the organised and customary character which creates an imbalance between the professional and the consumer.
• under an organised distance sales or service-provision scheme run by the supplier,
• that, 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.

AUSTRIA, BELGIUM, CYPRUS, DENMARK, FRANCE, GERMANY, IRELAND, ITALY,
LUXEMBOURG, MALTA, PORTUGAL, SLOVENIA and the UNITED KINGDOM have verbatim or
almost verbatim transposed the definition of a distance contract given in Art. 2(1) of the
Directive 97/7. FINLAND, THE NETHERLANDS and SWEDEN have used some different terms
which seem to have the same meaning as the definition in the Directive. ESTONIA\textsuperscript{1243} and
LATVIA\textsuperscript{1244} have added that the supplier must have made an offer or a proposal to the
consumer to make an offer. Among others, CZECH\textsuperscript{1245}, DANISH\textsuperscript{1246}, ESTONIAN\textsuperscript{1247}, GREEK\textsuperscript{1248},
POLISH\textsuperscript{1249} and SPANISH\textsuperscript{1250} law clarify the definition by stating that there is no distance
contract if the supplier and the consumer are present together at the same place at the time the
contract is concluded.

Some member states have not implemented the – restrictive – precondition that the contract
must be concluded “under an organised distance sales or service-provision scheme”. This can
be observed for the CZECH REPUBLIC, HUNGARY, LATVIA, LITHUANIA and SLOVAKIA.
Consequently, such member states have extended the scope of application of their distance
selling laws to contracts concluded without such a system, e.g. cases where the supplier uses
means of distance communication merely exceptionally for the conclusion of a contract.

b. Definition of "means of distance communication"

Article 2(4), sent. 1 of the Directive 97/7 defines “means of distance communication”, being
one of the elements of the distance contract, as “any means which, without the simultaneous

\begin{footnotes}
\footnotetext{1243}{§ 52 (1)(2)of the Law of Obligations Act.}
\footnotetext{1244}{Article 10(1) of the Consumer Rights Protection Law.}
\footnotetext{1245}{§ 53(1) of the CC.}
\footnotetext{1246}{§ 10a(1) of the Consumer Contracts Act.}
\footnotetext{1247}{§ 52(1)(3) of the Law of Obligations Act.}
\footnotetext{1248}{Article 4(1) of the Consumer Protection Act 2251/94.}
\footnotetext{1249}{Article 6(1) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an
Unsafe Product.}
\footnotetext{1250}{Article 38(1) of the Law 7/1996 of 15th January on retail trade.}
\end{footnotes}
physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties”.

Most of the member states have transposed this definition literally or with only some deviations in the wording, e.g. AUSTRIA\textsuperscript{1251}, BELGIUM\textsuperscript{1252}, CYPRUS\textsuperscript{1253}, the CZECH REPUBLIC\textsuperscript{1254}, DENMARK\textsuperscript{1255}, ESTONIA\textsuperscript{1256}, FINLAND\textsuperscript{1257}, FRANCE\textsuperscript{1258}, GERMANY\textsuperscript{1259}, IRELAND\textsuperscript{1260}, ITALY\textsuperscript{1261}, LITHUANIA\textsuperscript{1262}, LUXEMBOURG\textsuperscript{1263}, MALTA\textsuperscript{1264}, the NETHERLANDS\textsuperscript{1265}, PORTUGAL\textsuperscript{1266}, SLOVENIA\textsuperscript{1267} and the UNITED KINGDOM\textsuperscript{1268}.

The POLISH\textsuperscript{1269} and the SLOVAKIAN\textsuperscript{1270} legislation have incorporated the definition of “means of distance communication” into the definition of distance contract. The GREEK\textsuperscript{1271} and the SPANISH law\textsuperscript{1272} use the term, but do not define it. The LATVIAN\textsuperscript{1273} law does not give a theoretical definition of “means of distance communication”, but lists possible and more frequently used means of communication. Also in SWEDEN, the term “means of distance communication” was defined in the Law of Obligations Act.\textsuperscript{1274}

\begin{itemize}
\item AUSTRIA\textsuperscript{1251}: § 5a(2) of the Consumer Protection Act.
\item BELGIUM\textsuperscript{1252}: Article 77(1)(2) of the Act of 14 July 1991 on trade practices and consumer information and protection; Art. 2(7) of the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services.
\item CYPRUS\textsuperscript{1253}: Article 2, 6\textsuperscript{th} indent of the Law for the Conclusion of Consumer Distance Contracts of 2000.
\item CZECH REPUBLIC\textsuperscript{1254}: § 53(1) of the CC; also including “means…, operated by an entrepreneur whose activity involves provision of one or more means of distance communication”.
\item DENMARK\textsuperscript{1255}: § 4 Consumer Contracts Act.
\item ESTONIA\textsuperscript{1256}: § 52(2) of the Law of Obligations Act.
\item FINLAND\textsuperscript{1257}: Chapter 6 § 4 of the Consumer Protection Act of 20 January 1978/38.
\item FRANCE\textsuperscript{1258}: Code de la Consommation Art. L. 121-16.
\item GERMANY\textsuperscript{1259}: CC § 312b(2).
\item IRELAND\textsuperscript{1260}: Article 2(1) 7\textsuperscript{th} indent of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.
\item ITALY\textsuperscript{1261}: Article 50(1)(b) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.
\item LITHUANIA\textsuperscript{1262}: Article 2(10) of the Law on Consumer Protection of the Republic of Lithuania.
\item MALTA\textsuperscript{1263}: Article 1(4) of the Distance Contracts Act of 16 April 2003.
\item NETHERLANDS\textsuperscript{1265}: Article 2, 6\textsuperscript{th} indent of the Distance Selling Regulations, 2001.
\item PORTUGAL\textsuperscript{1266}: CC Book 7 Art. 46a(e).
\item PORTUGAL\textsuperscript{1266}: Article 2(1)(b) of the Decree-Law 143/2001 of April 26.
\item SLOVENIA\textsuperscript{1267}: Article 43(2) of the Consumer Protection Act.
\item SWEDEN\textsuperscript{1273}: Regulation 3(1) 16\textsuperscript{th} indent Consumer Protection (Distance Selling) Regulations 2000.
\item UNITED KINGDOM\textsuperscript{1268}: Article 6(1) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.
\item SLOVAKIAN\textsuperscript{1270}: According to § 9 para 1 of Act No. 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling (as amended by Act no. 118/2006 Z.z. (date of coming into force 01.04.2006) distance contract means a contract on goods or services concluded between a supplier and a consumer with the use of one or more means of distance communication, as mainly addressed letter, addressed book-post, unaddressed book-post, offering catalogue, book-post advertisement with order form, automatic telephone set, telephone, videophone, fax, videotext (microcomputer with TV monitor) with keyboard or touch-sensitive display, radio, teleshopping or electronic mail.
\item SPANISH\textsuperscript{1272}: Article 4(1), sent. 1 and 2 of the Law 2251/94 on Consumer Protection.
\item LAW 7/1996 of January 15 on retail trade.
\item LAW 7/1996 of January 15 on retail trade.
\item LAW 7/1996 of January 15 on retail trade.
\end{itemize}
“communication” is not defined. The Swedish Law on Consumer Protection on Distance Contracts and Doorstep Selling Contracts uses a verbal construction instead, which reads as “communication takes place exclusively at a distance”\textsuperscript{1274}.

Article 2(4), sent. 2 of the Directive refers to Annex I which contains a rather detailed indicative list of examples of means of distance communication. Seemingly, the member states have different legislative cultures to deal with such detailed lists of examples. Some have left it out completely (e.g. \textsc{Belgium, Denmark, France, Luxembourg, the Netherlands, Portugal and Spain}). \textsc{Italy} had originally had such a list but recently adopted its new Consumer Code\textsuperscript{1275}, which removed it\textsuperscript{1276}. However, \textsc{Cyprus}, the \textsc{Czech Republic, Greece, Hungary}\textsuperscript{1277}, \textsc{Ireland, Malta, Slovenia}\textsuperscript{1278}, \textsc{Lithuania} and the \textsc{United Kingdom} (“letter” instead of “standard letter”) have basically adopted the examples of the Annex. Other national legislators have been inspired to omit or to add some examples in order to improve the list. The \textsc{Czech Republic} exempts correspondence\textsuperscript{1279}. \textsc{Estonia, Finland} and \textsc{Slovakia} have the notion “telephone” for both cases “telephone with or without human intervention” of the Annex. \textsc{Germany} has shortened the list to some core techniques and incorporated it into the definition of ‘means of distance communications’. \textsc{Polish}\textsuperscript{1280}, \textsc{Lithuanian}\textsuperscript{1281} and \textsc{Slovakian}\textsuperscript{1282} law have added further examples to their list. As the list is only indicative, such examples should not infringe EC law, in particular when the definition is transposed properly, which anyway has to be interpreted in accordance with the Directive.

\textsuperscript{1274} Chapter I Section 2 of the Law (2005:59) on Consumer Protection in Distance Contracts and Doorstep Selling Contracts.
\textsuperscript{1275} Legislative decree of 6 September 2005, No. 206 “Consumer code”.
\textsuperscript{1276} Legislative decree of 22 May 1999, No. 185 “Implementation of the Directive 97/7/EC concerning distance contracts between consumers and suppliers”.
\textsuperscript{1277} § 1(5) of the Government Decree No. 17/1999 (II.5.) on Distance Contracting
\textsuperscript{1278} Under \textsc{Slovenian} law in particular the following are means of distance communication: standard letter and other printed matters, catalogues, telephone conversations, press advertising with order form, teleshopping, facsimile machine, electronic mail, internet.
\textsuperscript{1279} § 53(1) of the CC.
\textsuperscript{1280} “Electronic advertising … or other electronic means of communication within the meaning of the Act of 18 July 2002 on the provision of electronic services (Official Gazette No 144, item 1204)”.
\textsuperscript{1281} “telegraph”.
\textsuperscript{1282} “Address list”.
c. Definition of "operator of a means of communication"

Article 2(5) of the Directive 97/7 defines an ‘operator of a means of communication’ as “any public or private natural or legal person whose trade, business or profession involves making one or more means of distance communication available to suppliers”. It should be noted that the term ‘operator of a means of communication’ is rather self-explanatory and is used in the Directive only in two cases, namely in Art. 5(2) and in Art. 11(3)(b), the first being a small exception from a general rule, the second being a rather general task assigned to the member states which can be implemented in many ways. Therefore, it is easily possible to transpose these two articles of the Directive without an explicit definition of the term ‘operator of a means of communication’ or even without using it at all.

Thus, it is not a surprise that many member states have not transposed this notion at all, such as AUSTRIA, the CZECH REPUBLIC, FRANCE, GERMANY, GREECE, HUNGARY, LATVIA, SLOVENIA, SLOVAKIA and SWEDEN. The DANISH Law does not contain a specific definition of a provider of communication technique, corresponding with Art. 2(5) of the Directive 97/7. A specific definition is not deemed necessary since the definition of a provider in the Directive already corresponds with the generally applicable understanding of "a provider" under DANISH law.

However, BELGIUM, CYPRUS, ITALY, LUXEMBOURG, PORTUGAL have transposed the term by copy and paste. Some national legislators deviate slightly from the wording of the Directive, e.g. the NETHERLANDS. For example, the SPANISH law replaces “whose trade involves making available” with “who are titleholders of the means of communication”\(^\text{1283}\). Others do not distinguish in regard to the specific nature of the entrepreneur between natural and legal (UNITED KINGDOM\(^\text{1284}\)) or public and private (IRELAND\(^\text{1285}\) and LITHUANIA\(^\text{1286}\)). This may be

\(^{1283}\) Article 48(2) of the Law 7/1996.

\(^{1284}\) Regulation 3(1) of the Consumer Protection Regulations 2000.

\(^{1285}\) Article 2(1) of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

\(^{1286}\) Article 2(11) of the Law on Consumer Protection.
due to the respective national meaning of the term ‘person’ which often includes legal persons or public law persons.  

FINLAND abstains from its own definition of an operator of a means of communication, POLAND refers to the directive’s definition for the transposition of Art. 5(2) of the Directive 97/7 (“invoiced by a natural or legal person who within the framework of his enterprise makes available at least one means of distance communication to which the consumer and the contractor have access”). The ESTONIAN Electronic Communication Act uses the term of an “electronic communications undertaking”, which is defined as “a person who provides a publicly available electronic communications service to the end user or to another provider of a publicly available electronic communications service”. Such variations seem to be deviations of the wording only and not of the substance.

d. Exemptions provided by Art. 3 of the Distance Selling Directive

aa. Contracts concluded by means of automatic vending machines or automated commercial premises

<table>
<thead>
<tr>
<th>Exemption (Art. 3(1)) 2nd indent</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, CY, CZ, DE, DK, EL, FI, FR, IE, IT, LV, LU, MT, NL, PL, PT, SK, ES, SE, UK (20)</td>
</tr>
<tr>
<td>Variations</td>
<td>EE, HU, LT, SL (4)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>BE (1)</td>
</tr>
</tbody>
</table>

The exemption concerning contracts concluded by means of automatic vending machines or automated commercial premises has been adopted by a great majority of member states, with the exception of BELGIUM. AUSTRIA has, in general, transposed this exemption, but the specific protection with regard to fraudulent use of credit cards according to Art. 8 of the

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1287 E.g. Malta where the Interpretation Act Cap. 249 of the Laws of Malta applies - more specifically article 4(d) which states that the express ‘person’ shall include a body or other association of persons, whether such body or association is corporate or unincorporate.  
1288 Chapter 6 § 4 (1) the Consumer Protection Act.  
1290 § 2(5) of the Electronic Communications Act (Elektroonilise side seadus).
Directive has been transposed in a way that it is also applicable to contracts concluded by means of automatic vending machines.\textsuperscript{1291} \textsc{estonia}\textsuperscript{1292}, \textsc{hungary}\textsuperscript{1293}, \textsc{lithuania}\textsuperscript{1294} and \textsc{slovenia}\textsuperscript{1295} did not implement the exemption for “automated commercial premises”, but for “automatic vending machines”. \textsc{lithuania} exempts these contracts from the application of Articles 4 (prior information), 5 (confirmation), 7(1) (obligation to execute the order within a maximum of 30 days) and Article 11(3)(a) of the Directive\textsuperscript{1296}.

**bb. Contracts concluded with telecommunications operators through the use of public payphones, Art. 3(1) 3\textsuperscript{rd} indent**

<table>
<thead>
<tr>
<th>Exemption (Art. 3(1) 3\textsuperscript{rd} indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>CY, CZ, DK, FI, FR, HU, IE, IT, LV, LU, MT, NL, PL, PT, SK, SL ES, SE, UK (19)</td>
</tr>
<tr>
<td>Variations</td>
<td>DE, EE, LT (3)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>AT, BE, EL (3)</td>
</tr>
</tbody>
</table>

This exemption has been transposed in all countries except for \textsc{austria}, \textsc{belgium} and \textsc{greece}. The \textsc{lithuanian} legislator did not restrict the provision to the use of public payphones, but excludes all contracts concluded with telecommunications operators. In \textsc{estonia}\textsuperscript{1297} and \textsc{germany}\textsuperscript{1298}, the transposition law exempts only the contracts concluded with telecommunications operators through the use of public payphones insofar as they concern the use of those payphones.

\textsuperscript{1291}$\S$ 31a of the Consumer Protection Act.
\textsuperscript{1292}$\S$ 53(2)(1) of the Law of Obligations Act.
\textsuperscript{1293}$\S$ 1(3)(b) of the Government Decree 17/1999 (II.5.) on Distance Contracting.
\textsuperscript{1294}Article 17(3) 5\textsuperscript{th} indent of the Law on Consumer Protection of the Republic of Lithuania.
\textsuperscript{1295}Article 43a(1)(5) 1\textsuperscript{st} indent of the Consumer Protection Act.
\textsuperscript{1296}Article 17(3) of the Law on Consumer Protection; CC Art. 6.366(3).
\textsuperscript{1297}$\S$ 53(2)(2) of the Law of Obligations Act.
\textsuperscript{1298}CC $\S$ 312b(3)(7)(b).
cc. Contracts concluded for the construction and sale of immovable property, Art. 3(1) 4th indent

<table>
<thead>
<tr>
<th>Exemption (Art. 3(1) 4th indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, CY, CZ, DE, DK, FR, HU, IE, IT, LU, MT, PL, PT, SK, SL, UK (16)</td>
</tr>
<tr>
<td>Variations</td>
<td>BE, EE, FI, NL, ES, SE (6)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>EL, LT, LV (3)</td>
</tr>
</tbody>
</table>

Only GREECE, LATVIA and LITHUANIA did not make use of this exemption. In BELGIUM, the exemption is not transposed in the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services (Liberal Professions Act, LPA). The Act of 14 July 1991 on Trade Practices and Consumer Information and Protection (Trade Practices Act, TPA) on the other hand does not apply to the sale of immovable goods. But according to well-established case-law, the TPA applies to all service contracts relating to immoveable property, including e.g. contracts for the construction of an immoveable property. Whereas ESTONIA did not implement the part “except for rental”, SPAIN did not include the whole part relating to “other immovable property rights, except for rental”. The NETHERLANDS₁²₉⁹ and SWEDEN₁³₀₀ only exempt contracts for the construction of immovable property. In contrast, the FINNISH legislation does not refer to the construction of immovable property. The Swedish law also mentions, besides the construction of buildings, “other fixed plant on land or in water”₁³₀¹. Member states like GERMANY, FINLAND and SLOVENIA explicitly exempt timeshare contracts besides contracts concluded for the construction and sale of immovable property.

dd. Contracts concluded at an auction, Art. 3(1) 5th indent

<table>
<thead>
<tr>
<th>Exemption (Art. 3 (1))</th>
<th>Member States</th>
</tr>
</thead>
</table>

₁²₉⁹ CC Book 7 Art. 46i(2)(b).
₁³₀₀ Sweden exempts contracts that are concluded for the construction of buildings or other fixed plants on land or in water.
₁³₀¹ Chapter 2 Section 1 of the Law (2005:59) on Consumer Protection in Distance Contracts and Doorstep Selling Contracts.
Except for GREECE and BELGIUM, this exemption has been transposed by every member state. However, BELGIUM has not totally exempted auctions, as the Trade Practices Act\[^{1302}\] and the Liberal Professions Act\[^{1303}\] only contain provisions that empower the King to lay down specific provisions for public auctions organised by means of distance communication.

Again, there are a significant number of member states who have deviated from the Directive. In LATVIA, the supplier is disburdened from any duties of information and from a right of withdrawal, when the contract has been concluded at an auction\[^{1304}\], whereas the other provisions of the Distance Selling law seem to be applicable. GERMANY and ESTONIA have not completely exempted auctions. In ESTONIA, auctions are only exempted from the right of withdrawal. This is similar in GERMANY, where the rules on distance contracts in principle apply to auctions, but the consumer does not have the right of withdrawal\[^{1305}\]. The Federal Supreme Court has held in this context that an Ebay ‘auction’ is not to be considered as an ‘auction’ in this sense\[^{1306}\]. Consequently, Ebay auctions fall under the distance selling laws.

The same result with regard to Ebay auctions should be reached in the following countries. DENMARK exempts auctions where “a significant number of bidders are normally present at the place of the auction”. The FINNISH Consumer Protection Act does not apply to contracts concluded at an auction, “if participation in the auction is possible also without using a means of distance communication”\[^{1307}\]. In SPAIN, auctions are generally exempted from the scope of application, but the Law 7/1996 of January 15 on retail trade\[^{1308}\] is, according to its Art. 38(3)(b), applicable to auctions concluded by electronic means. The SWEDISH law does not apply to contracts concluded at auctions where the bidding could be made by means other than at a

\[^{1302}\] Art. 83undecies(1) No. 6 of the TPA.

\[^{1303}\] Article 11, sent. 3, of the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services.

\[^{1304}\] Sections 8.3 and 15.9 of the Regulation regarding Distance Contracts.

\[^{1305}\] CC § 312d(4)(5).

\[^{1306}\] BGH judgment of 3 November 2004, VIII ZR 375/03, NJW 2004, 53-56.

\[^{1307}\] Chapter 6 sec. 6(5) of the Consumer Protection Act of 20 January 1978/38.

\[^{1308}\] Ley 7/1996, de 15 de enero, de ordenación del comercio minorista.
distance. In France, Slovakia and Slovenia only public auctions are exempted.

**ee. Partial exemption of contracts for the supply of foodstuffs etc. supplied by regular roundsmen, Art. 3(2) 1st indent**

<table>
<thead>
<tr>
<th>Partial Exemption (Art. 3(2) 2nd indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, DE, DK, FR, IT, LU, MT, NL, PL, PT, ES, SE, UK (13)</td>
</tr>
<tr>
<td>Variations</td>
<td>CY, CZ, EE, FI, EL, HU, IE, LV, LT, SK, SL (II)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>BE (I)</td>
</tr>
</tbody>
</table>

According to Art. 3(2) 1st indent of the Directive 97/7, Articles 4 (prior information), 5 (confirmation), 6 (right of withdrawal) and 7(1) (obligation to execute the order within a maximum of 30 days) do not apply to 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”. This exemption is said to be designed for the traditional English dairy man, but its scope is, of course, broader.

All the member states, except for Belgium, have implemented provisions transposing this exemption. Austria, Denmark, France, Italy, Luxembourg, Germany, Malta, the Netherlands, Poland, Portugal, Spain, Sweden and the United Kingdom have transposed this partial exemption more or less literally. In principle, Finland has also implemented the exemption for the supply of foodstuff by regular roundsmen, but has

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1309 Chapter 2 Section 1(2)(4) of the Law (2005:59) on Consumer Protection in Distance Contracts and Doorstep Selling Contracts.

1310 A "vente aux enchères publiques" is a classical auction where movable or immovable goods are sold openly to the public. The auction is most of the time driven by a "commissaire priseur" who is a public official.

1311 The Act on Voluntary Public Auction 527/2002 provides provisions on public auctions. The Act applies to the sales initiated by the owner of the unsecured assets, as well as to the sales of pledged assets initiated by the secured creditor on behalf of the pledgor.

1312 The public auction is regulated in the Execution of Judgments in Civil Matters and Insurance of Claims Act; the Ministry of Justice is empowered to regulate the procedure of the public auction in detail by regulation. The public auction is basically a way of selling certain seized movables (of higher value and is expected that they will be sold for a higher price than the estimated value).

1313 Not transposing “foodstuffs and beverages”, only referring to goods for everyday consumption.
narrowed it slightly\textsuperscript{1314}. If the supplier offers those goods and services by way of “cold calling”, the provisions on prior information, the confirmation and the right of withdrawal all apply\textsuperscript{1315}. According to LITHUANIAN law no reference to the supply by regular roundsmen is made. Furthermore, the provisions transposing Art. 11 (3)(a) of the Directive do not apply to these contracts\textsuperscript{1316}.

By contrast, some member states, such as the CZECH REPUBLIC, GREECE, SLOVAKIA and SLOVENIA, have widened the exemption and completely excluded these contracts from the scope of application of their transposition laws. This may constitute an infringement of the Directive, as, for instance, Art. 8 (Payment per Card) and Art. 9 (Inertia Selling) are applicable on such contracts and, therefore, must be transposed. Contrary to the Directive, ESTONIA has broadened the exemption by also excluding the provisions transposing Art. 7(2) of the Directive 97/7\textsuperscript{1317}. The IRISH transposition law states that Regulations 4, 5 and 6 and 7(1) shall not apply to the contracts for the supply of foodstuff etc. supplied by regular roundsmen. Regulation 7(1) of the Irish Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation does not contain the obligation to execute the order within a maximum of 30 days. This is a wrong transposition – probably a drafting mistake - because this obligation is stated in Reg. 9(1) of the Irish transposition law.

Some member states have stated differences concerning the place of the supply of the goods. The HUNGARIAN law only refers to the “foodstuff and contracts concerning the regular delivery of everyday consumer goods”. Also, the GREEK legislator did not explicitly lay down the consumer’s residence or workplace as places that the food could be supplied to\textsuperscript{1318}. In CYPRUS the scope has been widened for the supply of the said goods by regular roundsmen at all places other than the supplier’s workplace\textsuperscript{1319}.

\textsuperscript{1314} Using the term „regular delivery system” in Chapter 6 sec. 7(1)(1) of the Consumer Protection Act of 20 January 1978/38.
\textsuperscript{1315} Chapter 6 sec. 7(2) of the Consumer Protection Act of 20 January 1978/38.
\textsuperscript{1316} CC Art. 6.366(3): “The provisions of this Article shall not apply…”.
\textsuperscript{1317} § 53(3) of the Law of Obligations Act.
\textsuperscript{1318} Article 4(13)(γ) of the Consumer Protection Act 2251/94.
\textsuperscript{1319} Article 4(2)(α) of the Law for the Conclusion of Consumer Distance Contracts.
ff. Partial exemption of contracts for the provision of accommodation, transport, catering or leisure services, Art. 3(2) 2\textsuperscript{nd} indent

<table>
<thead>
<tr>
<th>Partial Exemption (Art. 3(2) 2\textsuperscript{nd} indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>CY, PT, UK (3)</td>
</tr>
<tr>
<td>Variations</td>
<td>AT, BE\textsuperscript{1320}, CZ, DK, DE, EE, EL, ES, FI, FR\textsuperscript{1321}, HU, IE, IT, LV, LT, LU, MT, NL, PL; SE, SK, SL (22)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>(0)</td>
</tr>
</tbody>
</table>

Article 3(2) 2\textsuperscript{nd} indent provides that Articles 4, 5, 6 and 7(1) shall not apply:

- to 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.

Until now, this Article is the only provision of the Directive 97/7 which had to be applied by the ECJ (C-336/03 – EasyCar\textsuperscript{1322}). The Court held that Art. 3(2) of the Directive is to be interpreted as meaning that ‘contracts for the provision of transport services’ includes contracts for the provision of car hire services. The reasoning offers some guidance for the future application of this provision. The Court stated that the exemption has the purpose of protecting the interests of suppliers of certain services in order that they should not suffer the disproportionate consequences arising from the cancellation at no expense and with no explanation of services. An example of this would be a booking which is made and then cancelled by the consumer at short notice before the date specified for the provision of that service. In the view of the ECJ, car hire undertakings carry on an activity which the legislature intended to protect against such consequences by means of the exemption. The reason is that those undertakings must make arrangements for the performance, on the date

\textsuperscript{1320} The Royal Decree of 18 November 2002 states only an exemption for Art. 4 and 5 of Directive 97/7 and additionally requires that the contract may not exceed 350 Euro.

\textsuperscript{1321} Article L. 121-20-4, 2°, of the Code de la consommation however states that articles L. 121-18 and L. 121-19 (informations to be provided and written confirmation) do nonetheless apply to electronic contracts for the provision of accommodation, transport, catering etc.

\textsuperscript{1322} Judgment of 10 March 2005 C-336/03 EasyCar (UK) Ltd v Office of Fair Trading; see in particular n° 28, 29.
fixed at the time of booking, of the agreed service and, therefore, for that reason, suffer the same consequences in the event of cancellation as other undertakings operating in the transport sector or in the other sectors listed in the exemption.

Only three member states have exactly transposed Art. 3(2) 2nd indent of the Directive. Many other member states have chosen different methods in transposing this exemption. For instance, the CZECH REPUBLIC, GREECE, LITHUANIA, SLOVAKIA and SLOVENIA have completely exempted the contracts regulated in Art. 3(2) 2nd indent. As this provision allows only a partial exemption, such member states are in breach of EC law. This may also be the case with ESTONIA, which has broadened the exemption by also excluding the provisions transposing Art. 7(2) of the Directive 97/71323.

One core element of the partial exemption in Art. 3(2) 2nd indent of the Directive 97/7 is that the date of execution must be fixed at the time of the conclusion of the contract. AUSTRIA, BELGIUM, CYPRUS (“upon the conclusion of the contract”), DENMARK, GERMANY, ESTONIA (“upon the conclusion of the contract”), GREECE, FINLAND, IRELAND, ITALY, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL, SPAIN (“upon the conclusion of the contract”), SWEDEN (“in the contract”) and the UNITED KINGDOM have implemented this clause. Others like the CZECH REPUBLIC, HUNGARY, LITHUANIA, LATVIA, POLAND, FRANCE, SLOVAKIA and SLOVENIA have extended the exemption to contracts where the date of execution is fixed after the conclusion of the contract.

The majority of the member states have not transposed the second part of the exemption in Art. 3(2) 2nd indent (“exceptionally, in the case of outdoor leisure events…”), namely AUSTRIA, BELGIUM, the CZECH REPUBLIC, GERMANY, DENMARK, ESTONIA, GREECE, FINLAND, FRANCE, HUNGARY, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, SLOVAKIA, SLOVENIA, SPAIN1324 and SWEDEN. On the contrary, CYPRUS, PORTUGAL and the UNITED KINGDOM1325 have transposed this part as it is in the Directive

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1324 1st Additional Disposition para. 1(2) of the Law 7/1996 of January 15 on retail trade.
97/7. The POLISH law does limit the exemption to leisure events, however it does not refer to "specific” circumstances, but to circumstances stipulated in the contract.¹³²⁶

III. Consumer Protection Instruments

1. Information Duties

a. Pre-contractual Information

Article 4(1) of the Directive obliges the supplier to provide the consumer with the following information in good time prior to the conclusion of the contract:

a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
b) the main characteristics of the goods or services;
c) the price of the goods or services including all taxes;
d) delivery costs, where appropriate;
e) the arrangements for payment, delivery or performance;
f) the existence of a right of withdrawal, except in the cases referred to in Art. 6(3);
g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
h) the period for which the offer or the price remains valid;
i) 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.

According to Art. 4(2) the information must be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used. Paragraph 3 additionally clarifies that in the case of telephone communications, the identity of the supplier and the commercial purpose of the call must be made explicitly clear at the beginning of any conversation with the consumer.

All member states have used the list of pre-contractual information duties provided in Art. 4 of the Directive as a model for their transposition legislation and have created a rather similar list. For the purpose of this study, the following aspects shall be pointed out:

aa. “In good time” prior to the conclusion of the contract

A certain ambiguity can be seen in the requirement that the information must be provided to the consumer “in good time” prior to the conclusion of the distance contract. The member states have incorporated this requirement into their national law with some variations of the wording (some examples on the basis of translations which may be inaccurate: CYPRUS: “in time” instead of “in good time”; CZECH REPUBLIC: “sufficiently in advance”; ESTONIA: “within a reasonable period of time before a contract is concluded”; LITHUANIA: “prior to concluding the contract” LATVIA: in “offers expressed to consumers” (no indication as to the point in time); POLAND: “at the latest at the time of the proposal to conclude a contract being submitted”; SLOVAKIA: “before the distance contract is concluded”; SLOVENIA: “within a reasonable time period depending on the means of communication used but before the consumer is bound by the contract or by the offer”; SPAIN: “before the beginning of the contractual process and with the necessary anticipation”). Belgian law is more restrictive than the Directive as the information duty must be fulfilled at the time of the offer, which is interpreted broadly including advertisements which imply the seller’s willingness to supply1327. As such provisions have to be interpreted and applied in accordance with the Directive, the courts responsible should not come to results which breach EC law. Nevertheless, it might be considered to clarify this requirement when reviewing the Directive. A model could be the wording of the parallel article of Directive 2002/65: “in good time before the consumer is bound by any distance contract or offer” whereby – following the example of some member states the word “reasonable” instead of “good” could be used. This would make it clearer that the courts shall judge on the question of whether the period was sufficient in order to allow the consumer to reflect on the information before concluding a contract.

bb. Additional pre-contractual information obligations

Many member states have added further information to the list. The bulk of such additional pre-contractual information obligations introduced by the member states is related to the

1327 Art. 78 and Art. 2 of the TPA.
identity of the supplier. In CYPRUS, the CZECH REPUBLIC, DENMARK, FRANCE, GERMANY, SPAIN, FINLAND, AUSTRIA, LUXEMBOURG, MALTA, POLAND, SLOVAKIA, SLOVENIA and SWEDEN, the prior information must always include the supplier’s address, whereas Art. 4(1) of the Directive 97/7 only asks for the address in case of contracts requiring payment in advance. In FRANCE, LUXEMBOURG and HUNGARY, suppliers also have to provide their telephone numbers. The SLOVAKIAN transposition law specifies the Directive insofar as the supplier also has to inform the consumer about a trading permit (natural person) or the trade name and registered office (legal person). In the CZECH REPUBLIC the prior information has to contain information about the supplier’s identification number and on a body supervising the activity of the supplier.

However, it has to be borne in mind that such additional information obligations might be a generalisation of other, more specific information obligations, such as Art. 3 of Directive 2002/65, applicable only in case of financial services. Article 3(1)(1)(a) of this Directive expressly obliges to provide information about the geographical address at which the supplier is established; and according to lit. d the supplier must give information about the trade register in which it is entered and the registration number, if any. In e-commerce cases, rather similar obligations also arise from Art. 5 of Directive 2000/31 which obliges to provide –

\[1328\] § 53(4)(a) of the CC.
\[1329\] § 11(1)(1) of the Act No. 451 of 9 June 2004 on certain consumer contracts.
\[1330\] Code de la Consommation Art. L121-18.
\[1331\] See also the OLG Karlsruhe judgment of 27.03.2002, 6 U 200/01, GRUR 2002, 730-731; and the OLG Munich judgment of 11 September 2003, 29 U 2681/03, NJW-RR 2003, 913-915 dealing with the requirements of how to provide such information on an internet homepage, and whether it is sufficient to provide this information below the heading “Impressum” on a special page to which users were directed via the link “contact”.
\[1332\] Article 40(1)(a) of the Law 7/1996 of January 15 on retail trade.
\[1334\] Article 5c(1)(1) of the Consumer Protection Act. See also the OGH judgment of 23 September 2003, 4 Ob 175/03v. The OGH held that a supplier who, in his prior information, only provides a PO box number and the municipality in which the company is based, and fails to give more precise geographical indicators (the street name), is in breach of § 5c(1)(1) of the Consumer Protection Act.
\[1337\] § 10 (1) lit. a of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling.
\[1338\] Article 43b(1) of the Consumer Protection Act – a transposition of Art. 4(1)(i) – minimum duration of the contract – is lacking.
\[1339\] Chapter 2 Section 6 of the Law (2005:59) on Consumer Protection in Distance Contracts and Doorstep Selling Contracts.
\[1340\] Article 3 (1)(a) of the Distance Contracts Act of 16 April 2003.
\[1341\] Article 2(1)(a) of the Government Decree 17/1999 (II.5.) on Distance Contracting.
among others – information about the geographic address (para. 1(b)), an email address (para. 1(c)) or (para. 1(d)) the trade register (if any) and the registration number.

Other additional information obligations relate to the right of withdrawal. In BELGIUM, GERMANY, ITALY, SLOVENIA, SPAIN and FINLAND, the consumer also has to be informed about the non-existence of the right of withdrawal. This may be inspired by Art.1(3)(a) of the Directive 2002/65 which stipulates the obligation to inform about the existence or absence of a right of withdrawal. In LUXEMBOURG and BELGIUM, the supplier has to inform the consumer in advance of the conclusion of the contract if he aims to charge the cost of the return of goods to the consumer in case of withdrawal. In ITALY the pre-contractual information need not only include the existence of a right of withdrawal, but also the conditions and procedures for exercising it. In SLOVENIA the description of the right of withdrawal in accordance with Art. 43c is to be included. In ESTONIA, the prior information has to contain - if the object is acquired or the service is used on credit - the right of the consumer to withdraw from the credit contract pursuant to the provisions of § 57 of the Estonian Law of Obligations Act.

Only a very few further additional information obligations that are not related to the supplier’s identity or to the withdrawal right, could be traced. In POLAND, for instance, the supplier has to inform the consumer about the place and procedure for submitting complaints already prior to the conclusion of the contract. In ESTONIA, the prior information has to contain the estimated time of entry into force of the contract.

1342 Art. 78 no. 6 of the TPA and Art. 12 No. 6 of the LPA.
1343 Article 52(1)(f) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.
1344 Spain has laid down further information duties e.g. on “the circumstances and conditions upon which the seller could supply a good of similar quality and price replacing the ordered good by the consumer, whenever this possibility is foreseen” (Art. 40.1.j) and – “In case, indication on whether the seller has or is integrated into any alternative dispute resolution system”. (Art. 40.1.k).
1345 Chapter 6 Section 13 Consumer Protection Act; see also the Consumer Complaint Board judgment of 26 October 2004, 03/36/3370. The Board held that the consumer has a right of withdrawal because the supplier did not inform the consumer about the non-existence of a right of withdrawal in case of delivery of goods that by their nature cannot be resold.
1346 Article 3(1)(f) of the Distance Contracts Act of 16 April 2003.
1347 Article 78(7) of the Act of 14 July 1991 on Trade Practices and Consumer Information and Protection, but no similar provision exists in the Liberal Professions Act.
1348 Article 52(1)(g) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.
1349 Article 43b(1)(6) of the Consumer Protection Act.
It should be noted that several member states have regulated some e-commerce related duties in very close context to their rules on pre-contractual information duties in cases of distance selling. For instance, the LATVIAN law provides some specific information duties for the supplier if the consumer uses the internet for the conclusion of the contract. These information duties are e.g. technical stages that shall be observed in order to enter into the contract; conditions for the storage of the contractual documents (whether the contractual documents are saved) and availability of such contracts to consumers; technical means for determination and correction of input errors prior to the making of an order and languages offered for the entering into the contract\(^ {1352} \). Also, in SLOVENIA, the supplier has to inform the consumer about details concerning the technical steps leading to the conclusion of the contract; a statement of whether the concluded contract will be kept at the enterprise and the method of access to it; a statement of the technical means for identifying and correcting errors prior to the placing of an order; the languages in which the contract may be concluded\(^ {1353} \). This is, of course, a (partial) transposition of Art. 10 of Directive 2000/31 and not a ‘gold plating’ of Directive 97/7.

**Overview: Additional Pre-contractual Information Obligations**

<table>
<thead>
<tr>
<th>Additional Information</th>
<th>Member State</th>
<th>Parallel EC law provisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supplier’s address (in any event)</td>
<td>AT, CY, CZ, DE, DK, ES, FI, FR, LU, MT, PL, SE, SK, SL</td>
<td>Art. 3(1)(a) Dir. 2002/65; Art. 5 No 1 lit. b Dir 2000/31</td>
</tr>
<tr>
<td>Supplier’s telephone number</td>
<td>FR, HU, LU</td>
<td>None (but cf. Art. 5(1)(c) Dir. 2000/31: email address)</td>
</tr>
<tr>
<td>Trading permit (natural person) / trade name and registered office (legal person)</td>
<td>SK</td>
<td>None (but cf. Art. 5(1)(d) Dir. 2000/31)</td>
</tr>
<tr>
<td>Identification number</td>
<td>CZ, HU</td>
<td></td>
</tr>
</tbody>
</table>

\(^ {1352} \) Article 2(10) of the Cabinet Regulation No. 207 “Regulations Regarding Distance Contracts”.

\(^ {1353} \) Article 43b(2) of the Consumer Protection Act.
| Information about a body supervising the activity of the supplier | CZ |
| Non-existence of the withdrawal right | BE, DE, FI, IT, SL, ES | Art. 3(1)(3)(a) Dir. 2002/65 |
| Conditions and procedures for exercising withdrawal right | IT, SL | Art. 3(1)(3)(a) and (d) Dir. 2002/65 |
| Costs of the return of goods after withdrawal | BE, LU |
| Right of the consumer to withdraw from a related credit contract | EE |
| Estimated time of entry into force of the contract | EE |
| Place and procedure for submitting complaints | PL |

**b. Written Confirmation, Art. 5**

Art. 5(1), sent. 1 of the Directive obliges the supplier to provide, in good time during the performance of the contract, written confirmation (or confirmation in another durable medium) of some of the information to be given prior to the contract, unless the information has already been given to the consumer in such form.

Most of the member states, such as AUSTRIA\textsuperscript{1354}, CYPRUS, HUNGARY, BELGIUM, FINLAND, FRANCE, IRELAND\textsuperscript{1355}, ITALY, LATVIA, LUXEMBOURG, MALTA\textsuperscript{1356}, THE NETHERLANDS\textsuperscript{1357}, PORTUGAL, SWEDEN and the UNITED KINGDOM have rather closely followed the Directive when transposing this provision. ESTONIA\textsuperscript{1358} GERMANY, GREECE, POLAND, SLOVAKIA and

\textsuperscript{1354} § 5d(2) of the Consumer Protection Act.
\textsuperscript{1355} Reg. 5(2) of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.
\textsuperscript{1356} Article 5(2) Distance Selling Regulations, 2001.
\textsuperscript{1357} CC Book 7 Art. 46c(2).
\textsuperscript{1358} § 55(1) of the Law of Obligations Act.
SLOVENIA\textsuperscript{1359} have widened this duty to confirm the information insofar as all information due to be given prior to the contract has to be confirmed, whereas the Directive regulates in Art. 5(1), sent. 1 such a duty only for some information. In GREECE a written confirmation during the performance of the contract is obligatory even if the information has already been given to the consumer in such form prior to the contract. However, in the CZECH REPUBLIC, LITHUANIA and in SPAIN\textsuperscript{1360}, there is - contrary to the Directive - no general obligation to confirm the prior information according to Art. 5(1), sent. 1.

Characteristic variations can be found with regard to the formal requirements (see below under aa.) and to the time of the confirmation (see below under bb.). Noteworthy also is that CYPRUS, GREECE and SPAIN\textsuperscript{1361} have introduced the requirement that the language used must be the same one that was prevalent in the offer.

**aa. Formal requirements**

<table>
<thead>
<tr>
<th>Formal requirements</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE (only in the LPA), CY, EE, FR, IE, LU, PT, UK (9)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>(0)</td>
</tr>
<tr>
<td>Variations</td>
<td>BE, FI, CZ, DE, DK, EL, HU, IT, LV, LT, MT, NL, PL, SE, ES\textsuperscript{1362}, SK, SL (16)</td>
</tr>
</tbody>
</table>

Article 5(1) states that the consumer has to receive written confirmation, or confirmation in another durable medium available and accessible to him, of some of the information laid down in Art. 4 of the Directive\textsuperscript{1363}. The following member states have literally transposed these formal requirements: AUSTRIA, BELGIUM in the Liberal Professions Act (LPA), CYPRUS, ESTONIA, FRANCE, IRELAND, LUXEMBOURG, PORTUGAL and the UNITED KINGDOM. Article 79(1)(2) of the BELGIAN Trade Practices Act obliges the supplier to present a clause

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\textsuperscript{1359} Article 43b Consumer Protection Act.
\textsuperscript{1360} Article 47 of the Law 7/1996 of January 15 on retail trade.
\textsuperscript{1361} Article 47(2) of the Law 7/1996 of January 15 on retail trade (with regard to the information to be given according to Art. 5(1), sent. 2 of the Directive).
\textsuperscript{1362} Article 47(2) of the Law 7/1996 of January 15 on Retail Trade (with regard to the information to be given according to Art. 5(1), sent. 2 of the Directive).
\textsuperscript{1363} Article 4(1)(a)-(f) of the Directive 97/7.
informing about the right of withdrawal with the exact text, written in bold, and on the first page of the contract.

Many member states have implemented variations with regard to the term “another durable medium available and accessible”. Such differences seem to be only deviations of the wording, and not of the substance. Some examples, on the basis of the available translations, are: DENMARK (in legible form on paper or another permanent medium available and accessible to the consumer), FINLAND (in writing or electronically so that the consumer can reproduce the information unchanged), GERMANY (text form\textsuperscript{1364}), HUNGARY (written information or other documents confirming the verbal information), MALTA (tangible medium\textsuperscript{1365}), SLOVENIA (a suitable permanent data storage medium), SWEDEN (in a document or another readable, permanent form which is accessible to the consumer), LATVIA (written confirmation or confirmation that can be perceived and retained in another visual or audio form and is available to consumers\textsuperscript{1366}). The LATVIAN law even lists examples for these other visual or audio forms, e.g. voice mail, audio text, videophone, video text, electronic mail or facsimile and other means of communication.

Some member states have increased consumer protection by not transposing the term “another durable medium available and accessible to the consumer”. They oblige the supplier always to provide confirmation of the information in written form. Such member states are the CZECH REPUBLIC\textsuperscript{1367}, GREECE\textsuperscript{1368}, LITHUANIA\textsuperscript{1369}, POLAND\textsuperscript{1370} and SLOVAKIA\textsuperscript{1371}. The NETHERLANDS has partially done the same by providing that the confirmation of some core information (e.g. main characteristics of the good or service, existence of right of withdrawal) must be given in writing. Only the information about other subjects (e.g. identity of the supplier, price, delivery costs and arrangements for payment, delivery or performance) can alternatively be provided

\textsuperscript{1364} Defined in CC § 126(b).
\textsuperscript{1365} This difference in terminology is arguably somewhat problematic since it is not clear whether electronic mail or contracts should be classified as tangible or intangible.
\textsuperscript{1366} Article 6(1) of the Cabinet Regulation No. 207 “Regulations Regarding Distance Contracts”.
\textsuperscript{1367} § 53(5) of the Act 40/1964 Coll., CC. Recently there has been a reform which seems to allow the provision of confirmation by any means of distance communication.
\textsuperscript{1368} Article 4(9) of the Consumer Protection Act 2251/94.
\textsuperscript{1369} CC Art. 6.366(6); Art. 17(6) of the Law on Consumer Protection of the Republic of Lithuania.
\textsuperscript{1370} Article 9(3) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.
\textsuperscript{1371} § 10(3) and (4) of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling.
in another durable medium\textsuperscript{1372}. In \textsc{ITALY} the supplier can only use another durable medium if the consumer chooses to do so\textsuperscript{1373}. In \textsc{Spain} the supplier can use another durable medium unless the consumer rejects this explicitly.

**bb. Time of the confirmation**

<table>
<thead>
<tr>
<th>Formal requirements</th>
<th>Member States</th>
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</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, EL, IE, LU, MT, NL, PT, UK (8)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>(0)</td>
</tr>
<tr>
<td>Variations</td>
<td>BE, CY, CZ, DK, DE, EE, ES, FI, FR, HU, IT, LV, LT, PL, SK, SL, SE (17)</td>
</tr>
</tbody>
</table>

Article 5(1) of the Directive further provides, with regard to the time when the confirmation is due, a rule with two elements. The confirmation must be given:

- in good time during the performance of the contract.
- where goods are concerned, the latest point being at the time of delivery (not applicable when the goods are for delivery to third parties).

Member states like \textsc{Austria, Greece, Ireland, Luxembourg, Malta, The Netherlands, Portugal or the United Kingdom} have almost literally implemented this provision.

Some member states have changed the terms “in good time”. Cypriot law refers to “in due course”. In \textsc{Germany, Finland} and \textsc{Sweden}, the supplier has to provide confirmation “at once” or “as soon as possible”, at the latest by the time of the performance or delivery. \textsc{Slovenia} fixes a “reasonable period of time” for providing confirmation. Other member states have completely left out a formula like “in good time”, e.g. \textsc{Italy} (“before or when entering into any contract.”), \textsc{Estonia}\textsuperscript{1374} (“at the latest during the performance”), \textsc{Spain}\textsuperscript{1375} (“at the time of the performance of the contract”), \textsc{Czech Republic}: (“after the conclusion of the contract, but no later than before the performance”), \textsc{Lithuania}: (“prior to performance of

\textsuperscript{1372} CC Book 7 Art. 46c(2).
\textsuperscript{1373} Article 53(1) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.
\textsuperscript{1374} § 55(1) of the Law of Obligations Act.
\textsuperscript{1375} Article 47(1) of the Law 7/1996 of January 15 on retail trade (with regard to the information to be given according to Art. 5(1), sent. 2 of the Directive).
the contract”). Also POLAND and SLOVAKIA determine the moment of the delivery of goods and the provision of services as the latest date when confirmation has to be provided.

As the Directive fixes the latest moment only for goods and not for services, many member states seemingly felt a need to clarify such a moment for services, too. Some examples are already mentioned above; others include, FRANCE (“au plus tard au moment de la livraison”), GERMANY (“at the latest until the complete performance of the contract”), LATVIA (“but no later than at the moment of delivery of goods or provision of services”) or SLOVENIA (“no later than by the time of delivery of the goods or the start of the provision of services”). BELGIUM has developed a rather elaborate set of rules. For goods, BELGIAN law follows the Directive. For the provision of services, confirmation has to be given at the latest before the performance, but if the performance has begun – with the agreement of the consumer - before the end of the withdrawal period, the supplier can also confirm during the performance\(^{1376}\). For the liberal professions, however, Belgian law provides a different rule, which is closer to the Directive\(^ {1377}\).

DENMARK (“when the contract is concluded”) has regulated an earlier point of time than the Directive requires. The HUNGARIAN transposition has the same starting point (“in good time before signing the contract”), but allows also for confirmation at “the time of the conclusion of the contract at the latest”. Some member states, e.g. BELGIUM, the CZECH REPUBLIC, ESTONIA, FRANCE, GERMANY, HUNGARY, ITALY and LATVIA, POLAND, SLOVAKIA, SLOVENIA and Spain have also omitted the reference to goods for delivery to third parties.

Such differences with regard to the point in time when the confirmation has to be provided may cause difficulties for suppliers who are active in cross-border trade. Nethertheless, suppliers should be able to overcome most of these difficulties by providing the confirmation as early as possible.

\(^{1376}\) Article 79(2) of the Act of 14 July 1991 on Trade Practices and Consumer Information and Protection.

\(^{1377}\) Article 13 of the Act of 2 August 2002 on Misleading and Comparative Advertising, Unfair Contract Terms and Distance Marketing in Respect of Professional Services.
cc. Information to be provided in any event (Art. 5(1), sent. 2 of the Distance Selling Directive)

Furthermore, the supplier must according to Art. 5(1), sent. 2 provide certain information in any event, namely:

- written information on the conditions and procedures for exercising the right of withdrawal;
- the geographical address of the place of business of the supplier to which the consumer may address any complaints;
- information on after-sales services and guarantees which exist; and
- the conclusion for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

Again, most of the member states have correctly transposed this specific information duty (e.g. AUSTRIA, BELGIUM, CYPRUS, the CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, PORTUGAL, SLOVAKIA, SLOVENIA, SPAIN, SWEDEN and the UNITED KINGDOM). Only some deviations could be observed. Additionally, in BELGIUM, SPAIN and CYPRUS the supplier has to provide the consumer with a standard notice on the right of withdrawal. The GERMAN Regulation on duties to supply information in civil law contains in its Annex a standard form, which suppliers can use in order to fulfil the obligation to inform the consumer on the existence, the exercise and the effects of the right of withdrawal. In FINLAND the information on the right of withdrawal also has to contain the fact that the consumer cannot withdraw any more if the service has begun with the consent of the consumer.

The POLISH transposition law does not include a duty to inform about after-sales services and guarantees. Other member states oblige the supplier to provide more detailed information than foreseen in the Directive. Additionally, in ESTONIA, the confirmation has to provide information about the conditions of the supplier’s liability. Article 79(1)(2) of the

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1378 BGB-Informationspflichten-Verordnung (BGB-InfoV).
BELGIAN Trade Practices Act obliges the supplier to present a clause informing about the right of withdrawal with the exact text, written in bold, and on the first page of the contract.

**dd. Exception from Art. 5(1) for services performed through the use of a means of distance communication**

<table>
<thead>
<tr>
<th>Exception</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, DE, FR, HU, IE, IT, LU, LV, MT, NL, PL, PT, SK, SL, ES, SE, UK (19)</td>
</tr>
<tr>
<td>Variations</td>
<td>DK, EE, FI (3)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>CZ, EL, LT (3)</td>
</tr>
</tbody>
</table>

Article 5(2) of the Directive 97/7 allows for the exemption that the supplier does not have to provide a confirmation for services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which he may address any complaints.

The majority of the member states have transposed this exemption, e.g. AUSTRIA, BELGIUM, CYPRUS, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, THE NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, SLOVENIA, SPAIN, SWEDEN and the UNITED KINGDOM, although many of them do not use the term ‘operator of a means of communication’ defined in Art. 2(5) of the Directive. In DENMARK the exemption only applies to services with a maximum price of DKK 75 (approx. EUR 10). Some member states do not refer to the term ‘operator of means of distance communication’ and use other terms, e.g. ESTONIA (“provider of telecommunication”) and FINLAND (“business whose distance communication service is being used”). These seem to be deviations only of the wording and not of the substance. The CZECH REPUBLIC, GREECE and LITHUANIA have not implemented this exception into their national law.

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1381 For more details, see above point II. 3 c. Definition of "operator of a means of communication".
1382 § 12(4) and (5) of the Act on Consumer Contracts.
c. Sanctions for Breach of Information Duties

Most of the provisions of the Directive on sanctions for any breach of information duties are rather general and thereby leave great discretion to the member states. For instance, Art. 11(1) obliges the member states to ensure that adequate and effective means exist to ensure compliance with this Directive in the interests of consumers. Article 11(2) (now practically superfluous because of the Directive 98/27 enacted in the meantime), grants public bodies, consumer organisations and professional organisations the right to take action. A further instrument to secure compliance can be seen in the provision for voluntary supervision by self-regulatory bodies of compliance (Art. 11(4)).

The only concrete rule on sanctions for non-fulfilment of information duties in the Directive is Art. 6(1). This provision leads to a prolongation of the withdrawal period in the case that the information obligations laid down in Art. 5 have not been fulfilled, or fulfilled late. The Directive is somewhat unclear as to the point whether the maximum period in case of no confirmation at all is just 3 months or – more plausible – three months plus seven working days. The period begins, in the case of goods, from the day of receipt by the consumer; in the case of services, the period starts from the day of conclusion of the contract. It is worth noting that this sanction only applies for the obligations laid down in Art. 5. Consequently, the information obligations to be fulfilled prior to the conclusion of the contract (Art. 4) are not sanctioned by this mechanism.

Moreover, the prolongation for just 3 months in the case that the consumer has not been informed about his withdrawal right creates incoherencies with regard to other consumer directives. Only the Timeshare Directive foresees in Art. 5 a rather similar prolongation rule. By contrast, in the field of the Doorstep Selling Directive, the ECJ has ruled in the Heininger\(^\text{1383}\) case that the withdrawal period does not begin before the consumer has been informed about his right of withdrawal. Thus, the consumer has an eternal right to withdraw if the information has not been given. The Directive on Distance Selling of Financial Services is unclear on this point. In Art. 6(1) 2\(^{nd}\) indent, this Directive provides that the withdrawal period does not begin before certain information has been given. But this Directive does not

\(^{1383}\) ECJ judgment of 13 December 2001 C-481/99.
contain an explicit rule on a maximum period during which the consumer is entitled to withdraw. If one applies the rule developed by the ECJ in the *Heininger* decision, the consumer also has an eternal right to withdraw under this Directive, as long as the necessary information is not provided.

The vague and ambiguous rules in the Directive 97/7 have lead to a broad variety of sanctions for breach of information obligations provided for by the member states. The following types of sanctions can be observed:

- Prolongation of withdrawal period along Art. 6(1).
- Injunctions (i.e. in most cases transposition of Directive 98/27).
- Right of competitors to claim for damages.
- Fines under criminal or administrative law.
- Other private law consequences.

This variety makes it rather difficult for suppliers to assess the risk of any non-fulfilment of information obligations. But it should be noted that such an uncertainty need not constitute a barrier to trade. The reason is that law-abiding traders remain totally unaffected. It may even be seen as an advantage when the sanctions for breach of information duties are difficult to predict and calculate. Those suppliers who fulfil the information obligation might benefit even more from the internal market in comparison to their competitors, who do not inform properly, thereby also coming into difficulties because of different sanction regimes in the member states.

**aa. Prolongation of withdrawal period along Art. 6(1)**

Article 6(1), sent. 4 provides that if the supplier has failed to fulfil the information obligations laid down in Art. 5, the period shall be three months. The period shall begin:

- in the case of goods, from the day of receipt by the consumer,
- in the case of services, from the day of the conclusion of the contract.

Additionally, Art. 6(1), sent. 5 provides that, if the information is supplied within the three month period, the seven working day period shall begin as from that moment.
Some member states have varied the length of the additional period. Not very substantially, but, nevertheless, in breach of the Directive are the Latvian and the Italian transposition laws which foresee a period of 90 calendar days instead of three months. Other member states have provided for a longer additional period. This can be observed e.g. for Germany\(^\text{1385}\), where the period is generally extended to 6 months in the case that information duties are not fulfilled. However, if the information about the withdrawal right is not given, the consumer is entitled to withdraw forever. In case this information is given later, the consumer has a prolonged withdrawal period of one month. Instead of extending the withdrawal period, Finland\(^\text{1386}\) has stipulated that, if there is no conformation at all, the contract is not binding upon the consumer. However, the consumer must inform the supplier within one year from the conclusion of the contract if he wants to claim that the contract is not binding. If the supplier provides the consumer with the conformation before he claims that the contract is not binding, the ordinary (14 days) withdrawal period begins. In case that a conformation is given, but does not fulfil all requirements, the withdrawal period is 3 months; if the conformation is corrected during that period, the ordinary (14 days) withdrawal period begins. In Sweden, the consumer has a withdrawal period of one year if the supplier fails to provide the information foreseen in Art. 5(1), sent. 2 of the Directive. When the failure concerns other information, the withdrawal period is just extended to three months. Also Greece has a rather elaborate system of sanctions in case of lack of confirmation. In general, the contract is avoidable, if the confirmation is lacking or incorrect. The supplier can only escape the avoidance if he provides the information within a three month period. If the supplier fails to provide the information within this three month period, the consumer is entitled to avoid the contract without any time limit.

\(^{1384}\) The prolongation rule is in France as in the Directive, Code de la Consommation Art. L. 121-20 (although the ordinary withdrawal period is just 7 days and, therefore, too short).

\(^{1385}\) CC § 355.

\(^{1386}\) Sections 15(2) and (3), sec. 20 of the Consumer Protection Act.
Some member states have varied the beginning of the three month period slightly. These are, e.g., LITHUANIA (start of period – also for goods – from the day of conclusion of contract), the CZECH REPUBLIC (start of period for both goods and services from the day of “receipt of contracted performance”) or CYPRUS and the UNITED KINGDOM (“the day after the day on which the contract is concluded”). The NETHERLANDS do not seem to have provided a rule on the beginning of the additional period at all.

bb. Injunctions

It goes without saying that – originally because of Art. 11(2) of the Directive 97/7, now on the basis of Directive 98/27 – compliance with information obligations can be enforced by injunction proceedings in all member states.\textsuperscript{1387}

cc. Right of Competitors to Claim for Damages

In some member states such as, e.g. AUSTRIA, BELGIUM, GERMANY or HUNGARY, competitors may also claim for damages against suppliers who breach information obligations and thereby achieve an unlawful advantage over the law-abiding market participants. For example, recently, GERMAN law also allows the siphoning of profits made from unfair marketing practices. However, the practical relevance of such instruments seems to be very limited until now.

dd. Fines under Criminal or Administrative law

Most of the member states, such as DENMARK, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, MALTA, PORTUGAL, SLOVENIA, SLOVAKIA AND SWEDEN, have stated administrative sanctions. Suppliers who fail to provide the information are guilty of an offence and can be sanctioned with a fine.

\textsuperscript{1387} It may be noteworthy that the scope of application of these instruments may differ. In the UNITED KINGDOM, for example, under Reg. 27 of the Consumer Protection (Distance Selling) Regulations 2000, what matters is that there has been a breach – it is irrelevant whether this harms the collective interests of consumers. It is therefore more readily available than the kind of injunction one would seek under the Enterprise Act, which implements the Injunctions Directive (amongst other things) and under which the breach to has to harm the “collective interests” of consumers.

\textsuperscript{1388} For more detail, see Part 3.G.
ee. Other Private Law Consequences

It is difficult to assess to what extent member states foresee consequences of the infringement of information obligations in general private law. There are not many examples where this is stated expressly in the law. For instance, in IRELAND a contract is not enforceable against the consumer if the supplier fails to provide the prior information\(^{1389}\). The same seems to be the case in MALTA and CYPRUS. In BELGIAN law, the omission to insert the prescribed withdrawal clause into the written document is sanctioned on the basis of Art. 79(1)(2) of the Trade Practices Act. According to this provision, the product is deemed to be delivered without the prior request of the consumer as a consequence of which the consumer is neither required to pay the price nor send the product back to the seller. Moreover, under BELGIAN law the consumer has a right of withdrawal if the information on the non-existence of the right of withdrawal is not provided. FINLAND also offers the consumer assistance by the Consumer Ombudsman in individual cases.

Besides such express regulations on other sanctions of infringement of information duties, it is more than probable in most member states the general rules on pre-contractual obligations, on breach of contract or on tort may lead to individual rights or claims of consumers such as a right of avoidance from a contract or a claim for damages. This depends very much on the concrete nature of the violated information obligation, on the availability of remedies under the general law of obligations, on the question of whether a breach of information obligations amounts to a breach of contract under the respective system and whether such a breach leads to a concrete damage or disadvantage to the consumer. The possible constellations are so manifold that general conclusions can hardly be drawn.\(^{1390}\) However, it has to be kept carefully in mind that information obligations heavily interfere with the general remedies under private law available in the member states. Therefore, any full harmonisation of the sanctions of non-fulfilment of information duties would massively intervene into member states’ private laws.

\(^{1389}\) Article 4(1) of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.

\(^{1390}\) Cf. Howells/Wilhelmsson, EC Consumer Law, 182.
2. Right of Withdrawal

a. Exceptions to the right of withdrawal

aa. Exception to the right of withdrawal if performance of services has begun before the end of the seven working day period (Art. 6(3) 1st indent)

<table>
<thead>
<tr>
<th>Exemption (Art. 6(3) 1st indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, CZ, DK, EE, FR, DE, HU, IE, IT, LU, MT, NL, PL, PT, SK, ES, SE (18)</td>
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<tr>
<td>Not transposed</td>
<td>EL, LT, SL (3)</td>
</tr>
<tr>
<td>Variations</td>
<td>FI, LV, UK (4)</td>
</tr>
</tbody>
</table>

Most member states have transposed the exception to the right of withdrawal if performance of services has begun before the end of the seven working day period, as stated in Art. 6(3) 1st indent of the Directive 97/7. This can be observed for Austria, Belgium, Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Spain and Sweden. However, Greece, Lithuania and Slovenia have not transposed this exception. Some countries have implemented provisions differing from the Directive. Finland, Latvia and the United Kingdom have supplemented this exemption by a provision which obliges the supplier to inform the consumer that he will not be able to withdraw from the contract if the performance of the service has begun. In Finland this information must be given in the confirmation of the information, while in Latvia and the United Kingdom, this is to happen prior to the conclusion of the contract. In Belgium the consumer is granted a right of withdrawal if the supplier has not informed him of the absence of the right of withdrawal.

bb. Exception to the right of withdrawal in case of goods or services the price of which is dependent on fluctuations in the financial market (Art. 6(3) 2nd indent)

<table>
<thead>
<tr>
<th>Exemption (Art. 6(3) 2nd indent)</th>
<th>Member States</th>
</tr>
</thead>
</table>

As in the Directive | AT, BE* (LPA), CY, CZ, DK, FI, IE, IT, LU, MT, NL, PT, SK, SL, SE, UK (16)
---|---
Not transposed | EE, EL, LT (3)
Variations | BE* (TPA), FR, DE, HU, LV, PL, ES (7)

* more than once

Fifteen member states have transposed this exception. Only in ESTONIA, GREECE and LITHUANIA, is there no provision corresponding to Art. 6(3) 2nd indent of the Directive 97/7. It cannot be assessed how these legal systems organise the unravelling of such contracts. In BELGIUM, only the Liberal Professions Act contains this exemption expressly. The Trade Practices Act however does not apply to stocks, so that also the exemption in this Act is partly used. GERMANY and SLOVENIA have given some examples of goods and services which fall under this exception. In LATVIA, the supplier has to inform the consumer about the absence of a right of withdrawal prior to the conclusion of the contract. FRANCE and POLAND have omitted the clause “which cannot be controlled by the supplier”. HUNGARY has implemented a clause stating that goods or services are exempted where the price cannot be “controlled” by the supplier. Such variations seem to be more a difference in the wording than in the substance. The SPANISH law does not refer to services and thereby consequently has limited the exception to goods. In the case of services the position of the consumer is therefore better as foreseen in the Directive, as he is granted a right of withdrawal.

### cc. Exception to the right of withdrawal in the case of goods made to the consumer's specifications etc. (Art. 6(3) 3rd indent)

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<tr>
<th>Exemption (Art. 6(3) 3rd indent)</th>
<th>Member States</th>
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<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, DE, FR, HU, IE, IT, LU, MT, NL, PT, SL, ES, UK (15)</td>
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<tr>
<td>Not transposed</td>
<td>EE, EL, LT (3)</td>
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<tr>
<td>Variations</td>
<td>CZ, DK, FI, LV, PL, SK, SE (7)</td>
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</table>

1391 Art. 14(3) No. 2 of the LPA.
1392 Art. 1 of the TPA.
Once again, most member states have transposed the exception referring to all the five alternatives mentioned in the Directive, i.e.:

- goods made to the consumer's specifications.
- goods clearly personalised.
- goods which, by reason of their nature, cannot be returned.
- goods which are liable to deteriorate.
- goods which expire rapidly.

Only ESTONIA, GREECE and LITHUANIA have not implemented any provisions transposing the exception to the right of withdrawal in the case of goods made to the consumer's specifications etc.

For a more detailed illustration of the variations with regard to the different alternatives stated in Art. 6(3) 3rd indent of the Directive 97/7, please refer to the subsequent table.

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<td>3</td>
<td>cannot be returned</td>
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</table>

The table shows that some countries have not implemented all alternatives regulated in the Directive. The Danish and SWEDISH law does not mention the alternative No. 1 (consumer’s specification). However, in DENMARK the parties can agree that the Supplier may initiate the production of the good before the expiration of the withdrawal period, in which case the right of withdrawal also expires at the same date the production of the good is initiated\textsuperscript{1393}. FINLAND, LATVIA and SWEDEN have not transposed the alternative No. 2 (clearly personalised). The CZECH transposition law does not refer to products which, by reason of their nature, cannot be returned (No. 3). The LATVIAN, POLISH and SLOVAKIAN laws do not mention the criteria “expire rapidly” (No. 5). LATVIA instead exempts products which can be “quickly utilised”, which is somewhat different to “expire rapidly” and, therefore, may be an infringement of the Directive.

\textsuperscript{1393} § 18(6) of the Consumer Contracts Act No. 451/2004.
FINLAND\textsuperscript{1394} has clarified alternative No. 1 by exempting “goods manufactured to the consumer’s specifications so that they cannot be resold without incurring considerable loss or that they cannot be resold at all” and thereby perhaps slightly enhancing consumer protection. Some member states have regulated additional criteria.

The practical relevance of this exemption is illustrated by some case-law of national courts. For instance, the GERMAN Federal Court of Justice stated that the consumer’s right of withdrawal is not exempted if the product (in this case a laptop which has been constructed out of prefabricated standard units according to the consumer’s wishes\textsuperscript{1395}) can be disassembled with minor efforts and without interference to its (the standard unit’s) functional capability\textsuperscript{1396}. The court held that the exemption covers only products which are personalised in a way that they can only be sold to other consumers with a significant reduction of price. CA Brussels judged that plants, flowers, fruit trees and similar products – as a general rule - cannot be considered products that age or deteriorate easily\textsuperscript{1397}. Consequently, the withdrawal period provided for by the Act of 14 July 1991 (Trade Practices Act) applies to these products.

dd. Exception to the right of withdrawal with respect to audio or video recordings, or computer software (Art. 6(3) 4\textsuperscript{th} indent)

<table>
<thead>
<tr>
<th>Exemption (Art. 6(3) 4\textsuperscript{th} indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, DK, FI, FR, DE, HU, IE, LT, MT, NL, SK, SL, SE, UK (16)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>EE, EL (2)</td>
</tr>
<tr>
<td>Variations</td>
<td>CZ, IT, LV, LU, PL, PT, ES (7)</td>
</tr>
</tbody>
</table>

\textsuperscript{1394} Chapter 6 sec. 16(3) of the Consumer Protection Act of 20 January 1978/38.
\textsuperscript{1395} “built-to-order-system”.
\textsuperscript{1396} BGH judgment of 19 March 2003, VIII ZR 295/01, NJW 2003, 1665-1667.
\textsuperscript{1397} CA Brussels judgment of 21 January 1999; P. Bakker Hillegom vs. Ets. Gonthier.
Most member states have transposed this exemption, namely AUSTRIA, BELGIUM, CYPRUS, DENMARK, FRANCE, GERMANY, HUNGARY, IRELAND, Lithuania, MALTA, the NETHERLANDS, SLOVAKIA, SLOVENIA, SWEDEN and the UNITED KINGDOM. However, ESTONIA and GREECE have not incorporated this exemption into their laws. ITALY exempts sealed audiovisual products and software, opened by the consumer. Some variation can be observed with regard to the term “which were unsealed by the consumer”: LATVIA (“the consumer opened the packaging”) and POLAND (“the consumer has removed the original packaging”) refer to the packaging, which at least comes close to the Directive. Also the CZECH transposition law (“if the consumer damages the original packing”) may perhaps be interpreted in the same sense. In PORTUGAL the consumer may not withdraw from the contract if he or she removes a certain kind of seal (“selo de garantia de inviolabilidade”), which may just be seen as a clarification of the function of the seal referred to in the Directive.

Some member states have broadened the exemption regulated in Art. 6(3) indent of the Directive 97/7. LUXEMBOURG, for example, also exempts software that has been downloaded by the consumer. This is more or less the same in SPAIN, where electronic files supplied via electronic means, able to be downloaded or reproduced immediately to be used permanently, are exempted from the withdrawal right. It could be argued that Art. 6(3) indent of the Directive only allows the member states to exempt audio or video recordings and software which is sold on a physical data medium and consequently requires that a consumer who buys audio, video etc. data to be downloaded, must have a withdrawal right. If this is true, the LUXEMBOURGIAN and the SPANISH law would infringe the Directive. This may be a point for clarification by the legislator.

**ee. Exception to the right of withdrawal with respect to newspapers, periodicals and magazines (Art. 6(3) indent)**

<table>
<thead>
<tr>
<th>Exemption (Art. 6(3))</th>
<th>Member States</th>
</tr>
</thead>
</table>

1399 Article 15(4) of the Cabinet Regulation No. 207 “Regulations Regarding Distance Contracts”.
1401 § 53(7)(d) of the CC.
1402 Article 7(d) of the Decree-Law 143/2001 of April 26.
1403 Art. 5(4)(d) of the Distance Contracts Act of 16 April 2003.
1404 Article 45 (c) of the Law 7/1996 of January 15 on Retail Trade.
As in the Directive | BE, CZ, FR, DE, HU, IE, IT, LV, LT, LU, MT, NL, SK, SL, ES, UK (16)
Not transposed | DK, EE, EL (3)
Variations | AT, CY, FI, PL, PT, SE (6)

Most member states have transposed the exemption stated in Art. 6(3) 5th indent of the Directive 97/7 (cf. the table above). However, DENMARK, ESTONIA and GREECE have not transposed this exemption. Some member states have implemented provisions deviating from the Directive. In AUSTRIA, contracts for the supply of periodicals (“Verträge über periodische Druckschriften” (§ 26(1)(1)) are not exempted from the right of withdrawal. FINLAND only excepts these products if they are not offered by the way of cold calling. CYPRUS grants no right of withdrawal for the supply of newspapers and any form of periodicals. POLAND uses them term “the press”. In PORTUGAL and SWEDEN, the legislator only exempted newspapers and magazines, but not periodicals. This may be due to the fact the two terms “magazine” and “periodical” could be seen as synonyms.

Exemption (Art. 6(3) 6th indent) | Member States
As in the Directive | AT, BE, CY, CZ, DE, DK, FI, IE, IT, LV, LT, LU, MT, NL, PT, ES (16)
Not transposed | EE, EL (2)
Variations | FR, PL, HU, SK, SL, SE, UK (7)

Most member states have transposed this exception stated in Art. 6(3) 6th indent of the Directive 97/7 (cf. the table above). Only ESTONIA and GREECE did not foresee any provisions

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1406 The Portuguese version of the Directive is different from the English one, and concerns only “jornais e revistas”.
1407 The Swedish version of the Directive is different from the English one, and concerns only “tidningar och tidskrifter”.

on the exemption of gaming and lottery services. Some variations of the wording can be observed, e.g. HUNGARY (exempts gaming agreements, which also includes the lottery), POLAND (games and betting), SLOVAKIA (lottery and other similar games), SLOVENIA (games of chance and lottery services), SWEDEN (gaming or other lottery services). Also the UNITED KINGDOM adds betting to the services which are exempted. A clear difference can be stated for FRANCE, which only makes authorised lotteries exempt.

**b. Formal Requirements for the Exercise of the Right of Withdrawal**

The Directive does not contain an explicit provision allowing the member states to regulate formal requirements for the exercise of the withdrawal right by the consumer. But as Art. 5(1) 1st indent foresees that the consumer is informed about “the conditions and procedures for exercising the right of withdrawal”, it is generally assumed that the member states are free to regulate formal requirements. This understanding is in line with, e.g. Art. 5(1), sent. 1 of the Doorstep Selling Directive, which expressly allows the member states to lay down the rule on the procedure for the exercise of the withdrawal right.

Nevertheless, most member states have not provided any formal requirements for exercising the right of withdrawal, e.g. the AUSTRIA, BELGIUM, CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, HUNGARY, IRELAND, LATVIA, LUXEMBOURG, MALTA, THE NETHERLANDS, PORTUGAL, SLOVENIA, SWEDEN AND SPAIN. This means that, in these countries, the consumer can withdraw by any means, including a pure oral declaration. Spain has additionally clarified that sending back the goods is to be seen as a withdrawal.

Other member states have regulated that the consumer must use a certain form when he withdraws from the contract. In CYPRUS, LITHUANIA, POLAND AND THE UNITED KINGDOM the notice of cancellation must be given in writing. The UNITED KINGDOM clarifies that writing includes also text on another durable medium. SLOVENIA has legislated to the effect that sending back the goods also constitutes a valid withdrawal. In SLOVAKIA, the parties are free

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1408 Although the TPA and the LPA lay down no specific requirements, the consumer needs to proof the withdrawal. To avoid all discussions the withdrawal should be proven in writing, so that the burden of proof necessitates a withdrawal in writing.

1409 Article 6(5) of the Decreel-Law 143/2001 of April 26 clarifies that a registered letter addressed to the supplier or person for this purpose appointed is to be seen as the exercise of the right of withdrawal. This does not seem to be an obligatory requirement.
to find an agreement on the formal requirement for exercising the right of withdrawal. If there is no agreement and the contract is concluded in writing, the notice of cancellation must also be in writing. In Germany the consumer has to inform the supplier about his decision to cancel the contract by a notice in ‘text form’ (which also allows text on another durable medium). Furthermore, it is possible to withdraw from the contract by sending back the goods. Similar provisions can be found in Greece where the consumer can exercise the right of withdrawal in written form or in another durable medium available and accessible to him. The Italian Consumer Code states that the consumer has to send this notice of cancellation in a letter sent by registered mail with return receipt (“lettera raccomandata con avviso di ricevimento”) and it has to be signed by the person who concluded the contract or drafted the proposal. It can also be sent by telegram, telex, fax and e-mail within the period, but it must be confirmed by a letter sent by recorded delivery within the following 48 hours. The presentation of the return receipt (“avviso di ricevimento”), however, is not an essential condition for proving the exercise of the right of withdrawal (Art. 64(2), sent. 3 of the Italian Consumer Code).

**Table: formal requirements**

<table>
<thead>
<tr>
<th>none</th>
<th>Written</th>
<th>Text form</th>
<th>Return of goods</th>
<th>Registered letter</th>
</tr>
</thead>
<tbody>
<tr>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

**c. Withdrawal period**

**aa. Length of period**

The Directive provides a period of seven working days. Legal literature has remained somewhat unclear as to whether a Saturday counts as a ‘working day’. It should be noted that

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1410 Article 4(10) of the Consumer Protection Act 2251/94.
1411 Article 64(2) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.
this issue has already been clarified long ago in the Regulation 1182/71 determining the rules applicable to periods, dates and time limits. Article 2(2) of this Regulation expressly defines ‘working days’ as all days other than public holidays, Sundays and Saturdays. Furthermore, this Regulation contains many provisions on the calculation of periods, which are also applicable for the withdrawal period to be granted by the member states under the Directive 97/7. One important example may be the rule in Art. 3(4) which provides that, where the last day of the period is a public holiday, Sunday or Saturday, the period shall end with the expiry of the last hour of the following working day.

Some member states, e.g. AUSTRIA, BELGIUM, IRELAND, LITHUANIA, LUXEMBOURG, THE NETHERLANDS, SLOVAKIA, SPAIN and the UNITED KINGDOM have adopted the seven working days period. It cannot be assessed, whether ‘working day’ has the same meaning in all these countries as defined in the Regulation mentioned above, in particular, whether the term excludes Saturdays. But as the term must be interpreted in accordance with the Directive, there should be no infringement, unless a national court comes to a different result.

Many member states have used the minimum clause to prolong the withdrawal period. The period lasts for 8 workings days in HUNGARY, 10 working days in GREECE AND ITALY, 10 (calendar) days in Poland, 14 (calendar) days in CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, LATVIA, PORTUGAL and SWEDEN, two weeks in GERMANY and even 15 (calendar) days in SLOVENIA and MALTA. In GERMANY the period is actually one month if the consumer has been informed about his withdrawal right after the conclusion of the contract. Only the FRENCH law seems to be problematic because the consumer has a period of only seven days (“jours francs”) to withdraw from the contract. “Jour franc” is a one-day-period (0h to 24 h). The day of the event, in this case the receipt of the good in case the delivery of goods or the day of the conclusion of the contract in case of provision of services, is not included for the computation of the period. Furthermore, for the computation of the withdrawal period it is irrelevant whether the seven "jours francs" include "jours ouvrables"

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1412 Equivalent rules can be found, for instance, in France or in Germany.
1413 The Trade Practices Act contains the following definition of working day: “all days other than Sundays and public holidays. If a period expressed in working days ends on a Saturday, the period is extended till the next working day” (Art. 1 No. 9 of the Trade Practices Act).
1414 Cf. also the Kammergericht Berlin judgment of 18 July 2006, 5 W 156/06 granting the consumer a withdrawal period of one month according to CC § 355(2)(2) in case of Ebay auctions. The court held that in Ebay actions the supplier can inform the consumer on his right of withdrawal in text form as a rule after the conclusion of the contract because an internet homepage does not fulfil the requirements of CC § 355(2)(1) stipulating information in text form.
(working days) or "jours feriés" (Sundays and public holidays). This understanding of the notion "jour franc" is supported by the text of Art. L.120-20 para 4 Code de la Consommation. According to this provision a Sunday or public holidays are not included in the withdrawal period, only if the period expires on such a day. Therefore, the seven “jours franc” period in France is a breach of EC law.\textsuperscript{1415}

Table: Withdrawal Period

<table>
<thead>
<tr>
<th>Withdrawal Period</th>
<th>Member State</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 calendar days</td>
<td>FR\textsuperscript{1416} (1)</td>
</tr>
<tr>
<td>7 working days</td>
<td>AT\textsuperscript{1417}, BE, ES\textsuperscript{1418}, IE, LT, LU, NL, SK, UK (9)</td>
</tr>
<tr>
<td>8 working days</td>
<td>HU (1)</td>
</tr>
<tr>
<td>10 working days</td>
<td>EL, IT (2)</td>
</tr>
<tr>
<td>10 calendar days</td>
<td>PL (1)</td>
</tr>
<tr>
<td>14 calendar days</td>
<td>CY, CZ, DK, EE, FI, LV, PT, SE (8)</td>
</tr>
<tr>
<td>Two weeks</td>
<td>DE (1) [one month if information on withdrawal right has been given after conclusion of contract]</td>
</tr>
<tr>
<td>15 calendar days</td>
<td>MT, SL (2)</td>
</tr>
</tbody>
</table>

bb. Start of period

(1.) Start of period in case of delivery of goods

| Begin in case of delivery of goods (Art. 6(1), sent. 3, 2\textsuperscript{nd} indent) | Member States |

\textsuperscript{1415} An explanation is given by Franck, Les ventes à distance en droit européen : la directive de 1997 sur les contrats à distance et sa transposition en France, published on the site of the Ministère de l’Économie, des finances et de l’industrie: http://www.minefi.gouv.fr/dgccrf/02_actualite/ateliers_conso/atelier27e.htm. It remains unclear if this is meant seriously: “Le texte communautaire prévoit alors un délai de 7 jours ouvrables, traduits en France, pays travailleur, par 7 jours francs, soit des jours d’une durée de 24 heures, durée journalière légale du travail en France, comme chacun le sait... Plus sérieusement, jours francs et jours ouvrables seraient donc équivalents. La directive est donc bien appliquée.”

\textsuperscript{1416} 7 “jours francs” according to Code de la Consommation Art. L121-20.

\textsuperscript{1417} Saturday is no working day.

\textsuperscript{1418} Spanish law contemplates that “the law of the place where the good has been delivered will determine which days are deemed as working days” – Article 44(1) of the Law 7/1996 of January 15 on Retail Trade.
Article 6(1), sent. 3, 1st indent of Directive 97/7 stipulates the start of the withdrawal period in the case of delivery of goods as the day of the receipt of goods by the consumer. Most member states have transposed this provision, e.g. Austria, Belgium (LPA), Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovenia, Slovakia, Spain, and Sweden.

In Belgium and Cyprus the period begins at the day following the day of the receipt of goods. In the United Kingdom the period begins with the day on which the contract is concluded but does not end until 7 days after receipt of the goods, starting on the day after receipt.\footnote{Regulation 11 Consumer Protection (Distance Selling) Regulations 2000.} In Finland the period begins after the receipt of confirmation or, if the goods are delivered after confirmation, with the delivery of the goods\footnote{Chapter 6 Section 15 of the Consumer Protection Act of 20 January 1978/38.}.

(2.) Start of period in case of provision of services

<table>
<thead>
<tr>
<th>Start in case of provision of services (Art. 6(1), sent. 3, 2nd indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE* (LPA), EE, DK, FI, FR, DE, HU, IE, IT, LV, LT, LU, MT, NL, PL, PT, SL, SK, SE, UK (21)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>ES (1)</td>
</tr>
<tr>
<td>Variations</td>
<td>BE* (TPA), CY, CZ, EL, (4)</td>
</tr>
</tbody>
</table>

* more than once

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\footnote{According to preparatory works HE 2000/79 vp, in the case of services, where there is no need to provide confirmation pursuant to CPA 5:14 the withdrawal period begins from the entry of contract.}
Article 6(1), sent. 3, 2nd indent of Directive 97/7 stipulates the start of the withdrawal period in the case of services as, “from the day of conclusion of the contract or from the day on which the obligations laid down in Article 5 were fulfilled if they are fulfilled after conclusion of the contract”. Most member states have transposed this provision (cf. the table above).

Some member states have implemented provisions varying from the Directive. In GREECE the period begins when the consumer receives the documentation informing him that the contract is concluded. In BELGIUM and CYPRUS the period begins at the day following the day of the conclusion of the contract if the confirmation has already been provided. The CZECH law refers to the “receipt of performance” for the beginning of the withdrawal period in the case of provision of services.\textsuperscript{1422} In SPAIN the final indent of the Directive’s rule\textsuperscript{1423} has not been transposed.

**cc. Postal Rule / Dispatching Rule**

Contrary to the Doorstep Selling Directive or the Financial Services Directive 2002/65\textsuperscript{1424}, which both contain an explicit dispatching rule, the Directive 97/7 does not foresee any provision specifying how the consumer can exercise the right of withdrawal on time. Nevertheless, some member states have implemented provisions on this. AUSTRIA\textsuperscript{1425}, ITALY\textsuperscript{1426}, SLOVENIA\textsuperscript{1427}, BELGIUM\textsuperscript{1428} and GERMANY\textsuperscript{1429} have stated a dispatching rule. In CYPRUS\textsuperscript{1430}, LATVIA\textsuperscript{1431} and the UNITED KINGDOM\textsuperscript{1432} the transposition law contains a postal rule which states that the notice of withdrawal sent by post shall be deemed to have been served at the time of posting, whether it has been received or not. This point could be clarified when reviewing the Directive, also with regard to the question whether such a rule purely

\textsuperscript{1422} § 53(6) of the CC.
\textsuperscript{1423} “provided that this period does not exceed the three-month period referred to in the following subparagraph”.
\textsuperscript{1424} In GREECE Art 4a (6)(c)(γ) of the Consumer Protection Act 2251/1994 (transposing the dispatching rule of Directive 2002/65) is also applied for regular distance contracts.
\textsuperscript{1425} § 5e(1), sent. 2 of the Consumer Protection Act.
\textsuperscript{1426} “The notice of withdrawal by recorded delivery letter shall be understood to have been sent in good time IF DELIVERED TO A POST OFFICE ACCEPTING the delivery by no later than the term provided for by the Code.” cf. Art. 64(2) of the Legislative Decree of 6 September 2005, No. 206 “Consumer Code”.
\textsuperscript{1427} Art. 43(1) of the Consumer Protection Act.
\textsuperscript{1428} Art. 80(2) of the Act of 14 July 1991 on trade practices and consumer information and protection.
\textsuperscript{1429} CC § 355(1), sent. 2.
\textsuperscript{1430} Art. 7(5) of the Law on the Conclusion of Consumer Distance Contracts of 2000.
\textsuperscript{1431} Civil Law Rrt.1537.
\textsuperscript{1432} Regulation 10(4)(b) of the Consumer Protection (Distance Selling) Regulations 2000.
ensures the timeliness of the withdrawal (like in Germany) or whether it even makes a withdrawal valid in the case that the declaration never reached the supplier (e.g. because the letter got lost after being dispatched) e.g. in Cyprus.

d. Effects of withdrawal

With regard to the effects of withdrawal, the Directive provides at least some basis principles in Art. 6(1) and (2):

- The consumer must be able to withdraw without any penalty.
- The supplier shall be obliged to reimburse the sums paid by the consumer free of charge; reimbursement must be carried out as soon as possible and in any case within 30 days.
- The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods.

The obligation to reimburse, free of charge, the sums already paid by the consumer has been transposed in all member states. With regard to the deadline of 30 days at the latest to reimburse the sums, some member states have adopted even stricter rules, e.g. Cyprus where the supplier has to reimburse the sum immediately \(^{1433}\) or Lithuania, Slovakia and Slovenia, where sums have to be reimbursed within 15 days \(^{1434}\). Germany has indirectly transposed Art. 6(2) of the Directive. The obligation to reimburse the sums paid has to be fulfilled within 30 days according to CC § 286(3) in conjunction with § 357(1), sent. 2 and 3.

If the trader is late in reimbursing the sums already paid, the Slovenian and Spanish legislators have adopted special sanctions to enforce the Directive’s provisions. Spain has established the right of the consumer to claim for double the sum when it has not been paid in that period of time. Slovenian law obliges the trader to pay, in addition to the legal interest on arrears, an additional ten percent of the total value for every 30 days of delay with reimbursement.

With regard to the reciprocal obligation that the consumer has to return the goods received, some member states have specified a time limit for the return. For instance, the Italian law

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\(^{1433}\) Article 11(1) of the Law on the Conclusion of Consumer Distance Contracts of 2000.  
\(^{1434}\) Lithuania: Art. 18(6) of the Law on Consumer Protection; CC Art. 6.367(7); Slovakia: § 12(4)(b) of the Act No. 108/2000 on Consumer Protection in Doorstep Selling and in Distance Selling; Slovenia: Art. 43d of the Consumer Protection Act: “as soon as possible and not later than 15 days”.
obliges the consumer to return the goods, if they have already been delivered, within 10 days; the SLOVENIAN law stipulates a period 15 of days (Consumer Protection Act, Art. 43d(1) and (2)). In PORTUGAL after having exercised the right of withdrawal, the consumer must keep the goods, so that he can return them to the supplier or person for this purpose appointed, in good conditions of utilisation.

According to Art. 6(2) of the Directive 97/7, only the costs of returning the goods can be charged to the consumer. Most member states have used this option allowing the trader to charge the costs to the consumer, some with variations. For instance, in ITALY and AUSTRIA the consumer may be obliged to pay the costs for the return of goods, if this has been agreed by the parties. The BELGIAN legislator has limited this possibility, as the consumer may not be charged for the direct cost of returning the products when (1) the product or service did not match the offer, or (2) the seller did not fulfil his information duties. The POLISH provision is unclear. However, Art. 12(3) and (4), referring to cases where alternative goods or services were provided, stipulate that in such cases the costs of the return of the goods ought to be borne by the trader. One could, therefore, assume that in other cases such costs are to be borne by the consumer. In FINLAND, the supplier even has to compensate the consumer for the costs of returning the goods or other performances if goods and performances can be returned normally by post (6:17 CPA).

However, in LITHUANIA, the legislator seems not to have transposed the limitation that the only charge that may be made to the consumer is the direct cost of returning the goods. Therefore, theoretically, the consumer may be charged with additional costs, too.

Some member states have stipulated express rules on additional costs, in particular if the consumer has made use of the goods or cannot return the acquired goods in their original state. For instance, in GERMANY and AUSTRIA, the consumer has to pay, under certain conditions, compensation for the use of the good, mainly in case of depreciation in value.
(KSchG § 5g(1)(2)) or even in German law, according to CC § 357(1), sent. 1, § 346(1), § 347, for any benefits he has gained as well as, in some cases, benefits he has not gained but should have gained. This obligation is in turn restricted by imposing on the seller the duty to inform the consumer about this possible consequence at the latest by the time of the conclusion of the contract (CC § 357(3)). In Hungary, the consumer has to compensate the seller, if he caused damage due to the improper use of the good (Art. 4(5) of the Government Decree 17/1999 on Distance Contracting). The Italian and Cypriot legislators saddle the consumer with the obligation to take good care of the goods while in his possession (Art. 67(2) of the Consumer Code; Art. 7(6) of the Law for the Conclusion of Consumer Distance Contracts of 2000). In Greece, the same rule applies during the period of withdrawal, whereas the consumer is engaged to take any necessary measure to keep the product in good repair.

One could perhaps say that such obligations are not imposed on the consumer “because of the exercise of his right of withdrawal” and therefore do not infringe the Directive. Nevertheless, it has been criticised that such provisions possibly do not all conform with Art. 6(2) of the Directive 97/71441.

e. Cancellation of credit agreement

Article 6(4) of the Directive 97/7 calls on the member states to regulate the automatic and immediate cancellation of a credit agreement if the credit is either granted by the supplier or by a third party on the basis of an agreement between the third party and the supplier, and in case that the consumer exercises his right to withdraw from the credit financed main contract. As the Directive requires detailed provisions on that question the countries are given leeway, so that a huge variety in regard to the implementation into national law can be found.

All member states except Slovenia have implemented provisions transposing Art. 6(4) of the Directive 97/7. Luxembourg and Malta transposed the mentioned article literally using the copy and paste technique. Other member states like Finland, Greece (referring to general civil law provision for the cancellation) Lithuania (“without any additional commitments on

1441 With regard to German law: Wendehorst, in: Münchener Kommentar zum BGB, Band 2a, München 2003, § 312d Rn. 10-11.
the side of the consumer”\textsuperscript{1442}, PORTUGAL ("automatically and simultaneously"), and SPAIN\textsuperscript{1443} have implemented variations but these differences seem to be deviations of the wording, but not of the substance.

Whereas in most countries the credit contract is automatically cancelled when withdrawing from the distance contract, in some member states like ESTONIA\textsuperscript{1444}, LATVIA and THE NETHERLANDS the consumer has to withdraw from both agreements, the distance contract and the credit agreement. In BELGIUM two kinds of solutions can be seen, whereas the credit agreement is automatically cancelled, without any charges or damages for the consumer, in the Liberal Professions Act, the consumer has a right of withdrawal according to the Trade Practices Act\textsuperscript{1445}.

THE AUSTRIAN, ESTONIAN and GERMAN laws require, additionally, that the credit contract can be regarded as economically linked with the distance contract. This is e.g. in ESTONIA the case if the third party used the assistance of the supplier in the preparation of or entry into the contract\textsuperscript{1446}.

The UNITED KINGDOM, HUNGARY and ITALY state a duty of the supplier to inform the creditor that the consumer has withdrawn from the distance contract.

Most other member states seem to refer to their general civil law for the reimbursement of the money already paid. Some member states have fixed the period for the reimbursement of the money already paid to the supplier or creditor. In LATVIA the supplier has to reimburse within a period of seven days the amount of money, together with interest, that has been paid for the goods or services up to the moment of revocation of the contract\textsuperscript{1447}. In FINLAND and IRELAND, the money has to be repaid “without delay and in any time within 30 days after being informed of the withdrawal of the distance contract”.

\textsuperscript{1442} Article 18(5) of the Law on Consumer Protection of the Republic of Lithuania.
\textsuperscript{1443} Article 44(7) of the Law 7/1996 of January 15 on retail trade.
\textsuperscript{1444} § 51 of the Law of Obligations Act.
\textsuperscript{1445} Art. 81(4) of the TPA read in conjunction with Art. 20 bis of the Consumer Credit Act.
\textsuperscript{1446} § 51 of the Law of Obligations Act.
\textsuperscript{1447} Article 31 of the Consumer Rights Protection Law.
The Directive states that the credit agreement shall be cancelled without penalty. Most of the member states have transposed this provision, e.g. BELGIUM, ESTONIA, Greece, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS and PORTUGAL. POLISH and SLOVAKIAN law left out the terms “without penalty”\textsuperscript{1448}.

In some member states, e.g. IRELAND, the consumer can be obliged to pay interest and other costs if agreed in the contract. In HUNGARY, claims regarding costs and interests from the consumer are expressly excluded.\textsuperscript{1449} However, damage related to the conclusion of the contract may be demanded. In AUSTRIA, the consumer can be made to bear the costs of an eventual necessary notarisation of signature and compensation for the discharged expenses of the supplier or third party due to the grant of credit, but solely under the condition that the parties have agreed this. Claims regarding other costs or interests are expressly excluded. In CYPRUS, if prior to the reimbursement, any period of time elapsed from the date that the renunciation notice was granted, the supplier or the consumer shall be liable to pay the interest that has accrued on the sum paid. In the UNITED KINGDOM, no charges can be put on the consumer. Nevertheless, a special rule concerning interest exists. Only if he repays the whole or a portion of the credit either before the expiry of one month following the cancellation of the credit agreement, or in the case of a credit repayable by instalments before the date on which the first instalment is due, no interest shall be payable on the amount repaid.

### 3. Performance

#### a. Obligation to execute the order within a maximum of 30 days

According to Art. 7(1) of the Directive 97/7, the supplier is obliged to execute the order of the consumer within 30 days from the day following the day of the order, unless the parties have agreed otherwise. This provision is incomplete, because it is obvious from para. 2 of the same Article, that the supplier is by no means obliged to accept the order. Therefore, Art. 7(1) must be read in the sense that this obligation only comes into force if the contract is concluded. Hence, it is a useful clarification, if, for instance, AUSTRIAN law expressly states that the

\textsuperscript{1448} Article 13(2) of the Act of 2 March 2000 on the Protection of Certain Consumer Rights and Liability for an Unsafe Product.

\textsuperscript{1449} Article 6(2) of the Government Decree No. 17/1999. (II.5.) on Distance Contracting
obligation to perform the contract within 30 days does not arise if the supplier does not accept
the offer. This will also be the case in most other member states.

The provisions of Art. 7(1) have been transposed by most of the member states, e.g. AUSTRIA,
BELGIUM, CYPRUS, DENMARK, ESTONIA, FRANCE, GREECE, ITALY, LUXEMBOURG, IRELAND,
MALTA, PORTUGAL, SPAIN, SWEDEN, SLOVAKIA and the UNITED KINGDOM.

In FINLAND, HUNGARY, POLAND, LATVIA LITHUANIA and SLOVENIA the period of 30 days
seemingly starts to run from the date of the conclusion of the contract. It cannot be assessed
whether this is earlier than required by the Directive, because the general rules on
computation of time in some of these countries might contain a rule similar to Art. 3(1), sent.
2 of the Regulation 1182/71. This rule reads that, where a period expressed in days is to be
calculated from the moment at which an event occurs or an action takes place, the day during
which that event occurs or that action takes place shall not be considered as falling within the
period in question. GREECE refers to the receipt of the consumer’s order by the supplier which
is later than foreseen in the directive.

In GERMANY Art. 7(1) is not transposed expressly since in German general contract law there
is a regulation stipulating that the contract must be performed immediately save for
unforeseen circumstances or separate agreement of the parties. Moreover, the German
regulations on standard terms and conditions would prohibit setting an excessively long or
inadequate period in standard terms. This is more favourable to the consumer than the
 provision foreseen in the Directive. The DUTCH law stipulates that the supplier is in default if
the contract is not performed within 30 days. The period begins on the day of the order, and
not the day after the order. In the CZECH REPUBLIC there is no period of 30 days, but the
contract must be performed within an adequate period.

| As in the Directive | AT, BE, CY, DK, EE, FR, EL, IE, IT, LU, MT, PT, ES, SE, SK, UK (16) |
| Period starts on day of conclusion of the contract | FI, HU, NL, PL, LV, LT, SL (7) |

1450 § 13(1) and (2) of Act No. 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling (as amended by Act no. 118/2006 Z.z. (date of coming into force 01 April 2006),
1451 According to Article 7(1) of the Government Decree the supplier is obliged to execute the order of the consumer within 30 days from the day following the day of the order, unless the parties have agreed otherwise.
b. Obligation of supplier to inform and to refund in case of unavailability of the goods or services ordered (Art. 7 (2))

According to Art. 7(2) of the Directive 97/7, in the case that the ordered goods or services cannot be delivered because they are not available, the supplier is obliged to inform the consumer and must refund any sums already paid by the consumer as soon as possible, and in any case within 30 days.

Article 7(2) has been transposed as foreseen in the Directive by ESTONIA, FRANCE, HUNGARY, IRELAND, LATVIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, SPAIN and the UNITED KINGDOM. In the United Kingdom\footnote{Regulation 19(8) of the Consumer Protection Regulations 2000.}, however, a refund does not have to be paid if the contract relates to an outdoor leisure event, which by its nature cannot be rescheduled, and if the parties concur \cite{1453}(cf. Art. 3(2) 2\textsuperscript{nd} indent of the Directive). This is rather similar in Cyprus and Portugal\footnote{Article 3(2)(c) of the Decree-Law 143/2001 of April 26.}, whereas Poland has even extended this exception for other cases. In FINLAND the period in which the supplier must provide a refund is different in the case that the parties have agreed to a later time of delivery or performance of the contract.

The SLOVAKIAN and SLOVENIAN\footnote{“as soon as possible but not later than 15 days”, but the consumer must be informed of the situation immediately, the 15 days period is relevant only for the refund.} regulations stipulate a period of 15 days for the supplier to refund the money already paid by the consumer. In CYPRUS the supplier must refund as soon as possible but not later than 14 days.

Some member states have supplemented the transposition of this article by more detailed provisions which relate the issue to general contract law. For instance, DENMARK and SWEDEN have clarified that the consumer has the right to cancel the contract if the supplier fails to perform the contract in time. The supplier has to inform the consumer about this right and refund the amount already paid as soon as possible and not later than 30 days. In BELGIUM, according to the adage \textit{res perit debitori}, the consumer has the right to be refunded...
(obligations to do). The rule *res perit creditor* only applies in contracts related to the sale of species goods. However in most cases the consumer sales to which this section applies, concerns genus goods, so that in most cases the rule *res perit debitore* applies. In FRANCE, the supplier’s responsibility is excluded, if he can prove that the failure of performance is due to the consumer, a third person or force majeure.

Other additional rules deal with the consequences of late payment by the supplier. In FRANCE and LUXEMBOURG, there is an express provision that the supplier has to pay legal interest on the sum which has to be returned, if he does not refund the sum within the 30-day period. In SLOVENIA the supplier has to pay the legal interest of arrears and, additionally, ten percent of the total value of the received payments for every period of 30 days delay. In SPAIN the consumer can claim double the amount of the sum he has paid to the supplier. It can be assumed that most other member states also provide for such rules on interest or other consequences of delay in their general contract law.

Many member states have only partially transposed Art. 7(2) of the Directive, because they rely on their general contract law in order to reach results which are – in some cases at least partly – in accordance with the Directive. In AUSTRIA, there is no transposition of the duty to refund as soon as possible or at least within 30 days. The obligation to inform the consumer and to refund any sums paid is also applicable, if the supplier does not accept the order of the consumer. In GERMAN and CZECH law, there is no transposition of the duty to inform that the goods are not available and no express rule with regard to the 30 days period, but it follows from general contract law that the consumer can demand the refund of sums already paid if the supplier fails to perform the contract. However, in Germany such a right of the consumer may depend on the lapse of an “adequate” time limit to be set by the consumer. Except in very rare cases, such an adequate period will be much shorter than 30 days. After the period has elapsed, the general rule which states that an obligation must be fulfilled immediately save for unforeseen circumstances or separate agreement of the parties, is applicable. Thus, with regard to the time limit, the results reached under GERMAN law will be in accordance with the Directive in the utmost majority of cases. But a crucial difference which can be seen as breach of the Directive, remains. Under German law the consumer must realise himself that

\[1455\] CC § 323(1).
the contract is not going to be performed and then must actively set the adequate time limit in order to avoid the contract and to obtain a refund of any sums paid.

The **ITALIAN** legislator even goes beyond the provisions of the Directive since the consumer must be informed in writing or by another durable medium. This is also applicable in the case where the promised performance is temporarily unavailable. On the other hand, the supplier has to inform the consumer on the unavailability of the goods and services ordered within 30 days, but there is no express duty to refund the money already paid within 30 days. The **GREEK** and the **LITHUANIAN** legislators have not transposed Art. 7(2) of the Directive 97/7. In **GREECE** and **LITHUANIA** the general provisions on impossibility of performance are applicable. According to the **GREEK** Consumer Protection Act 2251/94, Art. 4(7) any payments before the product or service is provided to the consumer are prohibited. The consumer can claim the refund of the already paid sums, if any sums have been paid nevertheless, and in the case of negligence the consumer can, additionally, rescind the contract and claim for damages.

<table>
<thead>
<tr>
<th><strong>Transposition of Art. 7(2)</strong></th>
<th><strong>Member States</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td><em><em>BE</em> (LPA), EE, FI</em>*, <strong>FR, HU, IE, LV, LU, MT, NL, PL, PT, ES, UK</strong> (14)</td>
</tr>
<tr>
<td>Right to cancel the contract</td>
<td><strong>DK, SE</strong> (2)</td>
</tr>
<tr>
<td>Shorter period for the refund of sums paid</td>
<td>15 days: <strong>SL, SK</strong>; 14 days: <strong>CY</strong> (3)</td>
</tr>
<tr>
<td>Express exclusion of responsibility of the supplier for some cases</td>
<td><em><em>BE</em> (TPA), FR</em>* (2)</td>
</tr>
<tr>
<td>Express obligation to pay interest or higher amount if sum is not refunded within 30 days</td>
<td><strong>FR, LU, SL, ES</strong> (4)</td>
</tr>
<tr>
<td>Not transposed</td>
<td><strong>CZ, DE, EL, LI</strong> (4)</td>
</tr>
<tr>
<td>No express maximum period specified for refund</td>
<td><strong>AT</strong> (1)</td>
</tr>
</tbody>
</table>

* more than once

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1456 Unless a later time of delivery is agreed.
1457 Except outdoor leisure events, cf. text above table.
c. Use of option granted in Art. 7(3) of the Distance Selling Directive

For the use of the option granted in Art. 7(3) of the Directive 97/7 cf. Part 3.E.IV. 1 of this report.

4. Payment by Card

<table>
<thead>
<tr>
<th>Payment per Card</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, EE, DK, EL, IE, MT, PL, SL, SK, UK (12)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>LV, LT (2)</td>
</tr>
<tr>
<td>Variations</td>
<td>CZ, DE, FI, FR, IT, NL, PT, ES (8)</td>
</tr>
<tr>
<td>Transposition not</td>
<td>LU, SE (2)</td>
</tr>
<tr>
<td>entirely clear</td>
<td></td>
</tr>
</tbody>
</table>

Most member states seem to have transposed the Directive’s provisions on payment by card. In Austria, Belgium\textsuperscript{1458}, Cyprus, Estonia, Denmark Greece, Ireland, Malta, Poland, Slovenia, Slovakia and the United Kingdom, the consumer is entitled to cancel payment (in the scope of a distance contract) when a fraudulent use of his credit card has been made.

However, Lithuania and Latvia have not transposed Art. 8 of the Directive 97/7, but it cannot be excluded that the general private law rules on fraud apply. In France, there is no specific provision implementing Art. 8 of the Directive in the Code de la consommation. However, according to general private law, professionals are liable in the case of undue payments in the case of distance payments [“règlements à distance”, not only by credit card]. The liability will be based on the contract\textsuperscript{1459}

For some countries variations could be observed. For instance, Italian law has clarified that the consumer has to prove that the payment was made due to the fraudulent use of a credit

\textsuperscript{1458} Art. 83 novies of the TPA.

By contrast, in Germany, the credit institute cannot claim the reimbursement of expenses for the payments made if the credit card has been used for fraudulent purposes, whereby the credit institute has the burden of proof for the claim. In Finnish law, the consumer is only liable for the unauthorised use of the credit card if he has given the means of identification to another, or the passing of the means of identification into the possession of an unauthorised person is due to the negligence of the account holder and this “negligence is not slight”; or the account holder has neglected to notify the creditor without delay.

Austria and Spain have broadened the scope of application by applying not only B2C situations but also other situations where no consumer is involved. Denmark has clarified that violations of the provisions regarding payment by card are subject to sanctions, including injunctions, by the Consumer Ombudsman in pursuance of the Payment Act. The Czech Law contains general provisions on the distance use of electronic payments means which grant the return of money in case of fraudulent use of the electronic payment means. In Poland the legislator states in case of “improper use of a credit card” the obligation to cancel the transaction (the cost to be borne by the trader) and an obligation to remedy any losses suffered by the consumer. According to Dutch law natural persons cannot be obliged to pay any amounts resulting from a fraudulent use of the credit card except in case of negligence. Additionally, in Portugal, the credit institute is obliged to refund any payment made within a maximum period of 60 days after the demand was made.

In Ireland the failure to comply is a criminal offence according to Art. 10 of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation. The Irish regulation states furthermore that “payment card” includes credit cards, charge cards, debit cards and store cards. Hungary has also stated criminal law sanctions.

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1461 CC § 676(h).
1462 The claim of the credit institute against the cardholder is a claim for the reimbursement of expenses.
1463 Chapter 7 Section 19 of the Consumer Protection Act of 20 January 1978/38.
1464 § 31a of the Consumer Protection Act.
1467 Article 10(3) of the Decree-Law 143/2001 of April 26.
1468 Regulation 10(4) of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.
5. Inertia Selling

Art. 9 of Directive 97/7 has been amended by Directive 2005/29, which now obliges the member states to “take the measures necessary to exempt the consumer from the provision of any consideration in cases of unsolicited supply, the absence of a response not constituting consent, given the prohibition of inertia selling laid down in Directive 2005/29”. Annex I of the Directive contains a list of commercial practices which shall in all circumstances be regarded as unfair. Annex I No. 29 prohibits inertia selling as an aggressive commercial practice. The impact of this amendment does not seem to be too far reaching as the scope of application of Art. 9 in its old version was not limited to inertia selling in the case of distance contracts but prohibited inertia selling as an unfair commercial practice. Therefore, it could be considered as abolishing the provisions on inertia selling contained in Directive 97/7.

a. Prohibition of the supply of goods or services to a consumer without their being ordered

<table>
<thead>
<tr>
<th>Inertia Selling (Art. 9, 1st indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>AT, BE, CY, DK, FR, EL, IT, LT, LU, NL, PT, ES, SK, SE (14)</td>
</tr>
<tr>
<td>Not prohibited</td>
<td>EE, CZ, HU, LV, PL, SL (6)</td>
</tr>
<tr>
<td>Variations</td>
<td>FI, IE, MT, UK, DE (5)</td>
</tr>
</tbody>
</table>

Most of the member states have prohibited inertia selling, e.g. AUSTRIA, BELGIUM, CYPRUS, Denmark, FRANCE, GREECE, ITALY, LITHUANIA, LUXEMBOURG, THE NETHERLANDS, PORTUGAL, SPAIN AND SWEDEN. FINLAND (“shall not be marketed”) has not explicitly prohibited inertia selling. Nevertheless, in FINLAND in the light of preparatory works (HE 79/2000 vp) this clause prohibits inertia selling.

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1470 It is not included in this prohibition the supply of free samples or commercial offers, and the sendings made with altruistic purpose by “instituições de solidariedade social”, since these goods have been produced by them (art. 29(5)).


1472 It has also been established in legal practice that provision of unsolicited goods that require consumer action is deemed unfair marketing.
In some member states, e.g. IRELAND, MALTA and the UNITED KINGDOM, it is a criminal offence to demand payment, threaten to commence legal action, to add a person to a list of defaulters/debtors, or to threaten or actually use another debt collection procedure, in relation to payment for unsolicited goods or services, where the person making such demands etc. has no reasonable cause to believe that he is entitled to receive payment. ESTONIA, the CZECH REPUBLIC, HUNGARY, LATVIA, POLAND, SLOVENIA have not prohibited inertia selling.

b. Exemption of the consumer from the provision of any consideration in cases of unsolicited supply; absence of a response shall not constitute consent.

<table>
<thead>
<tr>
<th>Inertia Selling (Art. 9, 2nd indent)</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>As in the Directive</td>
<td>BE, CY, DK, EE, FI(^{1473}), FR, HU, IT, LV, LU, PT, SK (12)</td>
</tr>
<tr>
<td>Not transposed</td>
<td>(0)</td>
</tr>
<tr>
<td>Variations</td>
<td>AT, CZ, DE, EL, IE, LT, MT, NL, PL, SL, SE, ES, UK (13)</td>
</tr>
</tbody>
</table>

Many member states have transposed Art. 9, 2\(^{nd}\) indent as stated in the Directive, e.g. BELGIUM, CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, HUNGARY, ITALY, LATVIA, LUXEMBOURG, PORTUGAL\(^{1474}\) and SLOVAKIA.

AUSTRIA has transposed Art. 9 of the Directive 97/7 in the Civil Code\(^{1475}\). This is an extension of scope because the provision is also applicable to B2B situations. POLAND has stated a provision that the trader bears the risk of the consumer not using the services which were unsolicited and that no obligation can be imposed on the consumer\(^{1476}\). In some member states, the consumer benefits from a presumption that if the trader sent unsolicited goods, the consumer may use it as an unconditional gift and refuse all payments, e.g. in the CYPRUS, LITHUANIA, MALTA, the NETHERLANDS, SLOVENIA and in the UNITED KINGDOM. In CYPRUS

\(^{1473}\) According to preparatory works, it is possible to provide for example unsolicited magazines offers or product offers for consumers for testing. However, there should not be any obligations to consumers related to their goods.

\(^{1474}\) When the consumer decides to return unordered goods, he has the right to be reimbursed for all expenses, within 30 days (Art. 29(4)).

\(^{1475}\) CC § 864(2).

this is presumed when neither the seller nor any other authorised person requires the return of the good after a period of 30 days\textsuperscript{1477}. In the CZECH REPUBLIC the consumer shall neither have to return the goods to the supplier nor to inform him about it\textsuperscript{1478}. In GREECE the consumer can “do as he pleases with the goods” except there has been an obvious mistake. In this case the consumer shall, if possible, hold the goods at the disposal of the supplier for a reasonable period of time\textsuperscript{1479}. In SPAIN the consumer has no duty to return the goods and can keep them free of charge, and in case of unraveling, the consumer has no duty to compensate for damages or deterioration. In AUSTRIA, the recipient has to inform the trader in this situation and send back the goods. In IRELAND, this provision has been correctly transposed for services\textsuperscript{1480}. On the other hand, the recipient of unsolicited goods is required to keep the goods for a period of time to enable the sender to recover the goods\textsuperscript{1481}. This requirement to retain the goods for six months could constitute consideration, and is absent from the provision in the Regulations on the inertia selling of services. SWEDEN has not explicitly transposed this Directive’s provision because this follows from its domestic general contractual principles.

6. Restrictions on the use of certain means of distance communication

Article 10 of the Directive 97/7 states that the use of automatic calling machines and fax machines require the prior consent of the consumer.

Almost all member states have transposed Art. 10 of the Directive by using the copy and paste method. These countries are: BELGIUM, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, HUNGARY, ITALY, LATVIA, LUXEMBOURG, THE NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, SLOVENIA SPAIN AND THE UNITED KINGDOM. ESTONIA, DENMARK and SLOVENIA have also extended the restrictions on the use of email. POLAND has chosen the opt-in rule for all means of distance communications.

\textsuperscript{1477} Section 13(2) Law for the Conclusion of Consumer Distance Contracts of 2000.
\textsuperscript{1478} § 53(9) of the CC.
\textsuperscript{1479} Article 4(4) of the Consumer Protection Act 2251/94.
\textsuperscript{1480} Regulation 11 of the Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.
\textsuperscript{1481} Section 47 of the Sale of Goods Act 1980.
In IRELAND the contract is not enforceable against the consumer if the supplier used these means of distance communication\textsuperscript{1482}. In MALTA, the trader is liable to compensate the consumer for any inconvenience caused and resultant damages suffered\textsuperscript{1483}. AUSTRIA has not transposed this provision expressly, but according to the legislator the same protection of the consumer is granted by the general clauses in the Civil Code\textsuperscript{1484}, the Unfair Competition Act\textsuperscript{1485} and, furthermore, by Austrian case-law in this area. Only LITHUANIA has not transposed Art. 10 of the Directive 97/7.

The Greek and DANISH transposition law in the field of automatic calling systems gives a broader protection than the Directive 97/7 because the opt-in provision regarding automatic calling systems and fax applies to everyone – and not just to consumers.

IV. Use of Options provided in the Directive

1. Option of member states to allow the supplier to provide the consumer with goods or services of equivalent quality and price

Article 7(3) of the Directive 97/7 contains an option of the member states to stipulate that the supplier can provide the consumer with goods of equivalent quality and price, if this possibility was provided before the conclusion of the contract, or in the contract. The option has been used by CYPRUS, ESTONIA, FINLAND, FRANCE, ITALY, HUNGARY, the NETHERLANDS and the UNITED KINGDOM.

IRELAND and LATVIA have added that the consumer must be informed of the possibility to deliver equivalent goods or services prior to the conclusion of the contract. In POLAND the possibility to deliver products of an equivalent price and quality, must be included into the contract. The required information must be given to the consumer in writing. PORTUGAL and GREECE have provided that the information on the costs of withdrawal must be given to the consumer in writing. However, in GREECE there is no rule stipulating that the possibility of alternative performance needs to be provided prior to the conclusion or in the contract.

\textsuperscript{1482} Reg. 12(1) Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation.
\textsuperscript{1483} Article 8 of the Distance Selling Regulations, 2001.
\textsuperscript{1484} CC § 16.
\textsuperscript{1485} § 1 of the Unfair Commercial Practises Act.
In SLOVAKIA the supplier has the right and the obligation to deliver goods or services of an equivalent quality and price if the parties agree. There is no special information duty or regulation on the costs. In SPAIN the supplier of a good has the right to deliver a similar one. This right is not applicable for contracts on services.

BELGIUM, the CZECH REPUBLIC, DENMARK, LITHUANIA, LUXEMBOURG, MALTA and SLOVENIA have made no use of the option. AUSTRIA has not transposed the option either, but a seller’s right of choice and a buyer’s right of replacement exist in Austrian general contract law. Also SWEDEN has not expressly transposed this option, but the possibility to provide the consumer, in the case that he agrees, with an alternative good or service originates from the principle of private autonomy. GERMANY, too, has not expressly transposed this option. According to general rules, the parties can, of course, agree on such a right of the supplier. However, the rules on unfair terms (CC § 308(4)) define strict limits concerning the use of such clauses (right of amendment) in standard terms. In any case, pursuant to CC § 312c(1) in conjunction with BGB-InfoV, § 1(1)(6), the supplier is required to inform the consumer about the existence of any such term. In the UNITED KINGDOM\(^{1486}\) and ESTONIA\(^{1487}\), the supplier has to inform the consumer prior to the conclusion of the contract if he proposes, in the event of the goods or services ordered by the consumer being unavailable, to provide substitute goods or services of an equivalent quality and price.

<table>
<thead>
<tr>
<th>Option transposed</th>
<th>CY, EE, FI, FR, IT, HU, NL, UK SK (only if parties agree) (9)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Option not transposed</td>
<td>BE, CZ, DK, LT, LU, MT, SL (7)</td>
</tr>
<tr>
<td>No express transposition, but general contract law with similar effect</td>
<td>AT, DE, SE (3)</td>
</tr>
<tr>
<td>Only for goods, not for services</td>
<td>ES (1)</td>
</tr>
<tr>
<td>Information must be given in writing</td>
<td>EL, PL, PT (3)</td>
</tr>
<tr>
<td>Possibility must be provided prior to the conclusion of the contract</td>
<td>IE, LV (2)</td>
</tr>
</tbody>
</table>

\(^{1486}\) Regulation 7(1)(b) of the Consumer Protection (Distance Selling) Regulations 2000.

\(^{1487}\) Article 54(1)(10) of the Law of Obligations Act.
2. Option of member states to place burden of proof on the supplier

<table>
<thead>
<tr>
<th>Use of Option</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>BE, CY, DK DE, EE, EL, HU, LT (Only regarding submission of mandatory required information to the consumer), LV (only regarding financial services) LU, MT, PT, SL, ES (14)</td>
</tr>
<tr>
<td>No use</td>
<td>AT, CZ, FI, FR, IT, IE, NL, PL, SE, SK, UK (11)</td>
</tr>
</tbody>
</table>

Article 11(3)(a) of the Directive enables the member states to 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 supplier. Half of the European countries, namely BELGIUM\textsuperscript{1488}, CYPRUS, ESTONIA, GERMANY, GREECE, HUNGARY, LITHUANIA, LUXEMBOURG, MALTA, PORTUGAL, SLOVENIA AND SPAIN, have made use of this option. DENMARK has not explicitly made use of this option, since the burden of proof in accordance with general principles of Danish law was already placed with the supplier. LITHUANIA though has only regulated the submission of mandatory required information to the consumer. The GERMAN law contains a special arrangement on the burden of proof in terms of the right of withdrawal; the supplier must prove that he has properly informed the consumer of his rights and that all the necessary criteria for the period to begin have been met. AUSTRIA, THE CZECH REPUBLIC, FINLAND, FRANCE, ITALY, IRELAND\textsuperscript{1489}, LATVIA, THE NETHERLANDS, POLAND, SWEDEN AND THE UNITED KINGDOM have decided not to transpose this provision.

3. Option of member states to provide for voluntary supervision by self-regulatory bodies

Article 11(4) of the Directive 97/7 grants the member states the option to provide for voluntary supervision by self-regulatory bodies. Most member states have chosen not to

\textsuperscript{1488} Art. 83decies(1) of the TPA.
\textsuperscript{1489} In Ireland, this reverse burden of proof only operates as regards Regulation 13 (an application by the Director of Consumer Affairs or other consumer organisations for an injunction from the High Court to ensure compliance with the Regulations). In all other regards, e.g. a private action between supplier and consumer, the normal rules of evidence apply.
implement this option. They are: Austria, Belgium, Cyprus, Denmark, Finland, France, Ireland, Italy, Lithuania, Malta, the Netherlands, Poland, Portugal, Slovenia, Sweden, Spain, and the United Kingdom. In the UK and Ireland, codes of conduct (to be approved by the Office of Fair Trading) are encouraged. Only Germany, Estonia, Greece, Hungary, Latvia and Slovakia have made use of this option provided in the Directive.

Table: Use of Option provided in Art. 11(4) Distance Selling Directive

<table>
<thead>
<tr>
<th>Use of Option</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>DE, EE, EL, HU, LV, SK (6)</td>
</tr>
<tr>
<td>No use</td>
<td>AT, BE, CY, CZ, DK, FI, FR, IE, IT, LT, LU, MT, NL, PL, PT, SL, SE, ES, UK (19)</td>
</tr>
</tbody>
</table>

4. Option of member states to ban the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts

<table>
<thead>
<tr>
<th>Use of Option</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>FI, DE, HU, LT, PT, SK (6)</td>
</tr>
<tr>
<td>No use</td>
<td>BE, CY\textsuperscript{1490}, CZ, DK\textsuperscript{1491}, EE, EL, FR, IE, IT, LU, LV, MT, NL, PL, SL, SE, ES, UK (18)</td>
</tr>
<tr>
<td>Transposition not entirely clear</td>
<td>AT (1)</td>
</tr>
</tbody>
</table>

Article 14, sent. 2 of the Directive 97/7 provides the option to ban the marketing of certain goods or services, particularly medicinal products, within their territory by means of distance contracts. Sixteen countries have not made use of this option (cf. the table above). The Slovakian Act 377/2004 on Non-smoker Protection establishes a prohibition of distance selling of tobacco products.

The Lithuanian laws on medicines distinguish the marketing of medicines depending on their nature. Denmark prohibited any kind of advertisements for medicinal products. In

\textsuperscript{1490} Cyprus does not exercise this option however it leaves the possibility open for the option to be exercised by other legislative acts dealing with specific products or services.

\textsuperscript{1491} Denmark has not made use of the option, since detailed rules regarding marketing of medicinal products already exist in Danish medicinal legislation.
FINLAND distance selling of medicinal products is not allowed. The Medicines Act stipulates strict restrictions for postal import of medicines. In Portugal the sale of medicines (in the sense of the Decree-Law 72/91 of February 8, Art. 2(1)(a)) is restricted to pharmacies and other authorized establishments (Art. 62 of the Decree-Law 72/91 and Decree-Law 134/2005 of August 16). HUNGARY has also used the option to ban the marketing of certain goods or services by means of distance contracts.

In CYPRUS, the conclusion of distance contracts may be prohibited or restricted on grounds of public interest, under the provisions of the legislation in force, for specific goods or services. In BELGIUM, Art. 83undecies of the Trade Practices Act grants the King the right to adopt specific rules for certain types of distance contracts. The Royal Decree of 11 January 1993 Concerning the Regulation of the Division, the Packing and the Marking of Dangerous Preparations provides in an additional information duty towards the consumer in the case of distance selling of such preparations, but medicinal products in ready to use form, are expressly excluded from the scope of this Royal Decree. The distance selling of prescription medicines is forbidden. The distance selling of non-prescription medicines falls under the general regime of the TPA.

Until 1.11.2004 GERMANY prohibited the mail order of medicinal products via chemists. The ECJ stated in C-322/01 – Doc Morris that “a prohibition on the sale by mail order of medicinal products the sale of which is restricted to pharmacies in the member state concerned” is a measure having an effect equivalent to a quantitative restriction for the purposes of Article 28 EC. The ECJ ruled that this prohibition can be justified – relying on Art. 30 EC – for medicinal products subject to prescription, but not to medicinal products which are not subject to prescription in the member state concerned. GERMANY amended its Pharmacies Act (Apothekengesetz) and Medicines Act (Arzneimittelgesetz) thereby allowing the mail order purchases both of over-the-counter and prescription-only medicinal products via chemists. However, chemists that are registered in Germany do require a mail order

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1492 VNA lääkevalmisteiden henkilökohtaisesta tuonnista Suomeen 1088/2002 vp.
1494 Art. 2(4) Royal Decree of 11 January 1993 Concerning the Regulation of the Division, the Packing and the Marking of Dangerous Preparations, as amended by the Royal Decree of 17 July 2002.
licence. In SLOVENIA, the Medicinal Products Act states that sale of medicinal products via internet that is accompanied with professional counselling is allowed if it is performed by someone who has a licence for such pharmaceutical activity and if quality and tracking is guaranteed.
Executive Summary

1. Transposition Deficiencies

All member states have transposed Directive 98/6. The analysis reveals transposition deficiencies mainly in the use of the options provided in Art. 6 (i.e. the option to exempt from the obligation to indicate the unit price in cases where it constitutes an excessive burden). In particular, several member states make permanent use of this option whereas Directive 98/6 just allows a temporary exemption.

2. Enhancement of Protection

a. Extension of scope

Some national transposition laws provide a wider scope of application in the field of price indication.

- Some member states broadened the definition of “consumer” (Art. 2 lit. (e)), e.g. by including legal persons.
- Many member states extended the scope of application to services (whereas Directive 98/6 applies only to products offered by traders, Art. 1).

b. Use of minimum clause

It should be noted that the minimum clause in Art. 10 of Directive 98/6 must be considered as being only declarative, and not as constitutive. This means that Directive 98/6 would continue to be just a minimum harmonisation measure even if its Art. 10 were deleted. The reason is that Directive 98/6 has been enacted on the basis of Art. 129 lit. (a) of the EC Treaty, the
predecessor of Art. 153 of the EC Treaty. With regard to measures enacted on that basis, Art. 153 para. 5 EC Treaty allows the member states to maintain or to enact measures which are more favourable to consumers than the Community measures.

Except for some clarifications which could be interpreted as an improvement of the consumer protection level, the member states made practically no use of the minimum clause.

3. Use of options

The majority of the member states used the options provided in Directive 98/6:

- Art. 3 para. 2, 1\textsuperscript{st} indent (option not to apply Art. 3 para. 1 to products supplied in the course of the provision of a service) has been made use of by more than 20 member states.
- Art. 3 para. 2, 2\textsuperscript{nd} indent (option not to apply Art. 3 para. 1 to sales by auction and sales of works of art and antiques) has also been made use of by more than 20 member states.
- Art. 5 (option to waive obligation to indicate the unit price in certain cases) has been made use of by several member states. Although these exceptions from the obligation to indicate the unit price have the fact that they are mainly related to food in common, the particular products excluded differ throughout the member states.
- Art. 6 (option to exclude the obligations to indicate the unit price in cases where it constitutes an excessive burden) has been made use of by nearly 20 member states.

4. Inconsistencies or Ambiguities

The notion of “small retail business” in Art. 6 is very vague.

5. Gaps in Directive 98/6

- No regulation of services.
6. Potential Barriers to (Cross Border) Trade

Some of the options, in particular Art. 5 and Art. 6, lead to great differences throughout the member states. In certain cases this may hinder cross-border trade.

7. Conclusions and Recommendations

In order to eliminate potential barriers to trade the following steps could be taken:

- Concretisation of the option provided for in Art. 5 (or changing the option into a general clause).
- Establishing a definition of “small retail businesses” with the aim of achieving more coherent national legislation.
I. Member state legislation prior to the adoption of the Price Indication Directive 98/6

Prior to the adoption of Directive 98/6 in the EU member states, consumer protection laws in the field of price indication were rather different.

Most of the member states had already enacted legislative acts stipulating price indication in their national laws long before Directive 98/6 came into existence. In the United Kingdom, the Prices Act was enacted in 1973. Other examples are Poland with its “Act on Prices of 26 February 1982”, Cyprus with its “Products and Services (Regulation and Inspection) Law of 1962, L.32/62”, Denmark with its “Price Labelling Act” of 1977 and Malta with its “Control on the Sale of Commodities Regulations, 1972”. Contrary to Directive 98/6, these provisions only obliged the traders to indicate the selling price of the products. Only some member states like Austria, Denmark and Germany stated an obligation for traders in their national law to indicate the unit price for certain products. Nevertheless, these provisions had nearly no practical impact because of numerous exemptions. In Belgium the unit price had to be indicated on products sold in bulk and pre-packaged products with a variable quantity.¹⁴⁹⁷

Some member states had no comparable protection in the field of price indication before the transposition of Directive 98/6, such as Ireland, where only a number of specific ministerial orders relating to the indication of prices with regard to specific subject-matters existed (e.g. the Retail Price (Diesel and Petrol) Display Order 1997 or the Retail Price (Beverages in Licensed Premises) Display Order 1999).

In some of the new member states (e.g. Czech Republic, Estonia, Latvia, Lithuania and Slovenia), no comparable protection existed.

¹⁴⁹⁷ Art. 6 and 7 of the Royal Decree of 30 June 1996 Concerning the Price Indication of Products and Services and the Order Form.
II. Scope of application

Directive 98/6 stipulates in its Art. 1 the “indication of the selling price and the price per unit of measurement of products offered by traders to consumers (…)”.

1. Consumer

Art. 2 lit. (e) of Directive 98/6 defines the notion of ‘consumer’ as “any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity”.

About one third of the member states’ laws provide a ‘consumer’ definition in the context of their specific transposition laws (e.g. CYPRUS\textsuperscript{1498}, DENMARK\textsuperscript{1499} and GREECE\textsuperscript{1500}). More than half of the European countries, however, refer to general ‘consumer’ definitions (e.g. BELGIUM\textsuperscript{1501}, CZECH REPUBLIC\textsuperscript{1502}, ESTONIA\textsuperscript{1503} and MALTA\textsuperscript{1504}), thus maintaining a coherent concept within their legal systems.

No express transposition of the definition exists in GERMANY, FRANCE and POLAND. Nevertheless, German law introduces the term ‘final addressee’ in the regulation covering

\textsuperscript{1498} Similar to Directive 98/6: Art. 2, 1st definition: definition of trader; 4th definition: definition of consumer

\textsuperscript{1499} Corresponding with the Directive: § 2 para 5 (definition of consumer), § 2 para 4 (definition of trader)

\textsuperscript{1500} Art. 2 lit. δ (definition of trader), Art. 2 lit. ε (definition of consumer) ruling of the ministry of economics and development Coll. No Z1-404-2001.

\textsuperscript{1501} Not the Royal Decree of 30/6/1996 concerning the indication of the price of products and services and the order form (as amended by R.D. 7/2/2000) but the Trade Practices Act transposes the definitions:

\textsuperscript{1502} Consumer Protection Act No. 634/1992.

\textsuperscript{1503} § 2 no. 1 (definition of consumer), § 2 no. 2 Consumer Protection Act (definition of trader).

\textsuperscript{1504} Art. 2 Consumer Affairs Act of 15/10/2002. The definition of consumer is qualified by the Price Indication Regulation including “any final purchaser” in the concept, Reg.2(2) Consumer Affairs Act (Price Indication) Regulations of 1/10/2002

Art. 2(3) also implements the concept of consumer defined in the Consumer Sales Directive (99/44) and, additionally, the definition of trader of the Unfair Contract Terms Directive (93/13).
price information without further concretising it. It is commonly accepted that the notion of ‘final addressee’ encompasses persons not passing on goods or services to another user but rather for use themselves. In contrast to the general ‘consumer’ definition in the German CC or the UWG (Act against Unfair Competition), in addition to individual consumers, buyers working in an independent commercial or business capacity as well as in public institutions can also be final addressees. However, in case of offers or advertisements vis-à-vis final addressees who use the good or service within their professional or official capacity, not all provisions on price indication apply.

Whereas the Polish transposition Act, despite its lacking definition of consumer, only excludes C2C situations from its scope of application, French case-law determines the consumer as a person concluding a contract which does not have a direct connection with his commercial activity. The ruling of the French Cass. Civ. has been further clarified, including in the ambit of the definition professionals who conclude a contract which does not constitute a direct connection with their professional activity.

Table: Legislative techniques

<table>
<thead>
<tr>
<th>Special definition in transposition law</th>
<th>CY, DK, EL, IE, LU, NL, SE, UK (8)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reference to a more general definition</td>
<td>AT, BE, CZ, EE, ES, FI, HU, IT, LT, LV, MT, PT, SK, SL (14)</td>
</tr>
<tr>
<td>No specific definition</td>
<td>DE, FR, PL (3)</td>
</tr>
</tbody>
</table>

The majority of the national definitions substantively mirror the content of the Directive’s definition with only some minor differences in wording or style. For instance, the AUSTRIAN legislator has negatively described the notion of ‘consumer’ as the person not fulfilling the

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1505 § 1(1), sent. 1 of the Price Indication Regulation.
1506 German Federal Supreme Court (BGH), GRUR 1974, 477 -; GRUR 1977, 264.
1507 § 13 of the CC.
1508 § 2(2) of the Act against Unfair Competition.
1509 § 9(1) no. 1 Price Indication Regulation.
1510 Article 1.2(1) of the Act on prices of 5 July 2001.
1511 Court of cassation (Cour de Cassation), Civ. 1ère 3 janv. 1996 ; 30 janv. 1996 ; 10 juillet 1996.
1512 Court of cassation (Cour de Cassation), Civ. 1ère 17 juillet 1996 ; 25 novembre 2002.
1513 Indirectly transposed in § 1 Consumer Protection Act.
1514 In the context of the Price Indication Regulations 2002, the term ‘consumer’ has to be interpreted according to the definition in Art. 2 Consumer Affairs Act.
requirements for being a trader\textsuperscript{1515}. The LITHUANIAN legislation foresees a “consumer” definition similar to Directive 98/6 in the general CC\textsuperscript{1516} and recapitulates it in the implementing Law on Consumer Protection\textsuperscript{1517}.

For a group of member states it can be perceived as an extension of the scope of application to legal persons in case they act outside their professional activity. The PORTUGUESE definition, in contrast to the restriction to natural persons in Directive 98/6, only states “persons”, thus allowing the inclusion of natural and legal persons into its concept. Similarly, in Malta, the term ‘consumer’ includes any final purchaser which means that also legal entities can be considered as consumers\textsuperscript{1518}. Explicitly mentioned are legal persons in SPANISH\textsuperscript{1519} law.

Further variations exist in Maltese law as other individuals, not being the immediate purchaser or beneficiary who have been authorised by the consumer, are regarded as ‘consumers’\textsuperscript{1520}. Similarly in SLOVAKIA, according to § 2(1) lit. a of Consumer Protection Act, the consumer is a natural person “that buys products or uses services for direct personal use by natural persons, especially for himself and members of his household”.

In Spain, the person has to be the final addressee of the good or service without “the aim of integrating them in production, transformation, commercialization processes”\textsuperscript{1521}. No explicit reference is made to “purposes outside his trade or profession”\textsuperscript{1522}.

Table: General overview of transposition

| Substantially equivalent as in Directive 98/6 | CY, DK, EE, EL, FI, HU*, IE, IT, LT, LU, LV\textsuperscript{1523}, NL, SE, SL, UK (15) |

\textsuperscript{1515} § 1 of the Consumer Protection Act.
\textsuperscript{1516} CC Art. 6350(1).
\textsuperscript{1517} CC Art 2(1).
\textsuperscript{1518} Reg. 2 (2) of the Price Indication Regulations.
\textsuperscript{1520} Art. 2 of the Consumer Affairs Act (Price Indication) Regulations.
\textsuperscript{1521} Art. 1(3) of the Law 26/1984, of 19 July, General for the Protection of the Consumers and Users.
\textsuperscript{1522} In the context of the implementation of the Unfair Contract Terms Directive, an explanatory note has been introduced in the Law 7/1998, of 13th April, on Standard Terms in Contracts, being a non binding part of (any) law, repeating the formulation, thus serving as an interpretation guideline for the legal “consumer” definition. It is debated whether to protect persons acting outside their business without being the final addressees.
\textsuperscript{1523} Definition of “Consumer“ has been changed since 27 October 2005 when a legal person was excluded from the scope of a consumer by adopting changes in the Consumer Rights Protection Law.
2. Trader

In Art. 2 lit. (d) of Directive 98/6, ‘trader’ is defined as “any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity”.

Some of the member states directly introduce the definitions into their transposition laws (e.g. CYPRUS, DENMARK and the UNITED KINGDOM). But the majority of national legislators have opted for the use of a more general definition of ‘trader’, thus maintaining a coherent scope of application in consumer law. In FRANCE and SWEDEN, the notion of ‘trader’ has not been specifically transposed.

In France, as the transposition text does not give any definition, it is deemed that, following Art. L. 113-3 of the Consumer Protection Act, the obliged party should be sellers and service providers. In Swedish law, no direct definition has been given but it is generally stated the regulations apply when a trader is supplying goods or services in his business to a consumer.

* more than once
About half of the member states’ legislations substantively mirror the content of the Directive’s definition of ‘trader’. Variations however exist in some countries, extending the scope of application to persons providing services (e.g. LUXEMBOURG\textsuperscript{1531}) or explicitly including persons dealing with agricultural production as regards plants and animals, gardening, vegetable cultivation, forestry and fishery (not sea fishery)\textsuperscript{1532}. A deviation in the use of terms, such as ‘seller’ (e.g. CZECH REPUBLIC, LATVIA, LITHUANIA) or ‘professional’ (e.g. ITALY, Luxembourg) could also be detected. HUNGARIAN law makes use of the terms ‘distributor’ and ‘manufacturer’\textsuperscript{1533}. The ‘distributor’ is considered as “the economic organization marketing merchandise or services to consumers”. In case the manufacturer's main office is not located in the territory of the Republic of Hungary, the importer of the goods shall be considered to be the ‘manufacturer’. In POLAND, the obligations of Directive 98/6 are imposed upon producers as well as sellers.

According to Art. 1 no. 6 of the BELGIAN Trade Practices Act liberal professions fall outside the scope of the trader concept. Furthermore, the definition of services in Art. 1 no. 2 of the TPA requires the pursuit of commercial activities as defined in Art. 2 and 3 of the Commercial Code.

In MALTESE law, the Minister responsible for consumer affairs may, in co-operation with the Consumer Affairs Council, designate any category or class of persons as a "trader" for the purposes of the transposition law. Moreover, the Maltese law also includes professionals who exercise acts of trade in their own name or in the name of any commercial partnership.

\textsuperscript{1531} Art. 1(1) of the Decree of 7.9.2001 on price indication (as amended by the decree of 29.07.2004).
\textsuperscript{1532} Art. 4 no. 1, Art. 3(1) no. 8 of the Act on the Freedom of Economic Activity.
\textsuperscript{1533} § 2 lit. j, lit. k of the Act CLV of 1997 on Consumer Protection.
In Lithuania, the concept of ‘trader’ includes the definitions of ‘seller’ and ‘service provider’. The first definition identifies the difference that any person selling the goods on the premises intended for business purposes, or outside them, shall be regarded as a ‘seller’\textsuperscript{1534}.

\textbf{GERMANY} has considerably extended the scope of its transposition law by applying it to everyone, who professionally or regularly (in any other manner) offers goods or services or, as offeree of goods or services, advertises goods or services vis-à-vis the final addressee\textsuperscript{1535}.

\textbf{Table: Transposition method}

| Substantively equivalent as in Directive 98/6 | AT, CY, DK, EL, ES, FI, IE, MT, NL, SL, ES, UK (12) |
| No explicit mention of ‘natural or legal person’ | EE, LU, UK (3) |
| Different use of terms | BE, CZ, DE, IT, LV, LT, LU, NL, SK (9) |
| Inclusion of the intermediary | BE, IT, MT (3) |
| Explicit inclusion of persons dealing with agricultural products | PL (1) |
| No mention of “within commercial or professional activity” | CZ, LU, LT\textsuperscript{1536} (3) |

\section*{3. Situations falling in the scope of application}

Article 1 of Directive 98/6 states that the regulations only apply to products offered by ‘traders’ to ‘consumers’. Many of the member states have, nevertheless, extended the scope of application to services: \textbf{BELGIUM}\textsuperscript{1537}, \textbf{CZECH REPUBLIC}\textsuperscript{1538}, \textbf{DENMARK}\textsuperscript{1539}, \textbf{ESTONIA}\textsuperscript{1540},

\begin{footnotesize}
\begin{enumerate}
\item Art 2(2) of the Consumer Protection Law.
\item § 1(1), sent. 1 of the Price Indication Regulation.
\item Only with respect to the definition of ‘seller’. See above.
\item Art. 1 no. 6, 7 of the Act of 14 July 1991 on trade practices and consumer information and protection.
\item Art. 2 of the Consumer Protection Act No. 634/1992 Coll.
\item Effective from 1 July 2006 the price indication rules were transferred to the Marketing Practices Act (re Act No 1389 of 21 December 2005) and the Price Indication Act (re Consolidated Act No 209 of 28 March 2000) was repealed. Pursuant to the Marketing Practices Act § 13(2), the scope of the price indication rules is extended to services, including electronic services (e.g. on the internet) if the consumer is able to place an order electronically.
\end{enumerate}
\end{footnotesize}
As to the option of the member states to exempt products supplied in the course of the provision of a service from the indication duty (Art. 3 para. 2, 1st indent), c.f. IV. 1.

**Table: Extension to services**

| Extension to service providers | BE, CZ, DE, DK, EE, FI, FR, HU, LV, LT, LU, PL, PT, SE, SK, SL (16) |

**4. Selling price**

In Art. 2 lit. (a) of Directive 98/6, ‘selling price’ is defined as the “final price for a unit of the product, or a given quantity of the product, including VAT and all other taxes”.

The majority of the member states have transposed this term in accordance with the definition contained in the Price Indication Directive. In some member states however, the implementation law slightly differs from the Directive’s regulations. In Malta, Poland and Slovakia, only the term ‘price’ and not ‘selling price’ is used. Whereas in Malta, it is regulated that the price must be the ‘final retail or unit price’ and has to include the value added tax and all other taxes, in Poland, it is only stated in the legal text that this price needs
to include the value added tax. In the CZECH REPUBLIC the selling price is the same price as the packaged product 1552. In LATVIA, not even other taxes than the value added tax have to be included in the selling price. Finally, FRANCE did not transpose the definition of ‘selling price’, but there exist provisions in French law obliging the indication of price, including all taxes 1553.

Table: Transposition method

| Substantively equivalent as in Directive 98/6 | AT, BE, CY, DK, EE, FI, DE, EL, HU, IE1554, IT, LT, LU, NL, PT, ES, SL, SE, UK (19) |
| Variations | FR, CZ, LV, MT, PL, SK (6) |

5. Unit price

Art. 2 lit. (b) of Directive 98/6 defines the ‘unit price’ 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 the product or a different single unit of quantity, which is widely and customarily used in the member state concerned in the marketing of specific products”.

Out of the 25 member states, BELGIAN, DANISH, ESTONIAN, ITALIAN, IRISH, DUTCH, SLOVAKIAN, SLOVENIAN and SPANISH laws do not substantively deviate from the definition in the sense of Directive 98/6. In most member states, the implementation laws vary from the definition.

In AUSTRIA the value added tax and all other taxes do not necessarily have to be included in the unit price. Furthermore, in Estonia and likewise in SWEDEN, the provision concerning the single different unit of quantity has not been transposed in conformity with Directive 98/6. Besides the specified units, namely kilogramme, litre, metre, square metre and cubic metre, not only one, but any different unit of quantity can be used. However, the requirement, that this different unit of quantity needs to be widely and customarily used in the concerned member state in the marketing of specific goods, is still upheld.

1552 Art. 13(3)(a) of the Act on Prices No. 526/1990.
1554 The selling price needs to be indicated in ‘Euros’.
In CYPRUS, FINLAND, GREECE, LATVIA, LUXEMBOURG and the UNITED KINGDOM, the possible indication of the price for one “different single unit of quantity which is widely and customarily used in the member state concerned in the marketing of specific products” is not envisaged at all.

Regarding the transposition law in the United Kingdom, however, the price for certain products must be indicated for quantities which are different from the ones listed in Directive 98/6. The price for products which are indicated in Schedule 1 of the Price Marking Order 2004 (e.g. food colouring, spices, coffee, fruit juices and soft drinks) must be indicated for a specified amount of grams concerning products sold by weight or for a specified amount of millilitres concerning products sold by volume. Furthermore, in respect of products which are sold by number, the price must be indicated for an individual item of that particular product. Similar provisions exist in CYPRUS.

Regarding the possibility to indicate the price for one different unit of quantity, the Hungarian legislator limited this possibility in such a way that this can only be done for products which are sold by number and where, therefore, the price can be indicated individually for each individual piece of that product.

In Latvia, the possibility to indicate the price for a unit other than the ones indicated by Directive 98/6 is widened insofar as the requirement, that this different unit has to be widely and customarily used in the marketing of that specific product, has not been implemented. In MALTA, only the term price, but not the more specific term unit price has been legislatively regulated. However, it is laid down that the price must be the final retail or unit price which has to include the value added tax as well as all other taxes.

The PORTUGUESE legislator has not directly implemented the definition of the term ‘unit price’ as stipulated in Directive 98/6 either. In fact, in Portugal, the unit price has been defined as the price applicable to a quantity of 1 kilogramme or 1 litre of foodstuff and 1 kilogramme, 1 litre, 1 metre, 1 square metre, 1 cubic metre, or 1 ton of non-food product. Besides these variations from the regulation laid down in Directive 98/6, the possibility to indicate the price for a different unit quantity has not been laid down.
The POLISH legislator only defined the unit price as a price for a unit of specified goods. The amount or number of these goods has to be expressed in units of certain measurements which have to be in accordance with the provisions on measures. Hence, neither the measurements specified by Directive 98/6, nor the option to apply one different unit quantity, nor the requirement to include all kinds of taxes in the price have been legislatively regulated. FRANCE has not directly transposed a definition of the term unit price.\textsuperscript{1555}

<table>
<thead>
<tr>
<th>Table: Transposition method</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Substantively equivalent as in Directive 98/6</strong></td>
</tr>
<tr>
<td><strong>Variations</strong></td>
</tr>
</tbody>
</table>

6. Products sold in bulk

Art. 2 lit. (c) of Directive 98/6 specifies ‘products sold in bulk’ as “products which are not pre-packaged and are measured in the presence of the consumer”.

Again, more than half of the member states have transposed the term ‘products sold in bulk’ substantively mirroring the Directive’s content. In MALTA and the UNITED KINGDOM, the definition is slightly different. Their legislation prescribes that the consumer does not necessarily have to be present when the non-pre-packaged products are measured since the implementation law only states that the product has to be measured at the request of the consumer. Similarly, in GERMANY, the products have to be measured alternatively either in the presence of the consumer or at his request. The LATVIAN law does not provide a direct definition of the term ‘product sold in bulk’, but lays down the regulation that only the ‘unit price’ needs to be indicated concerning ‘products sold in bulk’ or products which are measured in the presence of the consumer. In SLOVENIA, the definition is substantially

\textsuperscript{1555} Art 1(1) of the Regulatory Act of 16 November 1999 on consumer protection in the indication of the prices contains: “le prix de vente au kilogramme, à l’hectogamme, au litre, au décilitre, au mètre, au mètre carré ou au mètre cube ».

\textsuperscript{1556} Art. 1 of the Royal Decree of 30 June 1996 concerning the indication of the price of products and services and the order form which provides for a definition of ‘unit price’ does not expressly mention VAT and all other taxes to be included in the unit price. However, the Royal Decree must be read in conjunction with the Trade Practices Act which lays down the general obligation that advertised prices should include all taxes (cf. Art. 3 TPA).
equivalent with a slight variation: the presence of the consumer is needed “as long as this is allowed by the nature of the product”\textsuperscript{1557}. Likewise, in SWEDEN, it is determined that only the ‘unit price’ needs to be given when the product is not pre-packaged, but measured out in front of the consumer.

In LITHUANIA, although there is no legislative regulation which would be comparable to the ones in Latvia or Sweden, the term ‘products sold in bulk’ is understood as laid down in Directive 98/6. Finally, in FRANCE, POLAND and Sweden, the law neither provides any definition, nor does any seemingly common understanding of the term exist.

Table: Transposition method

| Substantively equivalent as in Directive 98/6 | AT, BE\textsuperscript{1555}, CY, DK, EE, DE, EL, ES, FI, HU, IE, IT, LU, NL, PT, SK (16) |
| Variations | LV, MT, SL, UK (4) |
| No specific legislative definition | CZ, FR, LT, PL, SE (5) |

III. Consumer Protection Instruments

1. Formal requirements (transparency) Art. 4

Art. 4 para. 1, sent. 1 of Directive 98/6 states that the selling price and the unit price must be unambiguous, easily identifiable and clearly legible.

The national legislators of AUSTRIA, BELGIUM, the CZECH REPUBLIC, DENMARK, ESTONIA, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, SLOVENIA\textsuperscript{1559} and the UNITED KINGDOM have faithfully transposed this Directive’s provision. Most member states therefore used the copy and paste technique.

\textsuperscript{1557} Art. 2(2) of the Rules on Price Indication for Goods and Services

\textsuperscript{1555} The TPA contains a similar definition (Art. 7 of the TPA, under the Section dedicated to the indication of quantities on the packaging of products), but not within the scope of the price indication section as such.

\textsuperscript{1559} Art. 8, 12 of the Rules on Price Indication for Goods and Services (issued by the Minister for the Economy). The prices for services also have to be indicated in an unambiguous way.
Some member states have implemented even stricter provisions. In FINLAND\textsuperscript{1560} and SWEDEN\textsuperscript{1561} both the selling and the unit price have to be indicated in a clear and individualised way to avoid any confusion. In CYPRUS\textsuperscript{1562}, the selling and unit price must also be distinct. MALTESE law states that the price on the label or mark must be boldly printed or otherwise indicated in writing. In SPAIN\textsuperscript{1563}, the price must be “located in the same visual ambit” and “visible for the consumer without need to apply for that information”. Only the national laws of FRANCE do not contain a specific legislative transposition.

<table>
<thead>
<tr>
<th>Table: Transposition of Art. 4 (formal requirements)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Transposition</strong></td>
</tr>
<tr>
<td>As in Directive 98/6</td>
</tr>
<tr>
<td>Stricter provisions</td>
</tr>
<tr>
<td>No specific legislative transposition</td>
</tr>
</tbody>
</table>

2. Sanctions (Art. 8)

Most of the member states have implemented Directive 98/6 as public law. Therefore, in these countries, the responsible public authorities control the application of the price indication law. As a consequence of this, a majority of the member states have stated public law sanctions. These sanctions range from fines to imprisonment.

Additionally, other member states have chosen to implement provisions that enable every competitor of the trader to take action before the courts, e.g. AUSTRIA\textsuperscript{1564}, GERMANY\textsuperscript{1565}, LATVIA et seqq. In Germany, this is only possible in cases of considerable infringement. In

\textsuperscript{1560} Art. 10(2) of the Regulation on Price Indications in Marketing of Consumer Goods.
\textsuperscript{1562} Art. 7(3)(a) of the Selling and Unit Price Indication Law of 2000, L.112(I)/2000.
\textsuperscript{1563} Art. 4(1) of the Royal Decree 3423/2000, of 15th December, on the regulation of the indication of prices of the products offered to the consumers and users.
\textsuperscript{1564} § 1 of the Act against unfair competition.
\textsuperscript{1565} §§ 3, 4 No. 11 of the German Act against unfair competition.
MALTA\(^{1566}\), in the case the offending person is convicted more than once, he may also be liable to have his licence to trade suspended for a period not exceeding one week.

The concrete sanctions can be identified with the help of the following table:

<table>
<thead>
<tr>
<th>Member State</th>
<th>Sanction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>- fines not exceeding € 1.450 (§ 15 PrAG)</td>
</tr>
<tr>
<td></td>
<td>- damages and injunctions according to the UWG</td>
</tr>
<tr>
<td>Belgium</td>
<td>- fines between 250 and 10.000 €</td>
</tr>
<tr>
<td></td>
<td>- cease and desist orders can be issued against sellers violating their obligations</td>
</tr>
<tr>
<td>Cyprus</td>
<td>- a fine of Cyprus Pounds £1.000 (maximum) or imprisonment for a period of not longer than 6 months</td>
</tr>
<tr>
<td></td>
<td>- for every subsequent conviction a fine of Cyprus Pounds £ 2.000 (maximum) or imprisonment for a period of 1 year (maximum)</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>- fines not exceeding 50.000.000 Czech koruna (Sec.24(1) Act No. 634/1992).)</td>
</tr>
<tr>
<td>Denmark</td>
<td>- The price indication rules are now transferred to the Marketing Practices Act (cf. above under F.II.2.) Consequently, the sanction system of the Marketing Practices Act applies. This means that the Consumer Ombudsman supervises the rules. The Ombudsman has a variety of sanctions, including negotiation (in order to make the trader comply voluntarily), injunctions and fines.</td>
</tr>
<tr>
<td>Estonia</td>
<td>- a fine of up to 100 fine units; if committed by a legal person, is punishable by a fine of up to 30 000 kroons</td>
</tr>
<tr>
<td>Finland</td>
<td>- fines (Chapter 11 section 1 Consumer Protection Act)</td>
</tr>
<tr>
<td>France</td>
<td>- fines (Art. R.113-1 Code de la Consommation)</td>
</tr>
<tr>
<td>Germany</td>
<td>- fines not exceeding 25.000 €</td>
</tr>
<tr>
<td>Greece</td>
<td>- fines and/or imprisonment according to Art. 30 of Agoranomikos Kodikas</td>
</tr>
<tr>
<td>Hungary</td>
<td>- fines, prohibition of continuation of the illegal conduct (Arts. 47, 48 Consumer Protection Act)</td>
</tr>
</tbody>
</table>

\(^{1566}\) Art. 9(3)(b) of the Consumer Affairs Act (Price Indication) Regulations.
<table>
<thead>
<tr>
<th>Country</th>
<th>Sanctions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ireland</td>
<td>- a fine not exceeding 3,000 €&lt;br&gt;- order (injunction) requiring the trader to act, or refrain from doing anything, to ensure compliance with the Regulations</td>
</tr>
<tr>
<td>Italy</td>
<td>- fines from 516,45 Euro (1,000,000 Lire) to 3,098,74 Euro (6,000,000 Lire)</td>
</tr>
<tr>
<td>Latvia</td>
<td>- administrative sanctions&lt;br&gt;- competitors can claim</td>
</tr>
<tr>
<td>Lithuania</td>
<td>- state inspection of non-food products&lt;br&gt;- consumer has the right to appeal to the State Food and Veterinary Service</td>
</tr>
<tr>
<td>Luxembourg</td>
<td></td>
</tr>
<tr>
<td>Malta</td>
<td>- a fine of not less than fifty liri and not exceeding five hundred liri&lt;br&gt;- suspension of licence to trade&lt;br&gt;- publication of a summary of the judgment in the media (one or more daily newspapers)(^\text{1567})</td>
</tr>
<tr>
<td>Netherlands</td>
<td>- a fine not exceeding € 16,750&lt;br&gt;- imprisonment for a maximum of 6 (six) months</td>
</tr>
<tr>
<td>Poland</td>
<td>- fines between 1,000 and 5,000 €</td>
</tr>
<tr>
<td>Portugal</td>
<td>- administrative sanctions</td>
</tr>
<tr>
<td>Slovakia</td>
<td>- Public control and market surveillance authorities&lt;br&gt;- fines up to 2,000,000 Slovak crowns (up to 5,000,000 Slovak crowns in case of repeated infringement within the space of one year)&lt;br&gt;- Right of consumer, consumer organisations to take action before the courts</td>
</tr>
<tr>
<td>Slovenia</td>
<td>- administrative sanctions provided for under general administrative law.</td>
</tr>
<tr>
<td>Spain</td>
<td>- control by competent bodies of the Autonomous Communities of Spain&lt;br&gt;- fines (the amount of the fines is determined by reference to three other Acts: Consumer Protection Act, Retail Trade Act and Royal Decree 1945/1983 on sanctions to protect consumers and food production)</td>
</tr>
<tr>
<td>Sweden</td>
<td>- sanctions in the Marketing Act</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>- control by local weights and measures authority&lt;br&gt;- fines (UK utilises system of sanctions generally provided in the Prices Act)</td>
</tr>
</tbody>
</table>

\(^{1567}\) See Reg. 9 (3)(b) of the Consumer Affairs Act (Price Indication) Regulations.
IV. Use of Options provided in Directive 98/6

1. Products supplied in the course of the provision of a service

Art. 3 para. 2, 1st indent permits the member states not to apply Art. 3 para. 1 to products supplied in the course of the provision of a service.

Most of the member states have made use of this option. In Austria, Belgium, Cyprus, the Czech Republic, Germany, Estonia, Greece, Hungary, Ireland, Lithuania, Latvia, Malta, the Netherlands, Poland, Portugal, Slovenia, Slovakia, Spain and the United Kingdom the trader is not obliged to indicate the unit price for products supplied in the course of the provision of a service. Also Italy\textsuperscript{1568} and Luxembourg\textsuperscript{1569} have made use of the option.\textsuperscript{1570} Italy explicitly exempts the provision of food and beverages\textsuperscript{1571}.

Some countries have not made use of the option, such as Finland, France, Denmark\textsuperscript{1572} and Sweden. With regard to Sweden it should be noted that the Prisinformationslag (SFS 1991:601)\textsuperscript{1573} is applicable to goods as well as to services.

Table: Use of option with regard to products supplied in the course of the provision of a service (Art. 3 para. 2, 1\textsuperscript{st} indent)

<table>
<thead>
<tr>
<th>Use of Option</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>AT, BE, CY, CZ, DE, EE, EL, HU, IE, IT, LT, LV, LU, MT NL, PL, PT, SE, SL, SK, ES, UK(21)</td>
</tr>
</tbody>
</table>

\textsuperscript{1568} Former Art. 2(5)(a) of the Statute 25/02/2000 n. 84 “Implementation of Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers” now stated in Art. 14(5)(a) of the Italian Consumer Code.

\textsuperscript{1569} Art. 3(2) no.2 of the Decree of 7.9.2001 on price indication.


\textsuperscript{1571} Art. 14(5)(a) of the Italian Consumer Code. “including the provision of food and beverages”.

\textsuperscript{1572} As mentioned above under F.II.2., since 1 July 2006 the price indication rules also apply to services. Thus Denmark no longer makes use of the option in Art. 3, para 2, 1\textsuperscript{st} indent of the Directive.

2. Sales by auction and sales of works of art and antiques

Art. 3 para. 2, 2nd indent of Directive 98/6 grants the member states the option not to apply Art. 3 para. 1 of Directive 98/6 to sales by auction and sales of works of art and antiques.

Again a vast majority of member states have chosen to implement this option. They are: AUSTRIA, CYPRUS, ESTONIA, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LITHUANIA, LATVIA, MALTA, the NETHERLANDS, PORTUGAL, SLOVENIA, SLOVAKIA, SPAIN and the UNITED KINGDOM.

BELGIUM and SWEDEN have made use of the option, but only exclude auctions. LUXEMBOURG only exempts works of art and antiques if such products carry a clear indication, which allows for their identification on a price list.

Only FINLAND, FRANCE and POLAND have not made use of the option provided in Directive 98/6. From 1 July 2006 DENMARK no longer made use of the option regarding works of art and antiques.

Table: Use of option with regard to sales by auction and sales of works of art and antiques (Art. 3 para. 2, 2nd indent)

<table>
<thead>
<tr>
<th>Use of Option</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>No use</td>
<td>DK, FI, FR, SE (4)</td>
</tr>
</tbody>
</table>

1577 Art. 7(2) of the Decree of 7.9.2001 on price indication.
1579 § 13(1) of the Marketing Practices Act.
### 3. Products for which indication of unit price would not be useful

Art. 5 of Directive 98/6 allows the member states to waive the obligation to indicate the unit price for products for which the indication might be not useful because of the product’s nature or purpose, or, if it creates confusion. Art. 5(2) allows the member states, in the case of non-food products, to establish a list of the products or product categories to which the obligation to indicate the unit price shall remain applicable.

Seemingly all member states have made use of this option. However, the categories of products exempted vary considerably. For instance, § 6 of the SWEDISH Prisinformationslag\(^{1583}\) simply states that the trader only has to provide information about the selling price when the nature of the good is of such character that the unit price is of no interest to the buyer or might create confusion. The LATVIAN transposition law uses the same wording as Directive 98/6 and, furthermore, contains a short list of examples, such as milk, sour cream and eggs\(^{1584}\).

Several member states have excluded automatic vending machines from the obligation to indicate the unit price. They are: BELGIUM\(^{1585}\), the CZECH REPUBLIC\(^{1586}\), GREECE\(^{1587}\), HUNGARY\(^{1588}\), ITALY\(^{1589}\), IRELAND\(^{1590}\), LITHUANIA\(^{1591}\), the NETHERLANDS\(^{1592}\), PORTUGAL,
SLOVAKIA and SPAIN. GERMANY only exempts automatic vending machines for food and beverages. The UNITED KINGDOM excludes only those automatic vending machines which sell bread made up in a prescribed quantity and products which are pre-packaged in a constant quantity. In CYPRUS, after the amendment effected to the original transposition law by Law 136(I)/2005, the exception for vending machines is no longer applicable.

Many member states have exempted products sold in quantities below certain limits. These limits range from 5g or 5ml in CYPRUS and LITHUANIA, less than 10g or ml in Germany, less than 15g or ml in the Netherlands, less than 20g or ml in AUSTRIA, less than 50g or ml in ESTONIA, GREECE, HUNGARY, PORTUGAL, SLOVAKIA and SPAIN to 100g or ml in LUXEMBOURG.

Further exemptions are rather specific. Belgium has exempted ice cream and snacks sold for immediate consumption, products consumed on the premises in restaurants, hotels and bars etc. and, furthermore, wine sold in bottles of 75 cl. Germany excludes beverages, chewing tobacco, cosmetics, perfumes and products sold at a reduced price because the sell-by date is almost at an end. Italy has exempted products of various types included in the same package; pre-cooked, or prepared foodstuffs, or those to be prepared, formed of two or more separate items contained in a single package, requiring additional preparation by the consumer before the finished product is obtained; single-portion ice-creams and non-food products that can only be sold individually. FINLAND has chosen to exclude chocolate eggs, decorative sweets, pastries and confectionary products. The Spanish Annex I of the Royal Decree 3423/2000 also excludes “individual portions of ice cream” (lit. d), “wines with geographic

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1590 Art. 5(2)(f) of the Requirements to Indicate Product Prices Regulations.
1591 Art. 29.6.3 of the Rules of Labelling of Items (Goods) and Indication of Prices
1592 Annex II lit. D of the Decree of the 21st of May 2003, containing rules in regard to the indication of prices as replacement for the Decree price-indication on goods 1980
1593 Art. 4 of the Price Indication Decree 545/2002: only in the case of goods sold in vending machines for food and beverages.
1594 Annex I lit. c of the Royal Decree 3423/2000, of 15th December, on the regulation of the indication of prices of the products offered to the consumers and users.
1595 § 9(4) no. 5 of the Price Indication Regulation.
1596 Reg. 5(3) lit. c and d of the Price Marking Order 2004.
1597 Art. 29.6.2 of the Rules of Labeling of Items (Goods) and Indication of Prices
1598 Or above 10 kg or 10 l. Cf. Art. 4(2) lit. g of the Decree-Law 130/90, of 26 April.
1599 Art. 11 of the Royal Decree of 30/6/1996 concerning the indication of the price of products and services and the order form (as amended by R.D. 7/2/2000).
1600 Art. 16(1) of the Consumer Code.
1601 Art. 7(1) 3rd indent Regulation on Price Indications in Marketing of Consumer Goods.
nomination” (lit. e) and “alcoholic drinks with geographic nomination” (lit. f). Other member states like Belgium, the Netherlands, Italy and Spain have exempted “fantasy” packages or products.\footnote{Belgium: Art. 11 no. 6 of the Royal Decree of 30 June 1996 concerning the indication of the price of products and services and the order form; Netherlands: Annex II A, Decree of the 21st of May 2003, containing rules in regard to the indication of prices as replacement for the Decree price-indication on goods 1980: fantasy products and packaging which are offered. E.g. Chocolate Santa Claus, where the package is more important for the consumer than the product itself. Spain: Annex I lit. g Royal Decree 3423/2000, of 15th December, on the regulation of the indication of prices of the products offered to the consumers and users of nutritional products.}

Art. 5 para 2 of Directive 98/6 allows the member states to establish a list of non-food products or product categories to which the obligation to indicate the unit price shall remain applicable. Only Belgium, France and Luxembourg have enacted a detailed list on non-food products, France also has a list on food products.

Such variations can make it very difficult to predict the details of the price indication laws of the member states. This may cause traders to indicate unit prices just by way of precaution, if they want to trade abroad. In the case that the indication of unit prices is costly this necessity could deter the trader from doing business in other member states and therefore constitute a barrier to trade. Therefore concretising this option along the lines of the national transposition laws draw might be considered. Another possibility would be to replace the option in Art. 5 by a general clause which simply reads that there is no obligation to indicate the unit price for products for which it is obvious that such indication is not useful because of the product’s nature or purpose or if it creates confusion. This would leave it to the courts (and to the ECJ).

4. Indication of unit price were to constitute an excessive burden for certain small retail businesses

Again, a majority of the member states have made use of the option excluding the obligation to indicate the unit price in cases where it constitutes an excessive burden. Member states have implemented different criteria to protect small retail businesses. Only some characteristic examples shall be pointed out here.
Some member states have stated provisions that exempt shops depending on the total sales area. The relevant sales area ranges from less than 50m² in GREECE\(^\text{1603}\), less than 150 m² in SLOVAKIA\(^\text{1604}\), less than 280m² in the UNITED KINGDOM, less than 400m² in LUXEMBOURG and the CZECH REPUBLIC to 500m² in SLOVENIA\(^\text{1605}\). In BELGIUM, the indication of the unit price is not required for pre-packaged products that are sold in pre-determined quantities when they are sold by sellers whose sales area is less than 150m²\(^\text{1606}\).

Other member states use a certain number of employees as a criterion. AUSTRIA excludes sole traders with up to 9 employees and enterprises operating with up to 50 employees.\(^\text{1607}\) In the NETHERLANDS, businesses with up to five full-time employees are exempted.

Member states like the CZECH REPUBLIC\(^\text{1608}\), Greece\(^\text{1609}\), GERMANY\(^\text{1610}\), SLOVAKIA\(^\text{1611}\) and the Netherlands\(^\text{1612}\) distinguish between shops where consumers are served, which are exempt from the obligation, and self-service stores, which are not exempt.

In the United Kingdom, the option in Article 6 has been utilised in respect of bread made up in a prescribed quantity as well as any product pre-packaged in a constant quantity, offered for sale in a small shop, by an itinerant trader, or from a vending machine.

Some member states have exempted itinerant traders from the obligation to indicate the unit price, such as IRELAND, AUSTRIA and ESTONIA. The United Kingdom has chosen to exclude only those itinerant traders, who sell bread made up in a prescribed quantity and products which are pre-packaged in a constant quantity.\(^\text{1613}\) CYPRUS initially excluded both small retail businesses and itinerant traders but after the amendment effected to the original transposition law by Law 136(I)/2005, these exceptions are no longer applicable.

\(^{1603}\) Art. 6 lit. (a) of the Decision of the Ministry of Trade No. Z1–404.

\(^{1604}\) Art. 4 lit. a of the Price Indication Decree 545/2002.

\(^{1605}\) Art. 15 Rules on Price Indication for Goods and Services (issued by the Minister for the Economy).

\(^{1606}\) Art. 12bis of the Royal Decree of 30 June 1996 concerning the indication of the price of products and services and the order form. This provision has been implemented by an amendment decree of 21 September 2004.

\(^{1607}\) Art 10b(3) of the Price Indication Act.

\(^{1608}\) Art. 13(9) lit. b of the Act on Prices No. 526/1990.


\(^{1610}\) § 9(4) no. 3 of the Price indication regulation.

\(^{1611}\) Art. 4 of the of the Price Indication Decree.

\(^{1612}\) Annex I lit H 1’’ indent of the Decree of the 21st of May 2003, containing rules in regard to the indication of price.

\(^{1613}\) Reg. 5(3) lit c and d of the Price Marking Order 2004.
PORTUGAL, ITALY, Slovakia and SPAIN have implemented derogations for a transitional period. These periods expired in Portugal on 14.5.2002\(^{1614}\), in Italy on 01.03.2002\(^{1615}\), in Slovakia on the date the Treaty of Accession to the EU came into force\(^{1616}\) and in Spain on 30.06.2002. In Spain, legislative competence has been delegated to the Autonomous Communities which now have the faculty to establish a transitional period to indicate the unit price for products pre-wrapped in pre-fixed quantities and distributed by small retail businesses where the sale is concluded by a seller who deals personally with the customer and offers the products, and also in the case of itinerant trades.

The Czech Republic stated the 1 May 2014 as the expiry date\(^{1617}\). The majority of the member states have implemented the exemptions for small retail businesses without a time limit. This is contrary to Directive 98/6.

DENMARK, FINLAND, HUNGARY, LITHUANIA, POLAND, and SWEDEN have not made use of the option provided by Directive 98/6.

<table>
<thead>
<tr>
<th>Use of Option</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>AT, BE, CY, CZ, DE, EE, EL, FR, IE, IT, LV, LU, MT, NL, PT, SL, SK, ES, UK (19)</td>
</tr>
<tr>
<td>No use</td>
<td>DK, FI, HU, LT, PL, SE (6)</td>
</tr>
</tbody>
</table>

The variations of the individual transpositions in the member states can make it very difficult to predict the details of the Price Indication laws of a foreign member state. This could be removed by a more precise definition of small trader, which could be drafted along the criteria already contained in Art. 6.

\(^{1614}\) Art. 2(2) of the Decree-Law 162/99 of 13 May.

\(^{1615}\) Art. 7(1) of the Statute 25/02/2000 n. 84 “Implementation of Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers”.

\(^{1616}\) Art. 6 of the Price Indication Decree.

G. Injunctions Directive (98/27)

Drafted by Christian Twigg-Flesner

Executive Summary

1. Transposition deficiencies

- MALTA has not adopted legislation that extends to all the Directives listed in the Annex, and there are therefore gaps in the transposition of this Directive
- the law in HUNGARY requires that “substantial” harm be caused, which adds an additional element and raises the threshold before action can be taken
- no summary procedure is available in ESTONIA and LITHUANIA (cf. Art. 2(1)(a) of the Directive 98/27)
- CYPRUS and MALTA do not refer to the list in the Official Journal required under Art. 4(3) of the Directive in their domestic law, although in both countries, entities from another Member State appear to have the right to take action in any event
- IRELAND requires that consumer associations must have a statutory function of protecting collective interests, which seems to be narrower than the requirement in the Directive

2. Enhancement of protection

a. Use of options

- Article 5(1) of the Directive 98/27 (consultation with the defendant) – used by 13 member states. Out of the 13, eight require consultation only with the defendant, and five require consultation with the defendant and the relevant domestic independent public body.
- The NETHERLANDS and GERMANY do not expressly refer to the two-week period for consultation before action can be taken
b. Use of minimum clause (i.e. more stringent provisions in the field covered by the directive)

- many countries have extended the provisions implementing the Directive to domestic consumer legislation not transposing an EC directive
- some countries permit a wider range of orders, such as
  o CYPRUS (corrective measures to be taken by trader)
  o MALTA (correction to unfair contract terms; for other areas, order may specify measures to be taken to ensure compliance)
- There are several countries where collective actions by consumers are available against a single trader who has harmed several consumers (e.g. FRANCE, ITALY and the UNITED KINGDOM)
- In FRANCE and the UNITED KINGDOM, the criminal law is used as a means of enforcing some aspects of consumer protection law

c. Extension of scope

- no reference to ”collective interests” as threshold (may permit broader range of actions) in CYPRUS, LATVIA, and MALTA.
- PORTUGAL and SPAIN also include diffuse interest in the scope of their domestic law
- Some member states permit action even where an individual consumer has been harmed (CYPRUS, PORTUGAL, ESTONIA, and LATVIA).

d. Other measures enhancing consumer protection (i.e. more stringent provisions in fields not covered by the directive)

- competitors have the right to take action under the legislation dealing with unfair competition in some member states (e.g., AUSTRIA and GERMANY).
3. Inconsistencies

- Article 2(1)(c) of the Directive 98/27 (penalty payments where domestic law so provides) has been transposed expressly in 19 countries. In three countries (CYPRUS, DENMARK, UNITED KINGDOM), recourse is had to the general law on contempt of court.

- wide variation in national law determining criteria for recognising consumer associations as qualified entities (cf. Art. 3(b). of the Directive)

- variations in procedural rules make it more difficult to give full effect to requirements of the Directive

- several of the Directives contained in the Annex also contain provisions requiring the member states to set up procedures to ensure the effectiveness of their transposing law (e.g., Directive 97/7). This is usually done by injunction, but the threshold for taking action under these provisions is lower as it does not refer to the “collective interests” of consumers.

- variation in dealing with the Annex (transposition not required): 12 member states have transposed the Annex into their domestic law; 2 refer to it in the explanatory notes to their implementing legislation; two (CYPRUS and LUXEMBOURG) have amended each domestic law transposing the directives listed in the Annex; and nine member states have not transposed the Annex.

4. Potential barriers to trade

- scope of Directive 98/27 only extends to the rights granted under corresponding directives, but many of these are minimum harmonisation measures

- financial cost for consumer associations and public bodies to take action in another member state is a deterrent

- possible delays in updating list in Official Journal could deprive a qualified entity from one member state from taking action in another
5. Conclusions and Recommendations

- A clarification regarding the applicable law in cross-border cases might be desirable. It is noted that this may be resolved through the proposed “Rome II” convention.

- A related question is whether injunctions obtained in a domestic context ought to have Europe-wide reach, at least where the activities of the trader against whom an injunction has been obtained are not limited to one member state. An analysis as to whether this is already possible within Regulation 44/2001 (Brussels-Regulation) may be desirable.

- The relationship with Directive-specific enforcement mechanisms should be clarified. Thus, Art. 11 of Directive 97/7 and Art. 7 of Directive 93/13 both require that member states put into place adequate and effective means to ensure compliance with these respective Directives. This seems to overlap, to an extent, with this Directive. There is a difference in that the provisions in the specific Directives do not include the “collective interest” criterion, although, at a practical level, this may not matter hugely. It may therefore be possible to consider whether these specific provisions could be deleted.

- The evidence to date shows that the cross-border procedure is not being utilised. One reason may be the question of costs for qualified entities from one member state to take action in another. The Directive is silent on the question of costs; a basic rule giving the qualifying entity the right, if successful in the action, to recover costs (not just of the court action, but the costs incurred in taking the action, such as translation, legal advice etc.) could be considered.

- It may be desirable to consider whether a power to ask for compensation should be introduced. Difficulties in this regard may be establishing the loss caused and identifying beneficiaries (e.g., through creating a central fund to which individual consumers may apply). Linked to this is whether cross-border class-actions ought to be facilitated, too.
I. Member State legislation prior to the adoption of the Injunctions Directive

The situation in the member states before the adoption of the Directive 98/27 was rather diffuse, with only some countries having in place a system comparable to that introduced by the Directive 98/27. It should be noted that most member states had introduced procedures for some aspects of consumer law, notably in the context of the Directive 93/13. However, not all the member states had a regime comparable to that in the Directive 98/27; moreover, the existing frameworks were generally only accessible to qualified entities from the respective member state, and not those from another member state.

In Austria, for example, there were provisions dealing with challenges to unfair contract terms in standard form contracts, with standing given to a number of commercial associations, as well as the Association for Consumer Information (Verein für Konsumenteninformation).

Belgian law also recognised a right for domestic consumer organisations to seek an injunction. In Denmark, there was a possibility of bringing an action, provided that the claimant could demonstrate “a sufficient legal interest” to bring an action, although it was not clear whether this extended to the protection of collective interests.

The Estonian Consumer Protection Act of 1994 had empowered the Consumer Protection Board to take action “to demand that a third party terminate activities in violation of consumer rights if the activities of the third party affect the common interests of an unspecified number of consumers.” In Finland, the Consumer Ombudsman (CO) had a primary right to bring cases to Market Court. In case the CO did not act, consumer organizations and even labour organizations had a secondary right to bring cases concerning (unfair) marketing practices or (unfair) contract terms. However, authorities from other member states did not have right to bring the case to Market Court. In France, it had been possible since 1973 for consumer organisations to take action “if there was a direct or indirect disadvantage for consumers collectively”, these provisions were subsequently improved.

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1620 Art. 98(1), (4) of the Trade Practices Act.
with the introduction of a “collective action” procedure.\(^\text{1623}\) The law in the NETHERLANDS was similarly advanced.\(^\text{1624}\) GERMANY had also introduced a right of action for consumer associations in the context of unfair competition law,\(^\text{1625}\) and also in respect of standard contract terms,\(^\text{1626}\) but associations had to establish their standing in every case. PORTUGAL had extensive procedures for the protection of the collective interests of consumers,\(^\text{1627}\) as well procedures for individual consumers (whether or not harmed), consumer associations, the public prosecutor (Ministerio Publico) and the Institute of Consumers (Instituto do Consumidor) to take action. In SPAIN, the role of consumer associations to represent the collective interests before the courts had been recognised for some time,\(^\text{1628}\) and this position was progressively strengthened up to the point of having to implement the Directive 98/27.\(^\text{1629}\)

The position regarding consumer associations was confirmed in the Spanish Law on Civil Procedure,\(^\text{1630}\) which also extends the scope of protection beyond collective interests to diffuse interests. GREECE\(^\text{1631}\) and SWEDEN also had procedures in place for the protection of collective consumer interests. HUNGARIAN law also recognised a right of action for the General Inspectorate of Consumer Protection, as well as social organisations representing consumers’ common interests; moreover, foreign qualified entities could register injunctions through an administrative procedure.\(^\text{1632}\) Similarly, in POLAND, a procedure permitting social organisations with a statutory task of consumer protection could initiate proceedings for the protection of consumer interests.\(^\text{1633}\) In the UNITED KINGDOM, consumer associations had no right of action; the only entity empowered to act was the Director-General of Fair Trading.\(^\text{1634}\)

Action could be taken where there is a persistent course of conduct which was (a) detrimental to the interests of consumers and (b) ‘unfair’ to consumers (but a conduct would only be unfair if it breached an existing legal rule). Whilst it was possible to seek an

\(^{1623}\) Arts. 411(1) – 422(2) Consumer Protection Law, codifying provisions previously contained in Law no. 88-14, “Actions en justice des associations agréées de consommateurs”, of 5 January 1988. This provides for different types of actions, including the “action en representation conjointe”, which is the nearest to a collective action procedure.

\(^{1624}\) CC, Art. 3:305a and 3:305b, and Art. 6:240-242.

\(^{1625}\) Art. 13 of the Unfair Competition Act 1965.

\(^{1626}\) Art. 13(3) of the Law on Standard Terms of Business 1976.

\(^{1627}\) Law 83/95.

\(^{1628}\) Law 26/1984.


\(^{1630}\) Law 1/2000.

\(^{1631}\) Art.10(9) Consumer Protection Act (Law 2251/1994).

\(^{1632}\) Art. 39 Consumer Protection Act.

\(^{1633}\) Art. 61 of the Code of Civil Procedure 1990.

\(^{1634}\) Fair Trading Act 1973, Part III.
injunction in CYPRUS, this procedure was not available to public authorities or other organisations seeking an injunction for the protection of third parties such as consumers. No corresponding provisions existed in the CZECH REPUBLIC, ITALY, IRELAND, LATVIA, LITHUANIA, MALTA, SLOVAKIA, and SLOVENIA.

II. General Comments

The Directive 98/27 requires that all member states make it possible for qualified entities to take action before domestic courts to protect the various specific rights given to consumers under the measures implementing the EC directives on consumer law into the domestic legal system. Such action may be taken for purely domestic problems, i.e., an entity from member state A can take action before the courts in that state to prevent infringements of the relevant legislation by a trader from that state. In addition, the Directive 98/27 introduces specific provisions on the cross-border enforcement of such rights by allowing qualified entities from one member state to take action against a trader from another member state in the courts of that trader’s jurisdiction.

The Directive 98/27 therefore differs from all of the other directives under consideration in this study, because it does not confer any specific rights on individual consumers. Rather, this measure is concerned with the enforcement of consumer law by “qualified entities”. Such entities are empowered to seek an injunction to protect the “collective interests” of consumers. It is not dealing with class actions by consumers against traders.

The structure of this particular analysis therefore adopts a different format from the analyses of the directives covered so far, concentrating on the procedural rules specified in the Directive 98/27, and the use of the minimum harmonisation clause in Art. 7 of the Directive. It should be noted that even that clause is not a minimum harmonisation clause as they appear in the other consumer directives, because Art. 7 of the Directive is not concerned with granting consumers a higher degree of protection, but rather permits the adoption/
maintenance of more extensive rights to take action at the national level. This section will first turn to the procedural rules contained in the Directive.

In general terms, all the member states have taken steps to give effect to the central provisions of the Directive, although there are some variations, and potential gaps in some member states. It can also be noted that not all of the member states have transposed the Directive simply by adopting one single piece of legislation. In CYPRUS and LUXEMBOURG, provisions based on the Directive 98/27 have been inserted into each piece of legislation on particular aspects of consumer protection.\(^\text{1637}\) In MALTA, where the laws transposing the directives listed in the annex to the Injunctions Directive, are administered by different public authorities, the provisions based on the injunctions directive have been implemented in the procedural parts of the various domestic laws.

### III. Procedural Rules

1. Article 1(2) – Protection of “collective interests” of consumers

Article 1(2) of the Directive 98/27 sets out the definition of “infringement” for the purposes of the Directive. There has to be an “act contrary to the Directives listed in the Annex as transposed in the internal legal order of the member states”, and this act has to harm the “collective interests of consumers”. Such “collective interests” do not, however, include the culmination of the interests of individual consumers harmed by an infringement.\(^\text{1638}\) An action for an injunction to protect the collective interests of consumers is therefore not the same as a “class action”, representing a group of consumers harmed by an infringement.

The second requirement (“collective interests”) does not appear to have been transposed in all the member states. Thus, in CYPRUS, there is no specific reference to “collective interests”, although reference is made to “the general interest” and “the interests of consumers in general”, which is similar in substance. In addition, however, the relevant provisions can be

\(^{1637}\) For Luxembourg, see Loi du 19 décembre 2003 fixant les conditions d’agrément des organisations habilitées à intenter des actions en cessation (Act on injunctions of 19 December 2003).

\(^{1638}\) Cf. second recital of the Directive.
used also in respect of individual cases. HUNGARIAN law refers to illegal activities causing substantial harm to a wide range of consumers or illegal activities affecting the wide range of consumer as the threshold criteria. These are based on legislation existing before the adoption of the Directive, and were retained. It is arguable that the requirement that the harm be “substantial” may create a higher threshold than under the Directive. However, the reference to “a wide range of consumers” does not seem to be a significant variation from the notion of “collective interests”.

In LATVIA, the legislation extends to individual and group consumer interests, and is therefore broader than collective interests. In LITHUANIA, the legislation does not list the relevant measures as such, but rather includes a list of areas of consumer law in respect of which an injunction is available. The law in MALTA is also not restricted to the ‘collective interests’ of consumers, and provides for the issuing of ‘compliance orders’ for any breaches of consumer legislation. In POLAND, the legislation states that the ‘collective interests’ of consumers are not merely the sum of the individual interests of consumers, and, moreover, that the conduct that harms these collective interests must be illegal. The scope of the legislation in PORTUGAL extends beyond “collective interests”, and also includes individual as well as ‘diffuse’ interests of consumers. Similarly, the legislation in SPAIN does not define ‘infringement’ expressly and therefore does not refer expressly to collective consumer interests, but the legislation covers both collective (i.e., an ascertainable group of consumers) and diffuse (the group of affected consumers cannot be determined precisely) interests of consumers.

2. Article 2 – Actions for an injunction

This article requires that the member states designate a court or administrative authority which has the competence to deal with applications for an injunction. The powers of the

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1640 Art. 25(8) of the Consumer Rights Protection Law.
1641 Chapter X of the Law on Consumer Protection.
1642 Art. 94 of the Consumer Affairs Act. In the context of the Consumer Affairs Act, such orders may be issued in relation to breaches of that Act, any regulations made under that Act and any other law relating to consumer protection as the Minister may by order designate in the Government Gazette. There are similar provisions in the other laws implementing the various directives listed in the Annex to the Injunctions Directive.
1643 Art. 23a of the Law on the protection of consumers and competition.
court/authority concerned must include: (i) to issue an order to stop the continuation, or prohibit, an infringement; (ii) to initiate the publication of the decision in an appropriate format and/or of a corrective statement to deal with the continuing effects of the infringement; and (iii) to make an order for penalty payments for non-compliance, but only if the domestic legal system of the member state would already permit this.

a. Action for an order for the cessation or prohibition of an infringement

Article 2(1)(a) of the Directive 98/27 requires that it must be possible for qualified entities to seek an order which requires the cessation of, or prohibits, an infringement. This has been transposed in accordance with the Directive 98/27 in all the member states with the exception of MALTA and SWEDEN. In Malta, the implementing legislation is the Consumer Affairs Act, but this only covers the directives on misleading and comparative advertising, unfair terms, consumer credit and distance selling. The Minister has the power to issue orders extending the relevant provision to other consumer protection measures, but the legislation on package travel and timeshare is administered by the Maltese Tourism authority, and therefore beyond the reach of the Consumer Affairs Act. Maltese legislation therefore does not cover all the directives listed in the Annex, either because a ministerial order extending the relevant legislation to cover those directives has not been made, or because the necessary amendments in the laws administered by other public authorities have not yet been enacted. In SWEDEN, the Market Court deals with cases involving marketing cases, and there are two special authorities, the Consumer Ombudsman and the National Board of Consumer Protection, responsible for ensuring compliance by traders with consumer protection legislation.

aa. Availability of summary procedure

Article 2(1)(a) of the Directive also refers to the availability of a “summary procedure”. The situation in the member states is rather diverse. A temporary injunction may be obtained in AUSTRIA, which does not require proof of an immediate threat to consumers’ rights. In

1644 Arts. 94, 95 and 98 Consumer Affairs Act.
1645 Such as the Malta Tourism Authority in the case of the laws implementing the timeshare and package travel directives.
1646 Art. 30(1) of the Consumer Protection Law.
BELGIAN law, the action for an injunction must be brought before a court by a procedure which is comparable to a summary procedure but imposes even less strict conditions. In CYPRUS, there is a procedure for the issuing a temporary injunction, which is applicable to injunctions to protect the general interests of consumers, and the provisions introduced to transpose the Directive 98/27 expressly provide for the power of the court to issue a temporary injunction in accordance with the principles laid down in the Courts Law, Art. 32. DENMARK relies on its general procedures regarding interlocutory injunctions, which are also available in this context. In FINLAND, the Market Court may impose a temporary injunction, which, if necessary, can be accompanied by a conditional imposition of fine. In FRANCE, there is a general procedure (“référé”) for when an urgent decision from a judge is needed; this can be used by a consumer association in order to stop an infringement.

In GERMANY, it is not necessary to prove the urgency of the order at the time it is issued. GREECE also provides for temporary injunctions. SPAIN also offers an accelerated procedure ("juicio verbal"). In ITALY, where there are justified grounds of urgency a summary procedure is available. It needs to be shown that: (a) in all likelihood the claimant has a valid right which will be or is being infringed by the defendant (fumus boni iuris); and (b) the claimant has not delayed in seeking the relief; and (c) the matter is urgent because there is a danger of irreparable damage from the defendant’s wrongful activity (periculum in mora). An urgent injunction can usually be obtained within one to four months from filing the action.

In MALTA, where a compliance order is being contested before a Court, the Director of Consumer Affairs may request that court to issue an interim order if he considers that it is

1648 Art. 3 Cross-Border Injunctions Procedure Act.
1649 See e.g. Cass. Civ. [Cour de cassation, chamber civile ; France] judgment of 1 December 1987; Recueil Dalloz, 1987, Informations rapides, p. 255.
1650 Art. 940 of the Civil Procedure Code in conjunction with Art. 935 of the Civil Procedure Code and Art. 8 and 12(2) of the Act against Unfair Competition: Art. 940 of the Civil Procedure Code concerns general summary procedure that is applicable to an order for cessation and to an order for prohibition. Art. 12(2) of the Act against Unfair Competition states that – in contrast to general summary procedure – the plaintiff is not required to prove the urgency of the order at the time it is issued.
1651 Art. 10(9) lit. (c) of the Consumer Protection Act (Law 2251/1994).
1653 Art. 669-bis to 669-quaterdecies of the Civil Procedure Code.
necessary to do so in the public interest, pending the final outcome of the proceedings. The procedure in PORTUGAL follows a summary procedure, too.

In POLAND, a summary procedure has been available since 2000. It is available for claims resulting from contracts the value of which does not exceed 10000 PLN (around 2500 EURO) (increased from 5000 PLN in 2005). In SLOVENIA, a temporary injunction can be obtained in a dispute regarding misleading advertising or comparative advertising. A court can issue a provisional ruling following an application by a claimant in line with the provisions regulating insurance, by which it shall order the cessation of the misleading advertising or the illegal comparative advertising, or prohibit the publication of misleading advertisements or advertisements containing illegal comparative advertising in the event it has not yet been published and is about to be published in public. Otherwise, there are no special summary procedures available under Slovenian Law.

No summary procedure is available in ESTONIA or LITHUANIA.

b. Order for publication of decision

Article 2(1)(b) of the Directive 98/27 provides that an order may be sought for the publication of the decision to grant an injunction, and of a corrective statement. There is corresponding legislation in all the member states. For example, in ITALY, a court may order that a decision is published in one or more national newspapers, or in regional/local newspapers, where this would help in dealing with the consequences of the infringement. In MALTA, such a publication has to be made in at least to daily newspapers, and at the expense of the trader concerned.

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1654 Art. 97(3) of the Consumer Affairs Act.
1655 Art. 111(1) of the Law 24/96.
1656 Articles 5051 to 50515 were inserted into the Code of Civil Procedure of 1964.
1657 Art. 74 of the Consumer Protection Act.
1658 Art. 140(1) lit. (c) of the Consumer Code.
1659 Art. 101 of the Consumer Affairs Act.
In **POLAND**, the publication of the decision has to be funded by the business subject to the proceedings. In **SLOVENIA**, the plaintiff can demand that the decision be published at the defendant’s expense. It seems that in **SWEDEN**, publication occurs only in the regular journal published by the Market Court. **LITHUANIA** has not directly implemented this rule, but instead relies on the general rule that decisions by a court must be available publicly.

### c. Order for payments into the public purse

Article 2(1)(c) of the Directive provides for an order, if permitted under national law, for payments into the public purse or any beneficiary designated under national legislation; this may include daily penalty payments. Legislation based on this provision has been adopted in **BELGIUM, CZECH REPUBLIC, ESTONIA, FRANCE, GERMANY, GREECE, HUNGARY, IRELAND, ITALY, LATVIA, LUXEMBOURG, MALTA, NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, SPAIN** and **SWEDEN**.

In **GREECE**, a qualified entity from another member state cannot request compensation; this right is restricted to Greek qualified entities. However, as an order for compensation is subject to the rules of domestic law, this will not be a problem under the Directive; it may however, be problematic under the general non-discrimination principle.

**ITALIAN** courts will set a deadline for compliance with the order. If the defendant fails to do so, the court can require the payment of a lump sum into the public purse, or impose a periodic penalty payment of between 516 and 1032 EURO per day for as long as the infringement continues. Money collected in this way must be paid into State funds, and these can be re-allocated to a fund to be set up as part of a special basic budgetary section of the Ministry of Productive Activities to finance initiatives for the benefit of consumers.

**LITHUANIA** has not taken specific steps to transpose this provision; instead, the general principle that court judgments can be enforced, with appropriate sanctions for non-compliance, is relied upon.

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1660 Art. 23 of the Act on the protection of consumers and competition.
1661 See correspondent’s comment in the Database (SE).
1662 Art. 140(7) of the Consumer Code.
In MALTA, a failure to comply with a compliance order is a criminal offence. On conviction, a fine of up to Lm 10,000 (circa 23,000 Euros) and/or a daily fine of up Lm 50 (circa 130 euros) may be imposed for each day of non-compliance with the order. In POLAND, for example, the fine may be set at the equivalent of between 500 to 10,000 EURO for each day. In SPAIN, fines range from 600 to 60,000 EURO. With regard to the third element, in CYPRUS, a failure to comply with a court order puts the defendant into contempt of court and renders him subject to imprisonment, or his property subject to seizure. There is, however, no provision akin to Art. 2(1)(c) of the Directive.

In DENMARK, acting in violation of an injunction is a criminal offence generally; the same is true of the UNITED KINGDOM, where a failure to comply with a court order renders the defendant liable to proceedings for contempt of court, and there is no separate provision for penalty payments.

d. Private International Law

Article 2(2) of the Directive also requires that the rules of private international law regarding the law applicable to the situation, are not affected by the Directive. Most member states have not implemented this provision expressly. These countries rely on existing provisions in their rules on private international law. Those that have transposed this Article by adding specific provisions are the CZECH REPUBLIC, ESTONIA, HUNGARY, and SLOVAKIA.

3. Article 3 – Qualified Entities

This article defines “qualified entity”, which is a body or organisation with a legitimate interest ensuring that the collective interests of consumers, as provided for in the directives

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1663 Art. 106 of the Consumer Affairs Act.
1664 Art. 102(1) of the Act on the protection of consumers and competition.
1665 Art. 711(2) of the Law on Civil Procedure.
1666 The OFT has recently reported that it has secured the imprisonment of a trader who had failed to comply.
1667 CC Art. 64.
1668 Art. 34 of the Private International Law Act.
1670 Art. 10(1)-(3); Art. 11 and 15 of the Code of International Law.
listed in the Annex, are complied with. This should include both at least one independent public body (in countries where these exist), and/or other organisations whose purpose it is to protect the collective interests of consumers in accordance with the criteria laid down by their national law.

The implementation of this provision has taken different forms. In many member states, the relevant “qualified entities” are listed expressly in the legislation transposing the Directive 98/27, whereas in others, these entities are specified through a separate ministerial order. Furthermore, some member states have included a general provision setting out the criteria to be applied in determining whether a particular body might satisfy the requirements for being recognised as a “qualified entity”, whereas others have not done so. Many member states maintain lists of domestic “qualified entities”, and a domestic association needs to be on such a list to have standing before the courts. There does not seem to be scope for the courts to admit associations not on such a list to bring an action.

In Austria, the legislation\(^{1671}\) mentions those organisations that have the right to take action, which includes the Association for Consumer Information.\(^{1672}\) Belgium had already provided a right of action for domestic entities recognised by the Minister of Economic Affairs or represented in the “Raad van Verbruik” to take action. To this, the right of qualified entities from another member state to act was added in the implementing legislation. In Cyprus, the Competition and Consumer Protection Authority of the Ministry of Industry, Commerce and Tourism is specified as qualified entity. In addition, any legally constituted organisation which by virtue of any law or their memorandum of association have an interest in the protection of consumers’ collective interests may take action. No further criteria are laid down, and there is no approvals procedure which would allow for the exclusion of entities with an insufficient interest from the scope of the implementing provisions.

The Danish provision authorises the relevant minister to appoint the qualified Danish authorities and organisations.\(^{1673}\) Moreover, the minister may also appoint Danish authorities which can act on behalf of authorities from another member state in taking action. Similarly,

\(^{1672}\) “Verein für Konsumenteninformation”.
\(^{1673}\) Art. 4 of the Act on the protection of consumer interests.
FRANCE requires that qualified entities must be approved, and that only those entities which have the protection of the collective interests of consumers as an objective will be considered for approval, as will the Association of Family Unions (unions d’associations familiales). However, with the exception of the Commission des clauses abusives (a public body whose task is to monitor the use of unfair terms), French law does not know the kind of independent public body referred to in Art. 3(a) of the Directive 98/27 and no specific attempt at giving effect to this provision was undertaken. GERMANY requires that associations must be registered with the Federal Administrative Office (Bundesverwaltungsamt), that their membership must comprise at least 75 natural persons and that they have been in existence for at least one year. However, there is a presumption that Consumer Associations and Centres (Verbraucherverbände und –zentralen) funded by the public purse meet these requirements. In addition, certain trade associations can take action, as can the relevant Chambers of Trade and Commerce. In GREECE, there are detailed rules regarding consumer associations. These may only accept natural persons as their members, and the financial sources for their activities are restricted to subscriptions, proceeds from public events and the sale of newsletters/magazines, public funds and EU funds; no private funding is permitted. This should guarantee the association’s independence. Associations need to be recognised by court order and entered on a register of consumer associations. In order to be entitled to take action under the rules giving effect to the Directive, an association must have at least 500 members and must have been registered for at least 2 years.

In HUNGARY, there are a number of criteria which an organisation seeking to become a “qualified entity” must satisfy: it must be a social organisation founded on the appropriate legal basis; have consumer protection as one of its declared goals; must have been active for at least two years; and must have a membership of at least 50 persons. It must then apply to be included on the register of qualified entities.

1675 Articles R. 411-1 et seq. of the Consumer Code lists the criteria used to agree an association of consumers.
1676 See Articles L. 132-2 of the Consumer Code.
1677 Art. 4 of the Injunctions Act.
1678 Art. 3(1) of the Injunctions Act.
1679 Art. 10 of the Consumer Protection Act (Law 2251/1994).
ITALY also maintains a list of those entities which satisfy the criteria laid down in the provisions transposing Art. 3 of the Directive. A list is maintained by the Ministry of Productive Activities. Furthermore, independent public organisations, and organisations recognised in other EU member states, are also qualified entities. In IRELAND, the legislation simply states that a qualified entity is one which protects the collective interests of consumers affected by the infringement concerned, but such an entity must also satisfy the Court that it has a statutory function in relation to the protection of consumer interest which are the subject of the infringement concerned. The fact that this function must be “statutory” may exclude associations both from within Ireland and from another member states whose functions may not be statutory, but purely based on the terms of association.

In LATVIA, the qualified entity is the Consumer Rights Protection Centre, a public body, under the supervision of the Ministry of Economics. In LITHUANIA, there is no definition of ‘qualified entity’ in the domestic legislation, although the term itself is used in this legislation. The National Consumers’ Rights Protection Board is referred to as a ‘qualified entity’. The Board along with the State Food and Veterinary Service, State Inspection of Non-Food Products, the State Public Health Service or the Public Health Centres in districts under the State Public Health Service controls enforcement of the Law on Consumer Protection.\(^{1680}\)

In MALTA, “qualified entity” means a consumer association which is registered under the Consumer Affairs Act, or any other body whether constituted in Malta or elsewhere, which is designated as a ‘qualified body’ by the Minister responsible for consumer affairs after consulting the Consumer Affairs Council.\(^{1681}\)

The legislation in POLAND mentions the Ombudsman, Insurance Ombudsman, Consumers’ Representative and consumer organisations as qualified entities. PORTUGUESE law takes a very wide approach to the notion of ‘qualified entity’ by granting a right of action to individual consumers (whether or not they have been harmed by the conduct), consumer associations, the public prosecutor (Ministerio Publico) and the Institute of Consumers

\(^{1680}\) Art. 29 of the Law on Consumer Protection.

\(^{1681}\) Art. 2 of the Consumer Affairs Act. A somewhat different definition exists under other Maltese laws implementing the Injunctions Directive – for example the Distance Selling (Retail Financial Services) Regulations, 2005, which whilst including registered consumer associations, makes a list of the categories of those entities which may be eligible to be considered as a “qualified entity”. 
(Instituto do Consumidor). This is because of the pre-existing legislation in this field, which had adopted a wider approach than the Directive requires.

SLOVAKIA maintains a list of qualified entities which contains approximately 10 different consumer associations. In SLOVENIA, a qualified entity is “any legal person that has been founded for the protection of consumers” as well as an “organisation or independent public body of another member state if the consumer’s rights of that State could be endangered”; in case of the latter, prior consultation is required (see also below). The entity must have been operating for at least one year.

The implementation in SPAIN does not include the criteria from the Directive, but instead lists those entities which are qualified to take action under the national legislation implementing the Directive 98/27. In addition to relevant consumer associations, this also extends to independent public bodies, including Chambers of Commerce and the professional bars. In the UNITED KINGDOM, there are different categories of ‘enforcers’: general enforcers, designated enforcers, and Community enforcers. Only those in the latter category have the specific power to take action under the provisions transposing the Directive 98/27. The legislation states who the general enforcers are. In respect of “designated enforcers” there is a power for the Secretary of State to specify by order that a person or body of which he “thinks that it has as one of its purposes the protection of the collective interests of consumers” should be a designated enforcer.

In the CZECH REPUBLIC, however, there is no list of qualified entities at all; moreover, no independent public body has been established responsible for the protection of the collective interests of consumers.

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1682 Art. 75(1)-(3) of the Consumer Protection Act.
4. Article 4 – Intra-Community infringements

a. Recognising Qualified Entities from another EU Member State

Article 4(1) of the Directive 98/27 requires that each member state where an infringement originates must permit any qualified entity from another member state where the collective interests of consumers are affected by the infringement, to bring an action for an injunction. The locus standi of a qualified entity to launch proceedings may not be questioned if it is included in the list compiled and published by the Commission. To that end, member states are obliged by Art. 4(2) of the Directive to notify the Commission of the qualified entities from their jurisdiction.

The following countries have given effect to this requirement by referring expressly to the list published in the Official Journal under Art. 4(3) of the Directive: AUSTRIA, BELGIUM, CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, HUNGARY, ITALY, IRELAND, LITHUANIA, LUXEMBOURG, NETHERLANDS, POLAND, PORTUGAL, SLOVENIA, SPAIN, SWEDEN and the UNITED KINGDOM.

In LITHUANIAN law, the Consumer Rights Protection Board has the right to empower other institutions or organisations protecting consumers rights and having a right to protect public interests of the consumers to launch proceedings in the courts or other qualified entity of any other EU member state in order to oblige the seller or service provider acting within the member state to cease the infringements of the public interest of Lithuanian consumers.

No specific transposition of this article can be found in CYPRUS. However, this does not mean that entities from the member states are deprived of a right to take action, as the provisions on the right of a qualified authority to bring an action is not restricted to qualified entities from Cyprus. However, it is not stated expressly that entities from other member states can take action, and no reference is made to the list published in the Official Journal. MALTA has also not transposed this provision, and does not seem to refer to the list in the Official Journal. There is a general power to recognise non-Maltese entities as “qualifying

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1684 Extending the scope of Art. 29 of the Consumer Protection Act to the qualified entities in the list published in the Official Journal.
1685 Art. 28-7(2) of the Law on Consumer Protection.
entities” for the purpose of the Consumer Affairs Act, which would then permit them to take action in the same way as domestic qualified entities.\textsuperscript{1686} Under the Maltese laws other than the Consumer Affairs Act, there is a direct reference to those entities operating in other member states which are entitled to be recognized as ‘qualified entities’ under Maltese law.\textsuperscript{1687} LATVIA has also not transposed this provision, although the Law of Civil Procedure theoretically, admits the possibility that an entity from another member state could take action before the Latvian courts.

member state courts retain the right to consider whether the purpose for which the qualified entity was set up justifies its taking the specific action before them. This has been expressly incorporated into domestic law include AUSTRIA, BELGIUM, GREECE, IRELAND, and POLAND. However, in respect of IRELAND, it must be noted that any qualified entity must have a statutory function of protecting the collective interests of consumers; this seems to restrict the national legislation to a scope which is narrower than the Directive itself. DENMARK relies on a general requirement for standing that a claimant must show “sufficient legal interest” in bringing the action, and this applies to the type of action under the Directive. In FINLAND, a court is also entitled to investigate whether a claimant is entitled to bring an action, in line with the proviso contained in the Directive. In POLAND, the qualified entity from another member state has to show that the purpose of its activities justifies its starting proceedings in the Polish courts, and that these proceedings are aimed at conduct taking place in Poland but harming the collective interests of consumers in the member state where that entity is based.\textsuperscript{1688}

\textsuperscript{1686} Art. 2 of the Consumer Affairs Act.

\textsuperscript{1687} Thus, under the Distance Selling (Retail Financial Services) Regulations 2005 and the Advertising, Sponsorship and Teleshopping (Protection of Consumers’ Interests) (Television Broadcasting Injunction) Order, 2005 there is express reference to those qualified entities from another Member State which are included in the list complied by the EU Commission.

\textsuperscript{1688} Art. 100a of the Act on the protection of consumers and competition.
b. List of Qualified Entities published in the Official Journal

The European Commission is required to publish a list of all the qualified entities notified to it by virtue of Art. 4(2) of the Directive 98/27 in the Official Journal (see Art. 4(3) of the Directive). The most recent list was published in February 2006 ([2006] O.J. C 39/2). With the exception of MALTA, all member states have notified at least one qualified entity, although the number of entities varies considerably between the member states.

The following table illustrates the distribution of ‘qualified entities’ between the member states:

<table>
<thead>
<tr>
<th>Member State</th>
<th>Number of Entities Notified</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>8</td>
</tr>
<tr>
<td>BE</td>
<td>2</td>
</tr>
<tr>
<td>CY</td>
<td>3</td>
</tr>
<tr>
<td>CZ</td>
<td>5</td>
</tr>
<tr>
<td>DK</td>
<td>2</td>
</tr>
<tr>
<td>EE</td>
<td>2</td>
</tr>
<tr>
<td>FI</td>
<td>9</td>
</tr>
<tr>
<td>FR</td>
<td>18</td>
</tr>
<tr>
<td>DE</td>
<td>73</td>
</tr>
<tr>
<td>EL</td>
<td>71</td>
</tr>
<tr>
<td>HU</td>
<td>1</td>
</tr>
<tr>
<td>IE</td>
<td>1</td>
</tr>
<tr>
<td>IT</td>
<td>17</td>
</tr>
<tr>
<td>LV</td>
<td>1</td>
</tr>
<tr>
<td>LT</td>
<td>1</td>
</tr>
<tr>
<td>LU</td>
<td>1</td>
</tr>
<tr>
<td>MT</td>
<td>0</td>
</tr>
<tr>
<td>NL</td>
<td>1</td>
</tr>
<tr>
<td>PL</td>
<td>4</td>
</tr>
<tr>
<td>PT</td>
<td>3</td>
</tr>
<tr>
<td>SK</td>
<td>10</td>
</tr>
<tr>
<td>SL</td>
<td>17</td>
</tr>
<tr>
<td>ES</td>
<td>1</td>
</tr>
<tr>
<td>SE</td>
<td>11</td>
</tr>
<tr>
<td>UK</td>
<td>2</td>
</tr>
</tbody>
</table>

The total number of qualified entities notified to the Commission is 276. GERMANY has notified 26.4% of the total of qualified entities, followed closely by GREECE with 25.7%. This means that more than half of all qualified entities originate in two member states.
Overall, 235 qualified entities emanate from the pre-2004 member states (EU15), with only 41 entities from new member states (EU10). The overall distribution is illustrated in the graph below.

It should be noted that the United Kingdom has notified 11 entities, although one of them is, in fact, simply a reference to 204 separate entities, i.e., local weights and measures authorities. The analysis above is based on the assumption that only 11 qualified entities exist for the United Kingdom, although if each of the local authorities were treated separately, the position would be different:

On this view, the total would be 468 qualified entities, of which the United Kingdom would have 43.4% of the total. It would also mean that the percentage of qualifying entities from the EU 15 States would rise to 91%.
5. Article 5 – Prior Consultation

This article grants member states the option to require a qualified entity to consult with the defendant before applying for an injunction. Alternatively, member states may require such consultation to be with both the defendant and the independent public body who is a qualified entity. Even where such a requirement is introduced, it is limited to a two-week period, after which an action may be brought if there has been no response.

Member states which have not made use of the option to require consultation at all are: AUSTRIA, BELGIUM, CYPRUS, DENMARK, FINLAND, FRANCE, GREECE, LATVIA, POLAND, PORTUGAL, and SLOVENIA. In CYPRUS, whilst consultation is not a formal requirement, in practice, most qualified entities will consult voluntarily. In FINLAND, the Consumer Ombudsman can act as an advocate for, or assistant to, qualified entities from another member state, in order to help them with both language and relevant law, but there is no requirement to consult before taking an action.1689

In MALTA, there is no requirement of prior consultation; however, the Director of Consumer Affairs has the power to attempt to achieve voluntary compliance by the trader against whom an order might be sought if it is “possible and reasonable to do so”.1690 POLISH law refers to the possibility of an amicable settlement, which would, presumably, bring to an end the need for formal court proceedings.1691 In SLOVENIA, only a qualified entity from another member state is required to consult the Slovenian consumer protection office before bringing an action, although if no response has been received within two weeks, the action may proceed. In SPAIN, consultation is possible (albeit optional – no consequences flow from not consulting) in respect of specific areas, (medicines, broadcasting and advertising). Beyond that, no consultation is required, with the exception of the area of standard contract terms, where voluntary consultation with the Registrar of Standard Terms is provided for.1692

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1689 Art. 2(3) of the Act on cross-border injunction procedure.
1690 Art. 100 of the Consumer Affairs Act.
1691 Art. 100d of the Act on the protection of consumers and competition.
Consultation within the meaning of Art.5(1) before bringing an action for injunction before domestic court is required in: CZECH REPUBLIC, ESTONIA, GERMANY, HUNGARY, IRELAND, ITALY, LITHUANIA, the NETHERLANDS, SLOVAKIA, SPAIN, SWEDEN and the UNITED KINGDOM.

It should be noted that in GERMANY, the requirement to consult in the circumstances covered by the Directive was not transposed directly, but there is a wider principle that a claimant must consult a defendant before bringing an action against him before a court which has the equivalent effect.\textsuperscript{1693}

Out of the member states which do require prior consultation, the following do not demand that the qualified entity seeking to take action first consults with the independent public body in that member state: CZECH REPUBLIC, IRELAND, ITALY, LITHUANIA, the NETHERLANDS, SPAIN, and SWEDEN.

<table>
<thead>
<tr>
<th>No consultation required</th>
<th>Consultation with defendant only</th>
<th>Consultation with defendant and public body</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT, BE, CY, DK, EL FI, FR, LU, LV, PL, PT, SL\textsuperscript{1694}</td>
<td>CZ, DE, IE, IT, LT, NL, ES, SE</td>
<td>EE, HU, MT, SK, UK.</td>
</tr>
</tbody>
</table>

A specific a reference to the two week period can be found in the laws of the CZECH REPUBLIC, ESTONIA, HUNGARY, IRELAND, ITALY, LITHUANIA, MALTA, SLOVAKIA, SPAIN, and the UNITED KINGDOM. There appears to be some of variation between these countries with regards to the exact time period that needs to elapse before an action may be brought. Thus, in both Italy and Spain, the entity in question needs to wait for 15 days. In Malta, the 15-day period starts when the qualifying entity is informed by the Director that he has decided not to

\textsuperscript{1693} Art. 5 of the Injunctions Act in conjunction with Art. 93 of the Civil Procedure Code establishes the principle that the plaintiff must consult the defendant before bringing an action against him to court. If he fails to do so, the plaintiff may be liable for the costs of litigation if the defendant immediately accepts the claim. However, it is not compulsory for the plaintiff to consult an arbitration board.

\textsuperscript{1694} As noted above, Slovenia does require a qualified entity from another Member State to consult the Slovenian public body before taking action.
issue the compliance order requested. Once that period has expired, the qualifying entity may apply to the courts for an order requiring the Director to issue a compliance order.\textsuperscript{1695}

ITALY maintains a conciliation procedure, which is available prior to starting legal proceedings, which associations and other qualified entities may bring before the Chamber of Commerce, Industry, Trade and Agriculture competent for the local area as well as some other organisations dealing with out-of-court settlements in relation to consumers. The conciliation report, signed by the parties and the representative of the organisation dealing with out-of-court settlement, shall be filed for approval in the registry of the Court at the place in which the conciliation proceedings were conducted. The Court, having established that it complies with the relevant formal requirements, can order it to be made enforceable, and the approved conciliation report is an enforceable instrument.

6. Annex

The Annex to the Directive 98/27 lists all the directives to which it applies. This Annex has been amended by all the consumer directives adopted since the Injunctions Directive became law. Some member states have chosen to implement the Annex directly into their relevant domestic law, whereas others have not seen the need for this to be done.

Countries which have transposed the Annex as a separate list into their domestic law are: BELGIUM,\textsuperscript{1696} DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, HUNGARY, MALTA, PORTUGAL, SLOVAKIA, and the UNITED KINGDOM. Those which have not transposed it into their domestic law are: AUSTRIA, CZECH REPUBLIC, ITALY, IRELAND, LATVIA, LITHUANIA, the NETHERLANDS, SLOVENIA, SPAIN and SWEDEN.

In this regard, it must be stressed that there is no obligation to transpose the Annex itself. What is crucial is that domestic law ensures that an action for injunction is available for all the

\textsuperscript{1695} Art. 95 of the Consumer Affairs Act. There is a similar procedure under the Distance Selling (Retail Financial Services) Regulations, 2005 – see reg. 15 thereof.

\textsuperscript{1696} The Law of 26 May 2002 Concerning Intra-Community Actions for an Injunction in the Field of the Protection of Consumer Interests contains an annex such as the Injunctions Directive. This law however, does not apply to the liberal professions (Art. 3), for whom the Injunctions Directive was transposed in the Liberal Professions Act, which does not contain such list.
infringements covered by the Directive. Including the Annex in domestic law could be seen as increasing transparency in that it is easier to identify the collective interests of consumers included in directives listed in the Annex.

In **Austria**, Art. 28(a) of the Consumer Protection Act refers to transactions involving those circumstances on which there is a Directive, rather than listing either the directives or implementing legislation themselves. In **Ireland**, reference to the Annex is made in the explanatory notes to the implementing legislation. Similarly, in **Spain**, there is no separate list of relevant Directives, although some of these are mentioned in the Exposition of Motives of the Law 39/2002.

**Cyprus** and **Luxembourg** have not transposed the Annex because these countries have chosen to implement the Directive 98/27 by amending each respective domestic law implementing the consumer directives concerned.

<table>
<thead>
<tr>
<th>Method of Transposition</th>
<th>Member State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Include Annex in domestic law</td>
<td>BE, DK, EE, FI, FR, DE, EL, HU, MT, PT, SK, UK</td>
</tr>
<tr>
<td>Reference in explanatory notes</td>
<td>IE, ES</td>
</tr>
<tr>
<td>No transposition but relevant domestic law amended</td>
<td>CY, LU</td>
</tr>
<tr>
<td>No transposition</td>
<td>AT, CZ, IT, LV, LT, NL, PL, SL, SE</td>
</tr>
</tbody>
</table>

**IV. Use of the minimum harmonisation clause**

Article 7 of the Directive 98/27 permits the member states to grant qualified entities, as well as other persons, more extensive rights to take action in their territory. This provision therefore has a two-fold effect: on the one hand, it effectively enables the member states to broaden the ambit of the injunctions scheme by giving *locus standi* to a wider range of persons. On the other hand, a member state remains free to grant qualified entities a right to bring an action in circumstances not covered by this Directive (such as for additional domestic consumer protection rules).
In **Austria**, it is possible to challenge standard contract terms even when they are not specifically designed for consumer transactions; moreover, an injunction may be available for a wider range of contracts.

In **Belgium**, the injunctions procedure can be used to challenge infringements of domestic consumer rules not based on an EC Directive. Such action is also possible in **Italy**, **Hungary**, the **Netherlands**, **Portugal** and **Sweden**. Similarly, **Germany** applies the implementing legislation to infringements of consumer legislation generally. In the **United Kingdom**, the injunctions procedure can also be used for to deal with infringements of other consumer protection legislation, but the right of action excludes the qualified entities from another member state and is restricted to “domestic” and “designated” enforcers.

The law in **Cyprus** permits qualified entities to seek a wider range of orders, such as requiring the trader to take corrective measures, or any other order that may be reasonable in the circumstances of the case. Furthermore, it is not necessary that the collective interests of consumers are harmed, and even an infringement affecting a single consumer makes it possible to apply for an injunction, although it is not clear whether an injunction can be sought directly by an affected individual consumer, or whether this should be done by a qualified authority on his behalf. No reference is made to such a right vested on individual consumers. Actions for an injunction to protect individual consumer interests are also possible in **Latvia**.

In **Malta**, wider orders can be made: where the action is based on the use of unfair contract terms, the order may require the trader to incorporate terms to improve the information of consumers or to prevent a significant imbalance in the rights and obligations of the parties to the contract (if this would benefit consumers); for other actions, the order may specify the measures that need to be taken to ensure compliance. In **Poland**, the implementing legislation covers all natural and legal persons providing public services which are not an economic activity as such, as well as professions.

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1697 See Art. 95, 97 and 98 of the Trade Practices Act and the Annex of the Law, 26 May 2002 Concerning Intra-Community Actions for an Injunction in the Field of the Protection of Consumer Interests, which includes infringements on the TPA.
In SPAIN, a qualified entity from another member state may bring an action before the Spanish courts without having to show that the collective interests of the consumers in that State were harmed by the infringement originating from Spain. Moreover, in the fields of advertising, including advertising of medicinal products, and broadcasting, individual consumers also have standing to bring an action for an injunction. Moreover, entities from another member states can intervene in proceedings already pending before a Spanish court. Finally, the procedure for applying for an injunction is a fast-track one, requiring only oral proceedings.

Individual consumers can also take action in ESTONIA. No specific use of this provision was made in the CZECH REPUBLIC, DENMARK, FINLAND (although note that the Consumer Ombudsman has an advisory role for entities from another member state), FRANCE, IRELAND, LATVIA, LITHUANIA, the NETHERLANDS, SLOVAKIA, SLOVENIA, and the UNITED KINGDOM.

V. General Comments on Adequacy of Implementation of the Directive

1. Difficulties encountered during the transposition process

It has been noted that the Directive contains a number of features that may make it weaker than necessary. In particular, there are options given to the member states with regard to the appropriate procedure and competent authority, prior consultation and the criteria for recognising “qualified entities”. This creates a risk of different standards and may make it more difficult for a qualified entity from one member state to take action in another member state. Of course, such a flexible approach is needed, to an extent, because of the diversity of the national legal systems.

Moreover, the obligation under the Directive to establishing certain procedures which must be in existence in the member states to ensure the full effectiveness of a Directive may be problematic for some states, given the different – and contrasting – legal traditions. For example, in MALTA, the Directive has been implemented on a piecemeal basis (i.e., as part of the legislation transposing specific directives), which now means that different authorities
each with their own different appellate tribunals and procedures are charged with the enforcement of these rules.

2. Gaps in the Directive

It has been suggested that it would be beneficial to provide some guidelines on the application of the powers given by this directive. Otherwise, too much discretion may be left to the domestic courts, which will make it more difficult to apply these rules effectively.

Directive 98/27 only applies to domestic measures giving effect to corresponding EC directives, but most of these directives contain minimum harmonisation clauses. Some traders may therefore be subject to infringement proceedings in one member state, but not in another. A further question - illustrated by the Duchesne litigation by the UK’s Office of Fair Trading - is which law should be applied by the court in which the action is brought. In the Duchesne litigation, the Belgian commercial tribunal and the Court of Appeal took different views as to whether Belgian or English law applied, although in that case, there was an infringement under both laws.

In several member states, commentators have expressed scepticism about the practical relevance of the Directive in view of the financial difficulties which qualified entities may face when seeking to take action in another member state. Indeed, at the time of writing, there had only been one reported cross-border case.1698 One suggestion has been to give injunctions granted in one member state immediate EU-wide reach.1699 However, the Directive 98/27 is not limited to cross-border injunctions, and at a domestic level, there have been cases where action was taken to combat infringements at a national level.

Concern has also been expressed about the possible delays in notifying the Commission of new qualified entities, and also in publishing a revised list in the Official Journal. Consideration might also be given to extending the right of qualified entities to ask not only for an injunction, but also, in appropriate cases, to bring a claim for compensation on behalf of affected consumers (see, e.g., the French procedure on collective action).

1698 The UK’s Office of Fair Trading successfully took action in the Belgian courts.
Finally, it may be observed that the Directive 98/27 does not address the relationship with other consumer protection directives which already require that there is a right of action for independent public bodies and other organisations with a legitimate interest in the protection of consumers (see e.g., Art.7 of Directive 93/13; Art.11 of Directive 97/7). This is usually done by permitting such bodies and organisations to seek an injunction, but the threshold for taking action under these provisions is lower as it does not refer to the “collective interests” of consumers.

3. Other enforcement mechanisms

Correspondents were asked whether there were additional enforcement mechanisms for the protection of collective consumer interests available in the member states.

In Austria and Germany, competitors may be able to take action under the laws on unfair competition; the same applies in Latvia. Moreover, in Germany, the legislation on investor protection\textsuperscript{1700} provides for the possibility of bringing a test case to establish whether incorrect information about investments was published, or whether information was withheld. Provided that there are at least 10 claimants, the action will take evidence only once and a decision for all investors affected will be handed down. In Estonia, the Consumer Protection Board can intervene in individual cases. In the Czech Republic, an organisation in charge of consumer interests may bring an action for injunction with a civil court.\textsuperscript{1701} In France, a form of collective action is available in circumstances where a number of consumers have been affected by the same conduct of a single trader. Accredited consumer organisations may take up these cases on behalf of the consumers affected, provided that at least two consumers have instructed the organisation to act. Discussions are also underway to introduce the possibility of a class action taken on behalf of consumers directly. Hungary also contains provisions in its law on collective actions. France also involves the criminal law in the enforcement of several of the consumer directives. The same is true of the United Kingdom, which provides a range of criminal sanctions, e.g., for a breach of the information obligations under the Directive 85/577, or the Directive 90/314.

\textsuperscript{1700} Law on Test Cases for the Protection of Investors.
\textsuperscript{1701} Art. 54(2) of the CommC (Act No. 513/1991).
In MALTA, registered consumer associations may ask to intervene in proceedings before the Commission of Fair Trading. Moreover such associations have the right to make complaints to the Director of Consumer Affairs in relation to any law which he administers. A representative of the association is entitled to participate and assist in the proceedings undertaken following such reports. In the case of complaints made by the association under the Trade Descriptions Act, the association may participate in any subsequent proceedings as an aggrieved party.

ITALY is also considering reform in this area. The “Disegno di legge” no. 679 “Disposizioni per l’introduzione della class action” of 26 June 2006 is before Parliament. It would introduce a new article 141-bis into the Consumer Code to provide that consumers’ associations are entitled to recover damages on behalf of one or more consumers.

\footnotesize

\textsuperscript{1702} Art. 37 of the Consumer Affairs Act.
\textsuperscript{1703} Art. 30 of the Trade Descriptions Act.
VI. Conclusions and Recommendations

- A clarification regarding the applicable law in cross-border cases might be desirable. It is noted that this may be resolved through the proposed “Rome II” convention.
- A related question is whether injunctions obtained in a domestic context ought to have Europe-wide reach, at least where the activities of the trader against whom an injunction has been obtained are not limited to one member state. An analysis as to whether this is already possible within Regulation 44/2001 (Brussels-Regulation) may be desirable.
- The relationship with Directive-specific enforcement mechanisms should be clarified. Thus, Art. 11 of Directive 97/7 and Art. 7 of Directive 93/13 both require that member states put into place adequate and effective means to ensure compliance with these respective Directives. This seems to overlap, to an extent, with the Directive 98/27. There is a difference in that the provisions in the specific directives do not include the “collective interest” criterion, although, at a practical level, this may not matter hugely. It may therefore be possible to consider whether these specific provisions could be deleted.
- The evidence to date shows that the cross-border procedure is not being utilised. One reason may be the question of costs for qualified entities from one member state to take action in another. The Directive is silent on the question of costs; a basic rule giving the qualifying entity the right, if successful in the action, to recover costs (not just of the court action, but the costs incurred in taking the action, such as translation, legal advice etc.) could be considered.
- It may be desirable to consider whether a power to ask for compensation should be introduced. Difficulties in this regard may be establishing the loss caused and identifying beneficiaries (e.g., through creating a central fund to which individual consumers may apply). Linked to this is whether cross-border class-actions ought to be facilitated, too.
Executive Summary

1. Transposition deficiencies

All the member states have taken the steps necessary to amend their domestic law to give effect to the requirements of Directive 99/44. The Directive is a minimum harmonisation measure and allows the member states to adopt or retain legislation which provides a higher level of protection to consumers, and it is possible to identify many such instances where domestic law departs from the standard required by the Directive. In some cases, this has been a deliberate decision by the national legislator, in others it appears to be a side-effect of the failure to transpose particular aspects of the Directive. There are some instances where a member state, in departing from the standard set by the Directive, has fallen below the minimum standard, and there may consequently be transposition deficiencies in this regard.

For example:

- Art. 1 para. (4) (partial definition of ‘sale’ to include contracts for goods to be manufactured) - uncertainty about correct transposition in CZECH REPUBLIC, GREECE, MALTA and UNITED KINGDOM, although likely that this situation is also covered.
- Art. 2 para. (1): no general ‘conformity’ requirement in UNITED KINGDOM (although functional equivalent exists), or in SLOVAKIA.
- Deviations from conformity standard in GERMANY (by prioritising party agreement); LITHUANIA (reference to sources of public statements), CZECH REPUBLIC (no reference to sample, description, or specific purpose); UNITED KINGDOM (not all aspects of conformity mentioned in domestic law, such as performance, although unlikely to come to different result).
- Art. 2 para. (2) lit. (d), not transposed in CZECH REPUBLIC.
- Art. 2 para. (5) (installation): variations in LITHUANIA, SLOVENIA, SPAIN and UNITED KINGDOM which appear to fall short of what is required.
- Art. 3 – no price reduction where repair/replacement provided with significant inconvenience in GERMANY.
• Art. 3 para. (3): the UNITED KINGDOM and the NETHERLANDS apply the proportionality test in Art. 3(3) to compare repair not only with replacement (or vice versa), but also with the other remedies of price reduction/rescission. No transposition in LATVIA, LITHUANIA, PORTUGAL and SLOVENIA.
• Art. 3 para. (4) (**free of charge**): GERMANY permits deduction to take account of period during which consumer had use of goods before replacement; reference made to ECJ to see if in accordance with Directive.
• Art. 5 para. (3) (reversed burden) not transposed in LATVIA.
• Art. 7 para. (2): incomplete transposition in UNITED KINGDOM.

2. Enhancement of protection

a. Use of options

The Directive provides four options in the Articles, as well as two “soft options” via the Recitals. Generally, options have met with a mixed response, and there is no instance where the vast majority of the member states have opted for or against a particular option.

• Art. 1 para. (3) (exclusion of second-hand goods sold at public auction) was exercised only by 8 member states, with 17 not doing so.
• Art. 5 para. (2) grants the option to require notification of a lack of conformity within 2 months, used by 15 member states, but not by 10.
• The option in Art. 7(1) (reduced period for second-hand goods) was applied by 14 member states, whereas 11 chose not to use it.
• 13 member states have used the option in Art. 6(4) (language of guarantees).
• Some member states have expressly adopted provisions based on Recital 18 (suspension of two-year period), e.g., CZECH REPUBLIC, HUNGARY, MALTA, SPAIN.
• Some have also adopted measures following Recital 15 (period-of-use deduction in case of rescission).

There is therefore a degree of diversity in the use made of these options, with no option being overwhelmingly adopted or rejected.
b. Use of minimum clause (i.e., more stringent provisions in the field covered by the directive)

The minimum harmonisation clause has featured extensively in the measures transposing the Directive.

- A number of member states have, given a consumer the free choice between the four remedies.
- In some countries, there are longer time periods applicable (FINLAND, IRELAND, UNITED KINGDOM).
- A number of legislators took no steps to implement Art. 2(4), which could also be explicable on the basis of minimum harmonisation (CZECH REPUBLIC, LATVIA, LITHUANIA, PORTUGAL and SLOVENIA); others have only transposed some of the exclusions (LUXEMBOURG, FRANCE, GREECE). In ITALY, the consumer must be aware of the correction.
- No transposition of Art. 3(6) (no rescission for minor lack of conformity) in CZECH REPUBLIC, ESTONIA, PORTUGAL, SLOVENIA and UNITED KINGDOM.
- Some of the new member states have retained their system of mandatory guarantees (HUNGARY, SLOVENIA), or have more extensive rules in place (AUSTRIA, ESTONIA, FINLAND, LATVIA, MALTA). Note inadvertent impact in UNITED KINGDOM.

In many instances, the minimum harmonisation clause was relied upon where domestic law already exceeded the standard set by the Directive, making it unnecessary to adopt specific provisions to implement aspects of the Directive. Consequently, there remains a noticeable degree of variation between the member states.

c. Extension of scope

It is possible to identify extensions of scope in the majority of member states. This has generally been achieved either by broadening the definitions of “consumer”, “seller” or “consumer goods” in the implementing legislation, or by applying the provisions of domestic law to transactions other than consumer sales.
d. Other measures enhancing consumer protection (i.e. more stringent provisions in fields not covered by the directive)

- Additional factors to clarify operation of “conformity with the contract” test, such as instructions (HUNGARY), spare parts (CYPRUS), or packaging (DENMARK, ESTONIA, SWEDEN and FINLAND).
- Direct liability of producer (FRANCE, BELGIUM, PORTUGAL, LATVIA, LITHUANIA).
- The domestic laws of all the member states provide for damages as an alternative or additional remedy in cases of non-conformity.

3. Inconsistencies

- Some member states have implemented a “negative presumption” of conformity, i.e., goods are not presumed to be in conformity unless the criteria stated are met (GREECE, NETHERLANDS, PORTUGAL, SLOVENIA). Others do not refer to a presumption at all (FRANCE, MALTA).
- The time at which conformity is to be assessed also varies, with some member states relying on the passing of risk as the crucial time, sometimes linked with delivery. The notion of delivery itself is not defined and remains unclear.
- The method for calculating a price-reduction is unclear – both a flat-rate and proportionate reduction approach are possible.
- Art. 4 (right of redress) is vagueness, leaving a considerable degree of interpretation to the member states in giving effect to its provisions.

4. Consumer Protection gaps

One gap identified in this analysis is that the relationship between the remedies in Art. 3 and the right to damages is not made clear, leaving scope for uncertainty. The Directive does not address the position of computer software. There are also no provisions on the need to
maintain spare parts (necessary for effective repair), no on after-sales services. There are also no provisions dealing with the particular difficulties of cross-border enforcement.

5. Potential barriers to trade

A number of possible barriers to trade could be identified. The first, a barrier on the consumer-side, may be the lack of any provision on cross-border enforcement. A second possible barrier is the fact that, in some member states, there is direct liability of a producer, whereas in the majority, there is not. Finally, the different interpretation and application of the Directive’s provision through national law in the courts of the member states may bring about further barriers, although there is as yet not sufficient evidence of this.

6. Conclusions and Recommendations

The following matters could be considered as part of reviewing the Directive:

- Options: it is apparent that all options have been used by some of the member states, but in no instance has there been an overwhelming tendency to use, or to disregard, any of the options given in the Directive. Consequently, no clear recommendation regarding the removal of any of the options can be given.
- Definition of ‘consumer’ (refer to the general discussion of this matter)
- Definition of ‘seller’ (refer to the general discussion of this matter)
- Definition of ‘goods’, in particular whether software and other digital products should be included in the definition. A related question is whether any licenses associated with the supply of software, or other digital products, should be covered by the rules of this Directive, too – for example, when the license is not extensive enough. It may not be possible to address this issue in the context of this Directive, but there may be questions of drawing the line in the correct place if digital products are to be included in the definition of ‘goods’.
- Clarification in the text of the Directive that the proportionality criterion should not permit a comparison of repair/replacement with price reduction, to avoid confusion on this matter.
- Clarification of who bears the burden of proof in respect of some of the provisions (e.g., Art. 2 para. (3)).

- Right of redress for the seller: consider whether this could be clarified further, and consider, in particular, whether a clear ‘action directe’ approach could be adopted.

- The introduction of direct producer liability, and, possibly, distribution network liability, could be considered again. In the context of the internal market, it may be particularly important that a consumer can seek a remedy from somebody based in his own country. The Directive does not address this matter at present, and it should be considered if a system of producer liability, possibly combined with distribution network liability, should be adopted.

- The relationship of the remedies in Art. 3 and the national rules on the award of damages: it may be considered whether the Directive should address this. That would raise the questions which forms of damage should be covered. Broadly speaking, four heads of damages can be identified: (i) Equivalence (to the remedies in the Directive); (ii) consequential losses; (iii) loss of profit; and (iv) additional costs incurred as a result of buying replacement. This matter may best be considered once the Common Frame of Reference has been completed.

- Related supply transactions: there are other supply transactions, such as hire-purchase or conditional sale, as well as hire and leasing, which are frequently used by consumers buying more expensive goods. Conditional sale may be included within the scope of the Directive, although the position is not clear. Other supply transactions were explicitly excluded during the legislative process leading up to the adoption of the Directive, but this could bring about the different treatment of similar transactions. The nature of the risk in the context of a hire or leasing arrangement is different from that in sale, or conditional sale; nevertheless, it may be desirable to consider including a wider range of transactions within the scope of the Directive.
I. Member state legislation prior to the adoption of the Consumer Sales Directive

All the current member states (EU25) had legislation applicable to the sale of goods to consumers in place before the adoption of Directive 99/44 in July 1999. However, there was a significant degree of variation in this existing legislation, possibly because of the fundamental nature of sales contracts in the general law of contract in many countries. The following is a brief, and not by any means exhaustive, overview of the situation as it was before the Directive 99/44 was adopted.

At the outset, it needs to be observed that there was a basic difference between countries adhering to the difference between specific and generic goods that stems from Roman Law ("Gattungskauf" vs "Stückkauf") and those, which do not. This distinction was once present, in a moderate form, in the common law but largely lost through developments from the 19th century onwards. The approach to seller liability under these two regimes varied.

In terms of the areas covered by the Directive, a fundamental distinction may be drawn between countries, which had already adopted legislation specifically dealing with consumer sales contracts, and countries that relied upon a general legislative framework covering all types of sales, including consumer sales. General rules applied, for example, in Belgium, Cyprus, France, Germany, Hungary, Ireland, Italy, Malta, and the United Kingdom.

In the Central and Eastern European countries among the new member states (EU10), there were largely only general civil codes, which applied and did not contain specific consumer provisions (e.g., Czech Republic, Estonia). In Latvia, an early version of the Consumer Rights Protection Law of 1992 had introduced basic rules on consumer sales, but these fell short of the requirements of the Directive 99/44. A similar situation arose in Lithuania, where a 1994 law introduced consumer protection provisions that supplemented the Civil Code of 1964. In Poland, the law contained provisions applicable only in consumer
transactions, making the obligations of the seller more precise and indicating to the consumers how exactly they could obtain remedies.\textsuperscript{1704}

Among those which had adopted consumer-specific rules, some only provided a few additional provisions rather than a detailed separate framework on consumer sales. Thus, in Austria, the Consumer Protection Law restricted the variations that could be made to the applicable legal rules by permitting an agreement whereby the seller could (i) avoid termination/price reduction by providing conforming goods within a reasonable time; and (ii) avoid price reduction by repairing the fault. In Greece, a seller of new durable consumer goods was required to provide a written guarantee to a consumer.\textsuperscript{1705} Such guarantees had to be of a duration in proportion to the life expectancy of the product, and for which there were minimum standards. The law in Ireland\textsuperscript{1706} included a specific right for consumers to request a replacement for non-conforming goods. In Portugal, Law 24/9 on Consumer Protection offered some consumer-specific rules in addition to the civil code. The law in Spain required mandatory guarantees for durable goods and stipulated the minimum content of guarantees;\textsuperscript{1707} moreover, the Spanish civil code had also adopted the Roman law distinction between specific and generic goods. In Slovenia, the general sales law rules applied, with only few modifications by the Consumer Protection Act.\textsuperscript{1708} Apart from seller’s responsibility for material defects, a parallel regime of mandatory guarantees for the so called “technical goods” was provided for by the general rules\textsuperscript{1709} and further specified in the Consumer Protection Act. Sweden had also adopted a Consumer Purchase Act, which is a separate and complete piece of legislation.

In the United Kingdom, modifications had been made to certain provisions of the Sale of Goods Act 1979, e.g., by restricting sec. 15A on slight breaches of contract to non-consumer cases with the effect that consumers could exercise their right of termination even where there had only been a minor non-conformity.

\textsuperscript{1704} Regulation on the conditions of concluding and executing contracts of sale of movable goods involving consumers of 30 May 1995 (now repealed) which supplemented the Civil Code provisions on legal guarantees.\textsuperscript{1705} Art. 5 of the Law 2251/1994 on Consumer Protection.\textsuperscript{1706} Sec. 53(2) of the Sale of Goods Act 1980.\textsuperscript{1707} Art. 11 of the Law 26/1984 on the Protection of Consumers.\textsuperscript{1708} Consumer Protection Act 1998.\textsuperscript{1709} Obligations Code Art. 481 – 487.
Others had adopted rules, which were broadly similar to those eventually introduced by Directive 99/44, such as DENMARK, FINLAND, NETHERLANDS, and SLOVAKIA.

There were also variations in the standard of conformity that was applied, and the factors that would be relevant in considering whether goods were in conformity with the contract; nevertheless, there were common requirements such as basic fitness for purpose. In some countries, such as FRANCE (where there were separate provisions on non-conformity with the contract) or MALTA, existing rules focused on latent defects.

Moreover, the remedies that were made available in cases of non-conformity varied. Some member states already made available remedies such as repair and replacement in their domestic laws, including DENMARK, FINLAND, NETHERLANDS, SLOVENIA, and SPAIN.

Before implementation, therefore, there was a significant difference between the laws of the member states. To some extent, variations continue to exist even after the transposition because of the methods of implementation chosen. Thus, in some instances, changes were made to the existing civil code or sales law, whereas in other instances, specific consumer protection provisions were adopted (perhaps most notably in ITALY, where a new consumer code was adopted in 2005). For example, in MALTA, specific rights in relation to consumer and trader transactions where enacted as part of the Consumer Affairs Act. These rights were in addition to the rights that already existed under the Civil Code, and prevail over all other laws to the extent that they are more favourable to the consumer.

1711 Civil Code.
1713 Art. 1641 et.seq. of the Civil Code.
1714 Art. 1604 of the Civil Code.
1715 CC Art. 1424 et seq (Chapter 16 of the Laws of Malta).
1717 Civil Code.
1719 Art. 11 para. (3) of the Law 26/1984.
1720 Part VIII Consumer Affairs Act.
1721 Ibid. Art. 92.
II. Scope of application

1. General scope

The Directive applies to contracts for the sale of consumer goods by a seller to a consumer. These definitions define the scope of the Directive.

It may be observed at the outset that few member states have restricted their implementing legislation to the exact scope specified by the Directive (IRELAND being one of them). Most go beyond its scope in some respects, often because their domestic law makes no clear-cut distinction between consumer and non-consumer sales.

In AUSTRIA, the rules are significantly broader, covering B2B and C2C sales as well as B2C, and there is no restriction to tangible movable items. The CZECH REPUBLIC relies on its civil code that applies to all types of contract, and the implementation of the Directive has been undertaken in a rather haphazard fashion, creating some doubt as to whether it has been transposed adequately. GERMANY took the need to implement the Directive as an impetus for a wider reform to its law of obligations, and contract law in particular. The Civil Code in GREECE was amended and applies rules based on the Directive to all sales transactions, not only to consumer sales. In HUNGARY, the implementation of the Directive resulted in the creation of separate rules for consumer and non-consumer transactions. ITALY has extended the rules to contracts which are similar to contracts of sale, i.e., contracts for exchange and supply, work and materials, and all other contracts for the supply of consumer goods to be manufactured.1722

2. Definition of ‘consumer’

A consumer is “any natural person who … is acting for purposes which are not related to his trade, business or profession” (Art. 1(2)(a)). Member states which follow this definition of

1722 Art. 128(1) of the Consumer Code.
“consumer” are Belgium, Cyprus, Estonia, Ireland, Italy, Luxembourg and Netherlands.

In respect of Ireland, it should be noted that for the purposes of the general Irish sale of goods legislation, a similar definition to the United Kingdom’s “dealing as a consumer” (mentioned below) is used.\textsuperscript{1724}

In many member states, there are variations on the definition of “consumer”, which has generally the effect of broadening the overall scope of protection. In Austria, there is no express definition of “consumer”, but instead this notion is defined negatively as someone not a business.\textsuperscript{1725} In the Czech Republic, a “consumer” is a person not acting within the scope of its commercial and business activity.\textsuperscript{1726} Denmark includes legal persons within the definition.\textsuperscript{1727} In Finland, the concept is defined in Finland as “a natural person who purchases consumer goods primarily for the other purpose than to his/her professional purposes”.\textsuperscript{1728} Germany includes an employee during the course of his employment within the scope of the domestic legislation.\textsuperscript{1729} Greece refers to any individual or legal entity for whom/which goods or services offered on the market are intended, or who/which makes use of these goods or services, provided that this individual or legal entity constitutes the end recipient of the goods or services.\textsuperscript{1730} Hungary also applies its legislation to both natural and legal persons acting as contracting party outside his/her economic or professional activities.\textsuperscript{1731} Latvia has broadened the definition slightly by including any natural person who is expressing his/her desire to buy, buying or could buy goods or use services for the purposes, which are not related to his/her business or professional activities.\textsuperscript{1732} The law in Lithuania\textsuperscript{1733} does not use the term “consumer” but “buyer” in the Civil Code; in the Law on Consumer Protection, a slightly wider definition of “consumer” can be found: any natural

\textsuperscript{1723} Art. 2 of the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law.
\textsuperscript{1724} Sec. (3) of the Sale of Goods Act 1980.
\textsuperscript{1725} Art.1 para. (1)/(2) of the Consumer Protection Law.
\textsuperscript{1726} CC Art. 52(2).
\textsuperscript{1727} Art. 4 para (a) of the Consolidated Act.
\textsuperscript{1728} Chapter 1(4) of the Consumer Protection Act.
\textsuperscript{1729} CC Art. 13.
\textsuperscript{1730} Art. 1(4)(a) of the Law on Consumer Protection.
\textsuperscript{1731} CC Art. 685 lit. (d).
\textsuperscript{1732} Art. 1(1), sent. 3 of the Consumer Rights Protection Law.
\textsuperscript{1733} CC Art. 6. 350(1).
person who expresses an intention to buy, buys and uses goods or services for his personal, family or household needs not related to business or profession.\textsuperscript{1734}

MALTA deals with the issue of goods being transferred to another person after they have been bought by including in the definition of consumer a subsequent owner or beneficiary of the goods who has been expressly or tacitly authorized or permitted by the consumer – being the ‘original’ purchaser of the goods – and who has consumed or benefited from the goods provided to the consumer by the trader. Moreover the Consumer Affairs Act also empowers the Minister responsible for consumer affairs after consultation with the Consumer affairs Council to extend the definition of ‘consumer’ to other classes or categories of persons.\textsuperscript{1735}

POLAND does not use the term “consumer” but instead “buyer”, which is defined as a physical person buying goods for a purpose not related to professional or economic activity.\textsuperscript{1736} In PORTUGAL, a consumer is a person who receives goods or services not for professional use from a person who is professionally or commercially active with a view to economic gain.\textsuperscript{1737}

SLOVAKIA also deals with subsequent owners of the goods, albeit in a limited manner, by defining consumer as a “natural person buying products or services for personal use, including for members of that person’s household”.\textsuperscript{1738}

In SLOVENIA, a person has to be acting “outside his profession or profit-making activity”.\textsuperscript{1739} SPAIN relies on its general definition, which includes legal persons, but beneficiary has to be the final recipient of the goods; moreover, there is no reference that the person must be acting for purposes not related to his trade; instead, the law excludes from the definition of “consumer” those who are not final recipients of the goods, and acquire or use these with the aim of integrating them in production, transformation, commercialisation processes.\textsuperscript{1740} The

\textsuperscript{1734} Art. 2(1) of the Law on Consumer Protection.
\textsuperscript{1735} Art. 2 of the Consumer Affairs Act.
\textsuperscript{1736} Art. 1(1) of the Act on detailed terms and conditions of consumer sales and on the amendment of the Civil Code.
\textsuperscript{1737} Art. 1(1) of the Decree-Law 67/2003.
\textsuperscript{1738} Art. 2(1)(a) of the Act on Consumer Protection.
\textsuperscript{1739} Art. 1(2) of the Consumer Protection Act.
\textsuperscript{1740} Art. 1(3) of the Law on guarantees in the sale of consumer goods.
legislation in Sweden applies where goods are purchased mainly for non-professional purposes. 1741

In the United Kingdom, there are two definitions: the first is found in the Unfair Contract Terms Act 1977 and provides a definition of consumer for the purposes of the legislation on the sale and supply of goods (“dealing as consumer”: person not acting in the course of a business contracting with a person acting in the course of a business; in the case of legal persons, goods must be ordinarily supplied for private use);1742 the second only applies in respect of the provisions implementing Art. 6 on guarantees (“any natural person who is acting for purposes which are outside his trade, business or profession”). 1743 Both definitions are wider than those under the Directive.

France does not have a specific definition of “consumer”, relying instead on case-law developments. The main criterion in order to decide whether a transaction falls within the scope of consumer legislation is that there must be no link between the contract and the professional activity of the buyer.

<table>
<thead>
<tr>
<th>Definition of “consumer” as in Directive</th>
<th>Variation on definition of “consumer”</th>
<th>No specific transposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE, CY, EE, IE, IT, LU, NL</td>
<td>AT, CZ, DK, FI, DE, EL, HU, LV, LT, MT, PL, PT, SK, SL, ES, SE, UK</td>
<td>FR</td>
</tr>
</tbody>
</table>

3. Definition of ‘seller’

A seller is “any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession” (Art. 1(2)(c)). No specific transposition was made in Austria. Those who apply the definition of “seller” are Belgium (omitting “under a

1741 Art. 1(4) of the Consumer Purchase Act.
1742 Sec. 12 of the Unfair Contract Terms Act.
contract”), CYPRUS, DENMARK, FRANCE, GREECE, IRELAND, LATVIA, LUXEMBOURG, NETHERLANDS, SPAIN and SWEDEN.

In respect of BELGIUM, it should be noted that the Explanatory Note of the Consumer Sales Act cross-refers to the concept of ‘seller’ in the Trade Practices Act that includes non-profit associations. It remains unclear whether the definition of seller in the Consumer Sales Act also includes such associations, although there is a general tendency in Belgian law to interpret the definition of ‘seller’ broadly.

Again, variations exist in many countries. In the CZECH REPUBLIC, a “seller” is “a person acting within the framework of its commercial and other business activity”.

ESTONIA also uses the term “trader”.

FINLAND has a more detailed definition which includes a natural person as well as a private or a public legal person, who, in order to gain income or other economic interest, offers, sells or other provides consumer goods for payment.

GERMANY includes associations etc. not pursuing an activity for economic gain.

In GREECE, the definition also includes public enterprises.

HUNGARY has not defined “seller”, but the definition of “consumer contract” refers to the consumer’s contracting party as a person acting within scope of his economic or professional activities.

In ITALY, public legal persons included.

In LITHUANIA, a seller is a person selling goods on premises intended for business purposes or outside them, or a person engaged in trade.

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1744 CC Art. 52(2).
1745 Art. 2(2) of the Consumer Protection Act.
1746 Chapter 1 (5) of the Consumer Protection Act.
1747 CC Art. 14.
1749 CC Art. 6.350(1).
1750 CC Art. 685(3).
1751 Art. 128(2)(b) of the Consumer Code: “any natural or legal, public or private person who, under a contract sells consumer goods in the course of his trade, business or profession”.
1752 Art. 2(2) of the Law on Consumer Protection of Lithuania.
MALTA also utilises definition of “trader” from the Maltese Commercial Code; moreover, the Minister for Consumer Affairs can designate any other person or category of persons as a “trader”.\textsuperscript{1753}

In POLAND, there is no specific definition, but legislation applies to sales conducted “in the course of business”. PORTUGAL also no express definition, but it follows from the definition of consumer that a seller is a person who is professionally or commercially active with a view to economic gain and provides goods and services.

In SLOVENIA, the contract need not fall within seller’s commercial activity.\textsuperscript{1754} This is also the case, in some instances, in the UNITED KINGDOM, where any seller (including private individuals) are caught for some purposes; mainly, however, the law applies where a seller is selling in the course of a business, although the goods sold need not be the goods usually sold by that seller.\textsuperscript{1755}

In SLOVAKIA the definition of seller (an entrepreneur who sells products or provides services to a consumer).\textsuperscript{1756} relies on the general definition of ‘entrepreneur’ in Art. 2(2) of the Slovakian Commercial Code.

<table>
<thead>
<tr>
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<th>No specific transposition</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE,\textsuperscript{1757} CY, DK, FR, EL, IE, LV, LU, NL, ES, SE.</td>
<td>CZ, FI, DE, EE, IT, LT, MT, SK, SL, UK</td>
<td>AT, HU,\textsuperscript{1758} PL, PT</td>
</tr>
</tbody>
</table>

4. Definition of ‘consumer goods’

“Consumer goods” are “any tangible movable item, with the exception of goods sold by way of execution or otherwise by authority of law; water and gas where they are not put up for sale

\textsuperscript{1753} Art. 2 of the Consumer Affairs Act.
\textsuperscript{1754} Art.1(3) of the Consumer Protection Act.
\textsuperscript{1755} Sec. 12 of the Unfair Contract Terms Act, and the CA judgment in Stevenson v Rogers [1999] 1 All ER 613.
\textsuperscript{1756} Art. 2 para. (1) lit. (b) and para. (3) of the Act on Consumer Protection.
\textsuperscript{1757} Omitting only “under a contract”.
\textsuperscript{1758} Definition implicit in notion of “consumer contract”. 
in a limited volume or set quantity; and electricity” (Art. 1 para. (2) lit. (b)). Those who apply the same definition of “goods” are Belgium, Cyprus, France, Hungary, Ireland, Luxembourg, Poland, and Sweden.

Variations exist in many member states. In particular, a number have not made use of the specific exclusions listed in Art. 1(2)(b): Denmark, Estonia, Finland, Germany (which also includes water and gas supplied through the mains), Latvia, Malta (“any tangible moveable item of property”), Portugal (which also extends the law to immovables), and Slovakia (includes electricity and gas supplied to consumers). Initially, the legislation in Italy did not include a reference to ‘tangible’ and therefore the legislation extended to intangible goods, but this was changed and the definition now only applies to tangible goods, whether or not they need to be assembled. In Lithuania, there are no exclusions from the definition of goods itself; however, the provision of water, electricity and gas is excluded from the relevant parts of the Consumer Protection Act, and the practical effect is to follow the definition of the Directive. Netherlands defines goods only as tangibles, although the rules concerning tangible goods can be applied to non-tangible goods to the extent that this is possible. Slovenia has adopted a broader definition of goods and does not define consumer goods separately. Spain has added a reference that the goods must be “aimed at the private consumer”. The United Kingdom relies on the existing general definition of “goods”, which is broader. No specific transposition was undertaken in Austria, because the relevant law applies to all types of goods. In Greece, a broader definition can be found. There also appears to be no definition of “consumer goods” in the law of the Czech Republic.

1759 CC Art. 685(e).
1760 Art. 2(3) of the Consumer Protection Act.
1761 Chapter 1 Art. 3 Consumer Protection Act.
1762 CC Art. 90 and Art. 474(1).
1763 Art. 1(1), sent. 6 of the Consumer Rights Protection Law.
1764 Art. 72(1) of the Consumer Affairs Act.
1766 Art. 2(1) (f) of the Act on Consumer Protection.
1767 Art. 128(2)(a) of the Consumer Code.
1769 Art. 1(2) of the Law of Consumer Protection.
1770 CC Book 7, Art. 5(1) and Book 3, Art. 2.
1771 CC Art. 7:48.
1772 Art. 1(2), sent. 2 of the Law on guarantees in the sale of goods for consumers.
1774 Art. 6(2), sent. 2/3 of the Consumer Protection Law.
### Definition of “consumer goods” as in Directive

| BE, CY, FR, HU, IE, LT | CZ, DK, DE, EE, FI, IT, LV, MT, NL, PT, SK, SL, UK | AT, EL, CZ |

### Variation on definition of “consumer goods”

#### No specific transposition

**a. Exclusion of goods sold at public auction from the meaning of “consumer goods” (Art. 1 para. (3))**

Article 1 para. (3) of the Directive permits member states to exclude from the definition of “consumer goods” second-hand goods sold at public auction which individuals have the opportunity of attending in person. **Spain** has introduced a more limited exclusion, referring only to “administrative auctions”. **In the United Kingdom**, this option has been exercised, not by amending the definition of “goods”, but rather by modifying the definition of “dealing as consumer”, and a natural person (individual) will now not regarded as dealing as a consumer in these circumstances.

Other countries, which have made use of this option, are **Finland, France, Germany, Greece** and **Hungary**. **Sweden** had already established the position that auction sales where the consumer is present would be “as is” sales, giving rise to no conformity obligation, and this position continues to exist. It can therefore be said that Sweden also falls into the category of countries, which provide for this exception.

However, most countries have not exercised this option (Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Ireland, Italy) (but the prior usage of the goods must be taken into account and faults resulting from the normal use of the goods (‘wear and tear’) are

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1775 Note text above.
1776 Art. 2(1), sent. 2 of the Law on guarantees in the sale of goods for consumers.
1777 Sec. 12(2) Unfair Contract Terms Act. A legal person will not be regarded as a consumer where the goods in question are sold by auction or competitive tender, irrespective of whether the goods are second-hand or whether there was an opportunity to attend “in person” (presumably by sending a representative).
excluded),\textsuperscript{1778} LATVIA, LITHUANIA, LUXEMBOURG, MALTA, NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, and SLOVENIA)

<table>
<thead>
<tr>
<th>Option in Art. 1 para. (3) used</th>
<th>Option in Art. 1 para. (3) not used</th>
</tr>
</thead>
<tbody>
<tr>
<td>FI, FR, DE, HU, EL, ES\textsuperscript{1779}, SE, UK\textsuperscript{1780} (8)</td>
<td>AT, BE, CY, CZ, DK, EE, IE, IT, LV, LT, LU, MT, NL, PL, PT, SK, SV (17)</td>
</tr>
</tbody>
</table>

5. Definition of ‘sale’

There is no complete definition of sale, although contracts involving the “supply of consumer goods to be manufactured or produced” are also treated as contracts of sale for the purposes of the Directive (Art. 1(4)). Many countries have employed the extended notion of “sale” relying on Art. 1(4), and give effect to this in their jurisdiction.

The provision in Art. 1 para. (4) produced specific amendments in DENMARK (previously limited to instances where seller supplied predominant part of materials), FINLAND, and PORTUGAL (work & materials, and hire). In ESTONIA, the definition of “contract of sale” includes contracts for goods to be manufactured or produced, unless the person to whom the finished item is to be supplied provides a substantial part of the materials necessary for the manufacture/production.\textsuperscript{1781} In the latter case, the contract will be regarded as one for works. This appears to be narrower than the Directive; however, it should be noted that the Estonian legislation applicable to works contracts (services) contains corresponding provisions on conformity and remedies to those applicable to contracts of sale. The relevant provision of the CZECH legislation also seems narrower, referring only to contracts of sale or work & materials, but not stating clearly that goods to be produced are included;\textsuperscript{1782} however, no evidence of practical problems resulting from this difference is available.\textsuperscript{1783} GREECE appears to have made an oversight in its transposing legislation and has not amended relevant parts of

\textsuperscript{1778} Art. 128(3) of the Consumer Code.
\textsuperscript{1779} Limited use made of this option.
\textsuperscript{1780} Option exercised by restricting the definition of “consumer”, rather than “goods”.
\textsuperscript{1781} Art. 208 of the Law of Obligations Act.
\textsuperscript{1782} CC Art. 52.
\textsuperscript{1783} See also CC Art. 588.
the Civil Code to reflect the requirements of this provision. This provision was not transposed separately in LITHUANIA; however, the general definition of consumer goods already includes goods to be manufactured and there is consequently no gap in Lithuanian law in this regard. The same is true of LATVIA. In MALTA, there is no specific definition of ‘sale’, with the Consumer Affairs Act requiring traders to deliver goods in conformity with the contract of sale. In POLAND, this wider notion of sale posed one of the greatest difficulties in the transposition process; eventually, the Civil Code was amended to ensure that this provision is given adequate effect. In SLOVENIA, the Consumer Protection Act also applies to consumer services insofar as possible, and therefore no separate transposition of Art. 1 para. (4) has been made. The UNITED KINGDOM has not changed its definition of sale, but has amended legislation that might apply in the circumstances subject to Art. 1 para. (4) to ensure uniform application of the new rules.

III. Consumer Protection Instruments

1. Conformity with the Contract

In this section, the main aspects regarding the transposition of Art. 2 of the Directive will be examined.

a. “Conformity with the contract” requirement in general (Art. 2)

aa. Requirement to deliver conforming goods

The basic requirement is that the seller must deliver goods which are in conformity with the contract (Art. 2(1)), given effect to accordingly in many member states (BELGIUM, CYPRUS, 

1784 CC Article 6.306(1) provides that things which form the subject matter of a contract of purchase-sale may be “either existing things, owned or possessed by the seller, or things to be manufactured or acquired by the seller in future ….”.
1785 Art. 73(1) of the Consumer Protection Act. CC Art. 1346 et seq. specifically defines the sale as a contract whereby one of the contracting parties binds himself to transfer to the other a thing for a price, which the latter binds himself to pay to the former.
1786 See Art. 14 para. (3)-(5) of the Act on specific terms and conditions in consumer sales.
1787 Art. 38 of the Consumer Protection Act.
CZECH REPUBLIC, DENMARK (supplementing existing rules), ESTONIA, FINLAND (relies on existing general test), FRANCE, HUNGARY, IRELAND, ITALY, POLAND, SLOVENIA, SPAIN, and SWEDEN). The UNITED KINGDOM refers to “conformity” only in the context of the new remedies, but also uses a negative expression.\textsuperscript{1788} There is, however, no general conformity requirement in UK law (see below).

**bb. Presumption of conformity**

The majority of those member states, which have given effect to Art. 2, have adopted the presumption that goods are in conformity if they meet the criteria specified in Art. 2(2). However, a number of countries have chosen to express this requirement in a negative way, i.e., goods are presumed not to be in conformity unless they meet the criteria stated. This is the case in GREECE, NETHERLANDS, PORTUGAL and SLOVENIA.

AUSTRIA does not express its implementing provision in terms of a “presumption”, but does otherwise include the factors from Art. 2(2).\textsuperscript{1789} The law in FRANCE is also not expressed in terms of a presumption; rather, there is a requirement that in order for goods to be in conformity with the contract, they must be fit for their usual purpose, and correspond to any characteristics individually negotiated.\textsuperscript{1790} Rather than stating that there is a presumption that the goods are in conformity with the contract is they comply with the requisites as state in Art. 2(2) of the Directive, the law in MALTA requires the trader to ensure that the goods conform with such requisites.\textsuperscript{1791} Similarly, the NETHERLANDS does not use presumptions, and requires a buyer to prove (i) the parties’ agreement regarding the goods; (ii) what he could expect from the goods; (iii) what has been shown as a sample or model; and that the goods do not correspond to these matters.\textsuperscript{1792}

\textsuperscript{1788} Sec. 48F Sale of Goods Act 1979.  
\textsuperscript{1789} CC Art. 922.  
\textsuperscript{1790} Art. L. 211-5 of the Consumer Code.  
\textsuperscript{1791} Art. 73(1) of the Consumer Code.  
\textsuperscript{1792} CC Book 7 Art. 9, Art. 17(1).
cc. Criteria for presuming conformity (Art. 2 para. (2) lit. (a)-(d) generally)

Conformity is presumed if the goods correspond with the requirements of Art. 2(2). Again, member states have generally transposed the criteria giving rise to this presumption, although there is greater variation.

GERMANY did not transpose the aspects of “conformity” in Art. 2(2) verbatim, nor did it follow the general approach. Instead, the starting point for establishing conformity is the express agreement as to quality reached between the parties.\(^{1793}\) Only where there is no express agreement do the criteria corresponding to Art. 2(2) of the Directive come into play. Moreover, in that list, “descriptions” are restricted to those given only by the seller, and sales by sample or model are not listed expressly. Finally, the criteria are not regarded as cumulative, but are ranked in priority instead. This arrangement may conflict with the requirements of the Directive.

In LITHUANIA, there is no reference to the ways how the seller, the producer or his representative could make public statements - particularly in advertising or on labelling. In the CZECH REPUBLIC, no reference is made to sample or model in the national legislation, nor is there any mention of description given by the seller, or the purpose for which the consumer requires the goods, as aspects of conformity.

Whilst IRELAND has implemented Art. 2 para. (2) as per the Directive, under the general sale of goods legislation other factors are enumerated in the legislation, or have been identified by case law. For example, section 14(3) of the Sale of Goods Act 1893 refers to goods being fit for the purpose or purposes for which goods of that kind are commonly bought and as durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances. Based on case law, “other relevant circumstances’ has been held to include resale price, relative incidence of repairs, and cosmetic defects. Further, safety in relation to motor vehicles is expressly addressed by the legislation.\(^{1794}\) In SLOVAKIA, there appears to be no reference to the “conformity” requirement

\(^{1793}\) CC Art. 434(1), sent. 1.
as such; instead, goods must be of “usual quality”.\textsuperscript{1795} To this, the Civil Code adds that goods must correspond with the seller’s description, and also possess the quality stipulated by the contract or legal regulations.\textsuperscript{1796} In Spain, all four elements are considered except where one is inapplicable in the circumstances of the particular case. In Latvia, Art. 2(2)(b) has been transposed with the addition of a proviso that this factor will not be relevant where there was not reasonable for the consumer to rely on the specific competence and opinion of the seller.\textsuperscript{1797}

Some member states have added additional factors. Thus, in Cyprus, aspects of the quality of goods include the availability of spare parts, accessories and specialised technicians, where required; safety; reasonable durability in time and use; appearance and finish; and the non-existence of defects. The implementing provision in Luxembourg expressly refers, as an additional criterion, to “characteristics agreed between the parties”.\textsuperscript{1798} Denmark includes “durability” and “proper packaging” in the list of relevant factors.\textsuperscript{1799} In addition, it provides that there is a lack of conformity if the seller neglected on his own initiative to give the consumer information relevant to the consumer’s assessment of the goods and which the seller knew or should have been aware of.\textsuperscript{1800} In Estonia, “proper packaging” is also a relevant factor, and when goods are not packaged in a way that would be usual for such goods, or in a manner inadequate to preserve and protect the goods, there will be a lack of conformity with the contract.\textsuperscript{1801} Packaging which is proper in relation to the goods concerned is also a relevant factor in Sweden. Finland also makes packaging a relevant factor, if proper packaging is necessary to preserve or protect the goods; in addition, specific requirements imposed by law regarding the characteristics of the goods can be a relevant factor, except where the buyer intended to use the goods for a purpose where such requirements are of no significance.\textsuperscript{1802}

\begin{itemize}
\item \textsuperscript{1795}Art. 3(c) of the Act on Consumer Protection.
\item \textsuperscript{1796}CC Art. 496.
\item \textsuperscript{1797}Art. 14(1), sent. 3 of the Consumer Rights Protection Law.
\item \textsuperscript{1798}Art. 4 lit. (a) of the Consumer Sales Law.
\item \textsuperscript{1799}Art. 75a(2) of the Consolidated Act on Sale of Goods.
\item \textsuperscript{1800}Art. 76(1) of the Consolidated Act on Sale of Goods.
\item \textsuperscript{1801}Art. 217(1),(2) sub-para. (5) of the Law of Obligations Act.
\item \textsuperscript{1802}Art. 5:12 of the Consumer Protection Act.
\end{itemize}
HUNGARY provides a more detailed list of factors, and an additional requirement is that the supplier of goods has to mark these suitably for identification, and provide all the necessary information and instructions for proper use, in accordance with the provisions of legal regulations and professional standards.\textsuperscript{1803}

In POLAND, a distinction is made between two situations: (i) where qualities of the goods are individually negotiated; and (ii) other transactions. In the first case, a presumption of conformity arises where the goods correspond with the seller’s description or a sample shown to the buyer, as well as where the goods a fit for the purposes stated by the buyer before conclusion of the contract (unless the seller explained that this purpose was not possible).\textsuperscript{1804}

In the latter case, goods are presumed to conform if they are fit for normal purpose and have the qualities common for goods of the same type; they comply with expectations concerning this type of goods based on public statements by the seller, producer or his representative, as well as labeling or advertising.\textsuperscript{1805}

The UNITED KINGDOM does not have an identical list of factors, but takes corresponding items into account. There is a requirement that where goods are sold with reference to a description, they must correspond with this description (limited by case-law to essential commercial characteristics which a buyer might rely upon\textsuperscript{1806}, \textsuperscript{1807} and by sample, for this to be relevant). The main test is that “goods must be of satisfactory quality”.\textsuperscript{1808} There is then a list of factors that may be considered: (a) fitness for all the purposes for which goods of the kind in question are commonly supplied; (b) appearance and finish; (c) freedom from minor defects; (d) safety; and (e) durability. The satisfactory quality test does not make reference to “performance” of the goods, but can be interpreted in line with the Directive. There is also no reference to installation instructions, although, again, case-law indicates that shortcomings in installation instructions could be considered as a relevant circumstance.

\textsuperscript{1803} CC Art.277.  
\textsuperscript{1804} Art. 4(2) of the Conditions of Consumer Sales.  
\textsuperscript{1805} Art. 4(3) of the Conditions of Consumer Sales.  
\textsuperscript{1807} Sec. 13(1) of the Sale of Goods Act 1979.  
\textsuperscript{1808} Sec. 14(2) of the Sale of Goods Act 1979.
dd. Time at which conformity is assessed

Article 2 para. (1) requires that goods must be in conformity with the contract when they are delivered by the seller. The majority of the member states have adopted this provision, but there are variations in some countries.

It is noteworthy that GREEK law assesses whether goods are in conformity with the contract at the time risk passes from seller to buyer.\(^{1809}\) In POLAND, the relevant time is the time of delivery (i.e., the time of transfer of possession from the seller to the buyer), rather than the time of concluding the contract,\(^{1810}\) as is the case in LUXEMBOURG.\(^{1811}\) The position is similar in the UNITED KINGDOM, although the law was amended to equate passing of risk with the time of delivery.\(^{1812}\) In HUNGARY, the “time of performance” is regarded as the relevant time.\(^{1813}\)

b. Public Statements and exclusions (Art. 2 para. (2) lit. (d) and Art. 2 para. (4))

A particular factor in the Directive is that public statements regarding the good can be taken into account in assessing their conformity, although the seller can escape liability in a number of defined circumstances.

This provision was new to many member states. Both the main requirement and the seller’s defences have been transposed in accordance with the Directive in most of the member states (although not in the CZECH REPUBLIC). In respect of Germany, which has transposed this provision as required, it should be noted that “public statements” are ranking lower in priority than other factors in establishing conformity with the contract. In the UNITED KINGDOM, these provisions were transposed by making public statements a “relevant circumstance” for considering whether goods meet the statutory standard of “satisfactory quality”.

Article 2 para. (4) provides for three circumstances when a seller will not be liable for public statements made by another person in the distribution chain. This has been implemented by

\(^{1809}\) CC Art. 522.

\(^{1810}\) Art. 7 Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

\(^{1811}\) Art. 4, sent 2-3 of the Consumer Sales Act.

\(^{1812}\) Sec. 20(4) and 32(4) of the Sale of Goods Act 1979.

\(^{1813}\) CC Art. 305(1).
most member states.\textsuperscript{1814} The implementation of Art. 2(2)(d) and Art. 2(4) in the CZECH REPUBLIC seems to be only partial, and none of the exclusions from Art. 2(4) appear in the legislation.\textsuperscript{1815}

Those which have not transposed Art. 2(4) are LATVIA, LITHUANIA, PORTUGAL and SLOVENIA. In LITHUANIA, the justification for this appears to be that it increases consumer protection. Similarly, SLOVENIAN law does not provide an express rule by which the seller could evade liability in these circumstances.

In LUXEMBOURG, only the first situation (seller could not reasonably have been aware of the statement) is mentioned. The two other factors (seller not bound by public statements if, by the time of conclusion of the contract the statement had been corrected, or the decision to buy the consumer goods could not have been influenced by the statement), are not mentioned.\textsuperscript{1816} The same is true of FRANCE\textsuperscript{1817} and GREECE.\textsuperscript{1818} In contrast, DENMARK imposes liability of the seller even when he did not know and could not reasonably have been aware of the statement.\textsuperscript{1819} In ITALY, the exclusions may be narrower than under the Directive, because the consumer must have been aware that a public statement had been corrected at the time the contract was made.\textsuperscript{1820}

c. Exclusion of matters of which consumer is aware (Art. 2 para. (3))

Again, this has been transposed as required in many member states (BELGIUM, CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY,\textsuperscript{1821} GREECE, HUNGARY, IRELAND, ITALY, LATVIA, MALTA, NETHERLANDS, PORTUGAL, SLOVAKIA, SLOVENIA, SPAIN, and SWEDEN\textsuperscript{1822}).

\textsuperscript{1814} In SLOVAKIA, this appears to be contained in Art.8 para 4 of the Act on Advertising.
\textsuperscript{1815} CC Art. 616(2).
\textsuperscript{1816} Art. 3, sent. 3 of the Consumer Sales Act.
\textsuperscript{1817} Art. L. 211-6 of the Code de la Consommation.
\textsuperscript{1818} CC Art. 535(4).
\textsuperscript{1819} Art. 76(1) of the Consolidated Act on Sale of Goods.
\textsuperscript{1820} Art. 129(4) of the Consumer Code.
\textsuperscript{1821} German law may have a shortcoming: if Art. 2 para. (3) is intended to be applied objectively, then CC Art. 442 para. (1), referring to “unawareness caused by gross negligence” is inadequate for utilising a subjective test. This may, however, not lead to substantial differences in practice.
\textsuperscript{1822} Art. 17(1), Art. 19(3) Consumer Purchase Act.
This provision has not been transposed expressly in AUSTRIA. In respect of manufacturing contracts, it is provided that where the customer has provided materials that are clearly unsuitable, or has given instructions that are clearly incorrect, the supplier is not liable for the damage provided that he has warned the customer about this problem.\textsuperscript{1823} Moreover, the existing provision in CC Art. 928 excludes “obvious shortcomings”\textsuperscript{1824} from the scope of the seller’s liability, except where there has been fraudulent concealment of the shortcoming, or an express confirmation that this shortcoming is not present in the goods. It has been argued that this should extend to matters known to the buyer before conclusion of the contract.\textsuperscript{1825} This provision does not appear to be less favorable to a consumer than the Directive, and so this approach seems unproblematic. In the CZECH REPUBLIC, there is no mention of matters of which the consumer “could not reasonably be unaware”, and the final sentence of this paragraph is transposed by stating that the lack of conformity was caused by the consumer.\textsuperscript{1826} In HUNGARY, if a recipient of goods (including a consumer) has accepted performance whilst aware of a breach, a subsequent claim based on that breach is precluded except where the right to do so has been expressly retained.\textsuperscript{1827}

In LITHUANIA, the reference to a lack of conformity having its origin in materials supplied by consumer has been omitted.\textsuperscript{1828} A more restricted exclusion operates in the UNITED KINGDOM, where matters, which would mean that goods are not of “satisfactory quality”,\textsuperscript{1829} are not considered if the (consumer) buyer inspected the goods and that inspection ought to have revealed the problem, or which were specifically drawn to the buyer’s attention before the contract was made. This approach is more favourable towards a consumer. It also only applies with regard to “satisfactory quality”, but does not apply to compliance with description or sample, nor fitness for particular purposes.

\begin{footnotes}
\item[1823] CC Art. 1168a, sent. 3.
\item[1824] “Mängel, die in die Augen fallen” – transl. roughly as “faults apparent to the naked eye”.
\item[1826] CC Art.616(3).
\item[1827] CC Art.316.
\item[1828] Art. 6.327(2) of the Civil Code.
\item[1829] The “satisfactory quality” criterion is only one of the aspects of conformity, broadly corresponding to Art 2.2(d).
\end{footnotes}
d. Provision on goods to be installed (Art. 2 para. (5))

Under the Directive, the installation of goods is part of a contract of sale and incorrect installation can mean that goods are not in conformity with the contract.

Most member states have transposed these requirements in accordance with the Directive (Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal and Sweden). In Latvia, there is an additional condition regarding installation instructions: goods will also be presumed not to be in conformity with the contract where the installation instructions have not been provided in the official language (i.e., Latvian) and the installation by the consumer has rendered the goods non-conforming. The same is the case in Cyprus.

Lithuania has not introduced a specific rule in this regard, nor have Slovenia and Slovakia. In Slovenia, it is possible that the Consumer Protection Act will also cover this situation under the provisions dealing with services, but the situation is insufficiently clear to confirm that this would be so. Spain does not include part of Art. 2(5) (product intended to be installed by consumer). In Greece, incorrect installation itself can give rise to liability on the seller, even if this has not caused a non-conformity. The United Kingdom does not refer to inadequate installation instructions (although it is possible that case-law could take this into account when applying the “satisfactory quality” test; there is case-law in respect of safety guidelines and user instructions), and incorrect installation is dealt with under sec. 13 of the Supply of Goods and Services Act 1982, requiring the seller or his representative to have acted without reasonable care before a consumer is entitled to complain of a lack of conformity.

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1830 Art. 28(5) Consumer Rights Protection Act.
1831 CC Art. 536(1).
2. Consumers’ Rights in cases of non-conformity

a. Consumers’ rights in cases of non-conformity in general (Art. 3)

Article 3 states the remedies which are to be available to a consumer where there is a lack of conformity in the goods. Initially, the consumer’s choice is between repair and replacement; however, where these are impossible, or cannot be provided within a reasonable time or without significant inconvenience to a consumer, it is possible to ask for price reduction or (in the case of non-minor lacks of conformity) rescission of the contract.

aa. Implementation of the remedies

All the member states now provide for the remedies in Art. 3 of the Directive. That provision has been transposed as required in many member states, although in some countries, there are variations. These are highlighted below.

bb. Consumer Choice between remedies

Art. 3 envisages that a consumer has an initial choice only as between repair and replacement, followed by price reduction or rescission. This approach has been implemented in Austria, Belgium, Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Malta, Netherlands, Poland, Slovakia, Spain, Sweden and the United Kingdom. In both Ireland and the United Kingdom, a consumer has the choice between invoking the remedies under the national legislation transposing Art. 3, or to rely on the remedies available under general sale of goods legislation.

A different solution was adopted in Latvia. Here, a consumer has a choice between all four remedies initially; however, once 6 months from the date of concluding the contract of sale have elapsed, the hierarchy envisaged under Art. 3 of the Directive is applicable. In Germany, it seems that a consumer is not able to ask for a price reduction where a repair or

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1832 Note that in the United Kingdom, provisions to implement Art. 3 were introduced as Part 5A of the Sale of Goods Act 1979, but these operate alongside the existing rules which int.al. grant a consumer a right to terminate the contract if he does so within a reasonable time of delivery.

1833 Art. 28(1)-(3) of the Consumer Rights Protection Act.
replacement was provided only with significant inconvenience to the consumer. GREECE does not follow the hierarchical structure of Art. 3, instead making all the remedies available alongside one another. Also, in LITHUANIA and PORTUGAL, a consumer has a free choice among all four remedies. Similarly, in SLOVENIA, a consumer can choose between all four remedies, although rescission is not available unless a seller has at least had a reasonable time to effect repair or replacement.

b. The “disproportionality” criterion (Art. 3 para. (3))

Article 3(3) applies a proportionality element to consider whether a particular remedy is available. It is not entirely clear whether this applies only to an assessment as between “repair” and “replacement”, or also permits a consideration of price reduction/rescission.1834

Most countries have transposed the requirement as per the Directive, without further clarifying the scope of this criterion (AUSTRIA, BELGIUM, CYPRUS, DENMARK, ESTONIA, FRANCE, HUNGARY, IRELAND, ITALY, MALTA, SLOVAKIA, SPAIN, and SWEDEN). In CYPRUS, it may be inferred from the national legislation transposing the Directive that it applies this test only between repair and replacement.

The transposition in GERMANY applies the test only as between repair and replacement. In the CZECH REPUBLIC, the test applies only between repair and replacement, but the criteria for establishing whether a remedy is not proportionate have not been included in domestic legislation. The UNITED KINGDOM states expressly that price reduction/rescission can also be comparator remedies. In the NETHERLANDS, a different wording from Art. 3(3) has been used, which does seem to permit a broader comparison. In LUXEMBOURG, a variation to the test has been adopted, according to which a seller is obliged to bring goods into conformity with the contract unless this is impossible or disproportionate.1835 The consumer has the choice between repair or replacement unless one of them would cause excessive burden to the seller if compared to the other. It is not immediately clear if this is less favourable to consumers

1835 Art. 5(2) of the Consumer Sales Act.
than the Directive itself. The transposition in FINLAND does not appear to use the phrase “disproportionate”, referring instead to “unreasonable costs” for the seller as a bar to requesting a particular remedy.\textsuperscript{1836} However, this is not a serious flaw, because “disproportionality” is defined in Art. 3(3) of the Directive in the terms adopted by the Finnish legislation, and there is consequently no substantive difference from the Directive. POLAND also mentions only the criteria for establishing disproportionality, rather than the term itself.

No express transposition was made inLATVIA and LITHUANIA. PORTUGAL and SLOVENIA do not include the proportionality test, either. There is no transposition inGREECE (following from its decision not to arrange the remedies in a hierarchical order), although this criterion can be inferred from CC Art. 540(1) no. 1.\textsuperscript{1837}

c. “Free of charge” (Art. 3 para. (4))

A remedy has to be provided free of charge, and the seller has to bear the cost of postage, labour and materials, as well as other relevant costs. This definition has been transposed using the same criteria as the Directive in AUSTRIA, BELGIUM, CYPRUS, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, HUNGARY, IRELAND, ITALY, MALTA, POLAND, PORTUGAL, SLOVAKIA,\textsuperscript{1838} SPAIN, SWEDEN,\textsuperscript{1839} and UNITED KINGDOM. No express transposition was made in LITHUANIA.

In the CZECH REPUBLIC, the reference is only to “free of charge”, without further elaboration.\textsuperscript{1840} THE NETHERLANDS do not spell out the matters covered by “free of charge”. The same is the case inGREECE, where the law uses the phrase “without any cost to the consumer” instead.\textsuperscript{1841} FRANCE states that a remedy must be provided “without any cost to the buyer”.\textsuperscript{1842} In SLOVENIA, the rule is that the consumer is entitled to reimbursement of his

\textsuperscript{1836} Chapter 5 § 18 of the Consumer Protection Act.
\textsuperscript{1837} See Aitiologiki Ekti\thi\si II, 5, Mpexilvanis, Dikaio Epixeiriseon kai Etairion 2003, p 625, Fn. 43.
\textsuperscript{1838} CC Art. 509(1) and Art. 599(2).
\textsuperscript{1839} Art. 26(3) of the Consumer Sales Act.
\textsuperscript{1840} CC Art. 622(1).
\textsuperscript{1841} CC Art. 540.
\textsuperscript{1842} Art. L. 211-11 of the Consumer Code.
costs. In LUXEMBOURG, it is also only stated that the remedy must be provided without charge, but the specific elements from Art. 3(4) of the Directive are not transposed. Similarly in LATVIA, where it is provided as an alternative that the consumer can be compensated for the costs incurred in eliminating the non-conformity.

A controversial issue exists in GERMANY and has become the subject of a preliminary reference to the European Court of Justice under Art. 234 EC. German law provides that a seller is entitled to an allowance for any period of use of the goods which a consumer has had before a remedy was provided (“Nutzungsentschädigung”). Recital 15 admits the possibility of this practice in the case of rescission (see ‘f’, below). German law, however, applies this also where a consumer is entitled to a replacement. The BGH [Bundesgerichtshof] doubts whether this provision is compatible with Art. 3(4) of the Directive, according to which a remedy should be provided free of charge and has referred this question to the ECJ for a preliminary ruling.

d. Time limits on seller’s liability

aa. Two-year time period

Article 5 para. (1) of the Directive specifies that a seller is liable for a lack of conformity which arises within two years of delivery. This has been transposed as per the Directive in AUSTRIA, BELGIUM, CYPRUS, CZECH REPUBLIC, DENMARK, ESTONIA, FRANCE, GERMANY, GREECE, HUNGARY, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, POLAND, PORTUGAL, SLOVAKIA, SLOVENIA, and SWEDEN.

However, in CZECH law, there is a variation depending on the type of goods being sold: for consumer goods, it is 24 months; for groceries, it is eight days; for feedstuff, it is three weeks, and for animals it is six weeks.
Not all member states have introduced this particular provision. Those who have introduced different rules are Finland, Ireland and the United Kingdom. Both Ireland and the United Kingdom simply rely on the general limitation period for commencing a legal action for a breach of contract.

Belgium has introduced the rule, but there is an extension to this for certain types of defects (all the variations are discussed at IV.1.d, below). Moreover, on 1 September 2006, a proposal to amend the relevant Belgian legislation was presented, according to which the two-year period will start to run from the time of delivery, except where the seller has failed to inform the consumer about his legal rights. If such information is not given until later, then the two-year period will not start until this information has been provided. Belgian law would therefore impose an information obligation on the seller to ensure that consumers are adequately informed of their legal rights.

Spain has also introduced the two-year time period, although there is also a three-year limitation (prescription) period beyond which no action can be brought. The Netherlands have not implemented this period, although a general two-year limitation period applies (see IV.1.d, below).

**bb Option: reduced period for second-hand goods**

Article 7 para. (1), sent. 2 provides that member states may permit the parties to the consumer sales contract to agree on a shortened period of liability for second-hand goods. This has been given effect to in Austria, Belgium, Czech Republic, Cyprus, Italy, Germany, Hungary, Luxembourg, Poland, Portugal, Slovakia.

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1850 Art. 9(3) of the Law.
1851 Art. 9(1), sent. 1 and 2 of the Consumer Protection Act.
1852 Art. 1649quater (1) of the Act on the protection of consumers in respect of the sale of consumer goods.
1853 CC Art. 626(3).
1854 Article 13(2) of the the Certain Aspects of the Sale of Consumer Goods and Associated Guarantees Law.
1855 CC Art. 626(2).
1856 CC Art. 475(2).
1857 CC Article 308(4).
1858 Art. 6(7) of the Consumer Sales Act.
1859 Art. 10.1 of the Act on specific terms and conditions of consumer sale and amendments to the Civil Code.
SLOVENIA, SPAIN, and SWEDEN (this follows indirectly from the provision concerning the sale of goods as is, which is restricted, but where second hand goods are purchased at auction the situation is different).

### MS using option in Art. 7(1) vs. MS not using option in Art. 7(1)

<table>
<thead>
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<th>MS using option in Art. 7(1)</th>
<th>MS not using option in Art. 7(1)</th>
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<td>DK, EE, FI, FR, EL, IE, LV, LT, MT, NL, UK (11)</td>
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**cc. Option: duty to notify lack of conformity within 2 months**

Article 5 para. (2) of the Directive grants member states the option to provide that a consumer must notify a seller of a lack of conformity within a period of two months from the date on which the consumer detected this.

A majority of the member states has chosen to implement this option. They are: CYPRUS, DENMARK, ESTONIA, FINLAND, HUNGARY, ITALY, LITHUANIA, MALTA, THE NETHERLANDS, POLAND, PORTUGAL, SLOVAKIA, SLOVENIA, SPAIN, and SWEDEN.

In BELGIUM, there is no duty to notify a lack of conformity within the specific period, but the parties are able to specify a notification period, which cannot be less than two months, and may stipulate the consequences where the agreed notification period has not been complied with. Moreover, the consumer has to act within one year (even where the two-year period would not have expired by then). In DENMARK, the period starts when the consumer has actually discovered the lack of conformity. In FINLAND, the consumer has to notify the trader within a reasonable time, which will be at least two months. This restriction does not apply where the seller has been grossly negligent or has not acted in good faith. This is also the case in DENMARK. In HUNGARY, a consumer needs to inform the seller within “the shortest time permitted by the prevailing circumstances”, which is deemed to have been so made if it

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1861 CC Art. 620(2).
1862 Art. 37b(2) of the Consumer Protection Act.
1863 Art. 9(1), sent 2 of the Law on Guarantees in the Sale of Goods for Consumers.
1864 Art. 17 of the Consumer Purchase Act.
1865 Art. 23 of the Consumer Purchase Act.
1866 CC Art. 1649 quarter (2).
1867 Chapter 5 Art. 16 of the Consumer Protection Act.
1868 Chapter 5 Art. 16(2) of the Consumer Protection Act.
is done within two months.\textsuperscript{1869} In MALTA, the period starts from the point when the consumer actually discovered the non-conformity, rather than when he should have discovered it. Furthermore, it is sufficient to demonstrate compliance with this requirement if the notification to the seller is sent by judicial letter or by registered mail. In THE NETHERLANDS, notification is required within a “due period of time” after discovering the defect, which is stated to be “timely” if made within a period of two months. However, there appears to be some flexibility beyond that period in the sense that a “due time” could be more than two months.\textsuperscript{1870}

In POLAND, the two-month notification period has been implemented. It further provides that it is sufficient to send a written statement to this effect before this period expires.\textsuperscript{1871} In addition, the Minister of Economy together with the Minister of Agriculture, after obtaining an opinion of the Head of the Office for the Protection of Competition and Consumers, has the power to specify shorter periods for food products, considering their durability.\textsuperscript{1872} Similar to Belgium, Poland also states that a consumer can only enforce his rights if he takes action within one year of discovering the lack of conformity.\textsuperscript{1873}

In SPAIN, no sanction flows from the fact that notification has not been made within the two months required; more significantly, there is a presumption that the consumer did notify within the two-month time period, and the burden is on the seller for demonstrating that notification had, in fact, been made outside this period. In SLOVENIA, the consumer is also required to describe the defect and to enable the seller to examine the goods. In SLOVAKIA, in contrast, the consumer appears to be under an obligation to notify immediately.\textsuperscript{1874}

Member states that have chosen not to make use of this option are AUSTRIA, CZECH REPUBLIC, FRANCE, GERMANY, GREECE, IRELAND, LATVIA, LUXEMBOURG and the UNITED KINGDOM.

\textsuperscript{1869} CC Art. 307(1).
\textsuperscript{1870} CC Art. 7:23.
\textsuperscript{1871} Art. 9(1) of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.
\textsuperscript{1872} Art. 9(2) of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.
\textsuperscript{1873} Art. 10.2 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.
\textsuperscript{1874} CC Art. 599(1).
### dd. Recital option: suspension of two-year period

Recital 18 provides that member states may provide for a suspension of the two-year period in Article 5(1) and any corresponding domestic limitation periods for bringing an action, where the seller attempts to repair or replace non-conforming goods, or is in negotiations with a consumer over a settlement. In Belgium, the period is suspended during negotiations over a remedy and whilst repair/replacement is being carried out. In France, the period is suspended only when the buyer uses the extended guarantee. In the Czech Republic and Slovakia, the period between claiming a remedy and receiving conforming goods is excluded from the two-year period. In Hungary, the period is suspended during the time when the goods are repaired and the consumer is unable to use them.

Under the law in Malta, the two-year period is suspended for the duration of negotiations carried on between the trader and the consumer with a view to an amicable settlement. Spain has also introduced provisions to this effect, and the period is suspended where the consumer has asked for repair (from return of goods to seller until redelivery to buyer) or replacement (from requesting this until arrival of replacement goods).

In Latvia, no provision has been introduced, although the practice is that the period is extended proportionally when a problem arises. In Estonia, there is no provision on the suspension of the two-year period; there is, however, a provision suspending the period

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1875 Few national correspondents have reported that domestic law has adopted a specific rule in response to Recital 18.
1877 CC Art. 627.
1878 CC Art. 308(3).
1879 Art. 78 of the Consumer Affairs Act.
1880 Note additional rules on additional periods during which new lacks of conformity may appear, as set out at IV.1.c, below.
during which a guarantee is applicable whilst a remedy is being sought under the guarantee.\textsuperscript{1881}

\textbf{ee. Presumption of non-conformity during first 6 months}

Article 5(3) introduces a presumption of non-conformity at the time of delivery where a latent non-conformity manifests itself within 6 months of delivery. Most member states have transposed this rule correctly (\textsc{Austria, Belgium,\textsuperscript{1882} Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Slovakia, Slovenia, Spain, Sweden and the United Kingdom}).

No transposition was undertaken in Lithuania. In Finland, the six-month period starts with the passing of risk, rather than the time of delivery.\textsuperscript{1883} As risk generally does not pass until delivery, this is not problematic in most cases; however, a delay in delivery for reasons attributable to a consumer may result in risk passing to him if the seller has done everything necessary to be in a position to effect delivery.\textsuperscript{1884}

In Luxembourg, Poland and Slovenia, there is no mention of the restriction in Art. 5(3) that the presumption does not apply where this would be incompatible with the nature of the goods or the nature of the lack of conformity. In the United Kingdom, the presumption only applies to consumer contracts and only in respect of the new remedies introduced in Part 5A of the Sale of Goods Act 1979\textsuperscript{1885} (implementing Art. 3). For the existing remedies, which remain available, the presumption does not exist and the burden of proof falls on the consumer even during this initial 6-month period. A similar problem exists in Ireland, where the existing Sale of Goods legislation remains in force alongside the implementation of the Directive.

\textsuperscript{1881} Art. 230(1) of the Law of Obligations Act.
\textsuperscript{1882} Note that the proposal of 1 September 2006 would delay the start of this 6 month period if the consumer was not given information about it at the time of delivery until such information has been provided.
\textsuperscript{1883} Chapter 5 Art. 15(2) of the Consumer Protection Act.
\textsuperscript{1884} Chapter 5 Art. 16 of the Consumer Protection Act.
\textsuperscript{1885} And Part 1B of the Supply of Goods and Services Act 1982.
The approach adopted in PORTUGAL is very generous towards consumers: here, the reversed burden of proof applies throughout the two-year period from delivery, rather than merely the 6-month period envisaged under the Directive.\footnote{Art. 3(2) of the Decree Law 67/2003.}

In GERMANY, there have been several decisions by the Federal Supreme Court on the application of the reversed burden of proof. Thus, it has been held that this reversal applies even where a lack of conformity was identifiable at the time of purchase, except where it was so obvious that a consumer not knowledgeable in respect of the particular subject matter would have discovered the defect.\footnote{BGH (DE) VIII ZR 363/04, 14 September 2005.} Moreover, the fact that a third part has installed the goods does not negate the applicability of the reversed burden.\footnote{BGH (DE) VIII ZR 21/04, 22 November 2004.}

e. No rescission for ‘minor’ lack of conformity (Art. 3 para. (6))

This provision has been implemented in most member states, although some member states have chosen not to transpose Art. 3(6) of the Directive (no rescission where lack of conformity is minor). They are CZECH REPUBLIC, ESTONIA, PORTUGAL, SLOVENIA, and the UNITED KINGDOM. The effect of this is that in these countries, a consumer could rescind the contract where the seller has not repaired/replaced the goods even where the lack of conformity is minor. However, in Slovenia, according to Art. 458(3) Obligations Act, a minor defect is not regarded as a defect at all and the relevant legislation would also not be triggered. The effect is therefore akin to that pursued by Art. 3(6). In the United Kingdom, existing provisions of the Sale of Goods Act 1979 had preserved a right of termination in cases of minor defects where the buyer is a consumer,\footnote{Sec. 15A of the Sale of Goods Act 1979 – no right to reject and terminate where breach is minor and buyer is not dealing as a consumer.} and the government adhered to its policy of not reducing existing levels of consumer protection by not transposing Art. 3(6). In contrast, IRELAND excludes the right of rescission under the national legislation implementing the Directive where the non-conformity is minor, but the consumer retains a right of termination under general sales law, which extends to a minor lack of conformity.
In Denmark, the general rule is that the consumer has no right of rescission if the lack of conformity is minor. An exception is made if the seller does not complete a repair or replacement within reasonable time, free of charge and without any significant inconvenience for the consumer; in such a case the consumer is entitled to rescind the contract even if the lack of conformity is minor.

The law in Latvia, provides that a non-conformity will be deemed to be minor if this has been confirmed by an expert-examination organized according to the procedures specified in regulatory enactments.

The question of when a non-conformity is minor has already been considered by the courts in several of the member states. Thus, the Austrian Supreme Court has held that the accumulation of several defects - which would be minor if looked at individually – means that the lack of conformity is no longer ‘minor’. A further decision by that court stated that in order to consider whether a non-conformity is ‘minor’ it was not just the severity of the defect itself but also the proportionality of the consequences of rescinding the contract compared to the lack of conformity that had to be considered.

In Germany, it has been held that, in the case of a used car, a lack of conformity would be regarded as minor if the cost of removing the lack would be less than 3% of the purchase price. Furthermore, it has been held that where a seller has deliberately concealed the defect, it will also generally not be regarded as minor.

f. Rescission and period-of-use allowance

Recital 15 states that member states may provide that where a consumer is entitled to a reimbursement of the purchase price, a deduction may be made to take account of the use the

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1890 Art. 78(1) of the Consolidated Act on Sales of Goods.
1891 Art. 78(4) of the Consolidated Act on Sales of Goods.
1892 OGH [Oberster Gerichtshof; Austria], 7 Ob 194/05p, 28 September 2005.
1893 OGH [Oberster Gerichtshof; Austria], 8 Ob 63/05f, 21 July 2005.
1894 OLG Düsseldorf ZGS 04, 197.
1896 Not all national correspondents have reported whether domestic law has or has not adopted a specific rule in response to Recital 18.
consumer has had of the goods since delivery to him. This has been transposed in a number of
member states, including Germany, Italy,\textsuperscript{1897} and the United Kingdom (only in respect of
rescission under Part 5A).

In Germany, the literature has debated an apparent conflict between the fact that a remedy
has to be provided free-of-charge and that it is possible to make a deduction to take account of
the use the consumer has had of the goods. This deduction may also be made where the
consumer is given a replacement, which effectively means that the consumer has to make a
payment in addition to the contract price when non-conforming goods are replaced (see also
comments regarding Germany at ‘c’ above).\textsuperscript{1898}

In Estonia, where a seller provides a replacement, the consumer (and any other buyer) is
required to return the non-conforming goods to the seller.\textsuperscript{1899} This is made subject to the
general rules in the Law of Obligations Act regarding the return of items provided under the
contract in the case of withdrawal.\textsuperscript{1900} Perhaps of only significance in this context is Art. 189
para. (4), which provides that “if a thing subject to return or delivery has deteriorated and
such deterioration is not the result of the regular use of the thing, the decrease in the value of
the thing shall be compensated for”. This suggests that a consumer is not required to pay a
period-of-use allowance to the seller, but if there has been deterioration above and beyond
that to be expected from normal use, the consumer may have to compensate the seller.

g. Calculation of price reduction\textsuperscript{1901}

A difficult question that has arisen in the wake of the Directive is which method of calculation
should be applied to price reduction. It seems that there are various approaches, which may
lead to different results in practice (although in monetary terms, these differences will
generally be small). If the CISG were to serve as a model, then the so-called ‘proportionate
reduction’ of the purchase price model would apply. According to this approach, the price
would be reduced by the same ratio as the value of the goods as delivered is in relation to the

\textsuperscript{1897} Art. 132(8) of the Consumer Code.
\textsuperscript{1898} CC Art. 439(4).
\textsuperscript{1899} Art. 222(3) of the Law of Obligations Act.
\textsuperscript{1900} Art. 189-191 of the Law of Obligations Act.
\textsuperscript{1901} Only limited information about this issue was available at the time of writing.
value they would have had if they had been in conformity with the contract. A simpler calculation would be to reduce the price according to the difference between the value of the goods as delivered and the value they would have had if there had been no lack of conformity.

In **Germany**, the price reduction is calculated by multiplying the value of the non-conforming goods and the price, and dividing the result by the value which conforming goods would have had. The **Netherlands** also apply a proportionate reduction of the purchase price, as does **Hungary**.\(^{1902}\) **Slovenia** also applies the proportionate reduction approach; the relevant moment for comparison is the time of conclusion of the contract (the ratio is the relation between value of the goods without defect and goods with defect at the time of conclusion). **Spain** is a further country using proportionate price reduction.\(^{1903}\)

Many countries do not provide specific rules (these include **Malta**, **United Kingdom**).

### 3. Guarantees

The provisions on guarantees in Art. 6 require that guarantees must be legally binding, that certain information is provided, and that guarantees remain binding even where the rules in Art. 6 have not been complied with.

These provisions have generally been implemented in identical or very similar format in all the member states. Guarantees generally take effect as a form of contractual obligation. No transposition of Art. 6(2)-(5) was undertaken in **Lithuania**.

**Maltese** law goes beyond the requirements of Art. 6 by providing further substantive rules on guarantees.\(^{1904}\) **Hungary** and **Slovenia** continue to use mandatory guarantees (see below, IV.1.e). Slovenian law does not provide direct transposition measures for Art. 6(1), but the binding nature of a voluntary guarantee (as opposed to the mandatory guarantees) is covered by existing legislation.\(^{1905}\) Voluntary guarantees have to be in writing, and must contain

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\(^{1902}\) CC Art. 306(1)(b).
\(^{1903}\) Art. 8 of the Law 23/2003.
\(^{1904}\) See section IV.1.e, below.
\(^{1905}\) See by Art. 481 of the Obligations Code and Art. 15b-21 of the Consumer Protection Act.
information about the name and place of business of the seller/producer, the guarantee statement, the minimum duration of the guarantee.\textsuperscript{1906} The requirement to include a reference to the consumer’s legal rights is missing, which can cause problems because of the existence of mandatory guarantees. In respect of the consumer’s remedies under a guarantee, the hierarchy of consumer’s remedies under a guarantee resembles that under the Directive: first repair and replacement, then (if the latter are not effected within reasonable time), rescission or price reduction. There is also a right to damages.

The United Kingdom has transposed most aspects of Art. 6 in new legislation, except the first indent of Art. 6(2), on which there is already longstanding legislation which makes it a criminal offence to fail to mention a consumer’s legal right under sale of goods legislation.\textsuperscript{1907} In respect of guarantees given by a seller, the law in Finland provides that a seller will not be liable if the fault was the result of an accident, or the inappropriate handling of the goods or another circumstance attributable to the buyer.\textsuperscript{1908}

Article 6 para. (4) permits member states to require that guarantees are provided in a particular language. This option has not been exercised by Austria, Czech Republic, Finland, France, Germany, Ireland, Latvia, Netherlands (believing this provision to be “too complicated”), Poland and Slovakia.

It has been implemented in Cyprus (official language, provided that also an official language of the EU), Denmark (Danish), Estonia, Greece (Greek) Hungary (Hungarian), Italy (Italian), Luxembourg (choice between French and German), Malta (one of the official languages, i.e., English or Maltese), Portugal (Portuguese), Slovenia (Slovenian), Spain (at least Spanish) and the United Kingdom (English). Lithuania has not transposed this provision, relying instead on its general law requiring all commercial documents to be in Lithuanian. Sweden has not made use of the option in Art. 6 (4).\textsuperscript{1909} In Belgium, a rule applies according to which the language of the region where goods marketed must be used in

\textsuperscript{1906} Art. 18 of the Consumer Protection Act.
\textsuperscript{1907} Art. 4-5 of the Consumer Transactions (Restrictions on Statements) Order 1976.
\textsuperscript{1908} Chapter 5 Art. 15a of the Consumer Protection Act.
\textsuperscript{1909} During the implementation process in Sweden it was, however, held by the Government that a requirement to provide guarantees in a particular language (i.e. Swedish) already followed from Art. 6 (2) (“plain intelligible language”).
guarantee documents, as well as labeling.\footnote{Art. 13 of the Act on trade practices and consumer information and protection.} A similar situation arises in \textit{Poland}.\footnote{It should be noted that although no express requirement for guarantees to be provided in the Polish language is provided in the Act on detailed terms and conditions of consumer sales and on the amendment of the Civil Code, according to Article 3 para. (1) of the Act the seller is obliged to provide the buyer with the information needed to correctly and fully use the product. This information should be clear, understandable and unambiguous, and it should be in Polish language.} In \textit{Italy}, the law provides additionally that the font-size of the Italian text must not be smaller than the font size of the text of any other language.\footnote{Art. 133(4) of the Consumer Code.}

<table>
<thead>
<tr>
<th>Option on Language used</th>
<th>Option on language not used</th>
<th>Other language rule applicable</th>
</tr>
</thead>
<tbody>
<tr>
<td>BE, CY, DK, EE, EL, HU, IT, LU, MT, PT, SL, ES, UK (13)</td>
<td>AT, CZ, FI, FR, DE, IE, LV, NL, SK, SE (10)</td>
<td>LT, PL (2)</td>
</tr>
</tbody>
</table>

Article 6 para. (5) has not been transposed in \textit{Spain}. In the \textit{United Kingdom}, special enforcement powers have been given to the Office of Fair Trading and Weights and Measures Authorities for a failure by a person giving a guarantee to comply with the rules on guarantees in Regulation 15 of the Sale and Supply of Goods to Consumers Regulations 2002 (implementing Article 6).\footnote{Reg. 15(6)/(7) of the Sale and Supply of Goods to Consumers Regulations 2002.} In \textit{Austria}, a failure to comply with the rules on guarantees can give rise to a claim for damages.

### 4. The Right of Redress

Art. 4 envisages that a final seller can in turn bring a claim against the person or persons liable in the contractual chain. This may either require the final seller to bring a claim against his immediate contractual supplier, or it might permit the seller to claim directly against the person liable (i.e., responsible for the defect).
Steps to include a specific provision to reflect the requirements of Art. 4 where taken in CYPRUS, ESTONIA, FINLAND, GREECE, FRANCE, HUNGARY, ITALY, LATVIA, MALTA, and POLAND.

In FRANCE, general contract law should apply to these claims ("selon les principes du code civil"), and it is up to the courts to develop the circumstances in which such a claim should succeed. In FINLAND, the final seller has a claim against a business at an earlier level in the supply chain. This is subject to a number of exclusions: (i) the defect is the result of circumstances which arose after the earlier business had already supplied the goods; (ii) the final seller bases his claim on a statement made by someone other than the business; or (iii) an amount exceeding the price reduction/refund which the final seller could have claimed from the business on the same grounds.

In ITALY, it seems that an action may be brought directly against the person responsible, although this is subject to a time-limit of one year from providing a remedy to the consumer. In MALTA, the final seller normally has to exercise his right of action within six months. In the NETHERLANDS, a seller has a claim against the immediately previous seller. It is possible to claim compensation, except where the claimant was aware of shortcomings in the goods. These rights cannot be excluded. In PORTUGAL, a claim must be brought within five years of supply, and also no later than two months after providing a remedy to the consumer. A previous supplier will not be liable for matters, which only arose after the goods had been supplied to the seller. In SPAIN, the final seller must take action within one year from completing the remedy for the consumer and can claim against the person actually responsible for the lack of conformity. It should be noted that this course of action is similarly open to a producer (there is direct producer liability in Spain), who might claim against a seller if the latter is actually responsible for the non-conformity.

Many member states take the view that a claim should follow generally applicable contractual principles: AUSTRIA, BELGIUM, CZECH REPUBLIC, CYPRUS, DENMARK, IRELAND, LITHUANIA, SLOVENIA and UNITED KINGDOM. Some of these (Czech Republic, Denmark, Ireland,

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1914 Art. 77 of the Consumer Affairs Act.
1916 Chapter 5 Art. 31 of the Consumer Protection Act.
1917 CC Art. 1431.
Lithuania, Slovenia, Sweden, United Kingdom) have therefore taken no steps to transpose this provision.

In Austria, a claim by a final seller or intermediary has to be brought within two months of providing a remedy towards the consumer/subsequent buyer, and is limited to the value of the purchase price. There is an absolute limitation period of five years. In Belgium, any terms restricting the liability towards the seller who is liable to a consumer for a lack of conformity resulting from an act/omission by a previous seller in the contractual chain, are ineffective in relation to the consumer. In Germany, the final seller has a claim against his supplier for compensation, although this provision is restricted to “new goods”, rather than all the consumer goods subject to the Directive.

In Ireland and the United Kingdom, where no specific implementation of this provision was made, the claim may follow the contractual chain, but there are difficulties with this approach: the ground which may have given rise to the final seller’s liability towards the consumer may not be available to the seller in bringing a claim against his contractual supplier, and the seller may therefore be left without a basis of claim. Moreover, reasonable exclusion/limitation clauses could further restrict the seller’s attempt to obtain redress.

Lithuania also did not expressly transpose this rule, but general rules of civil law apply. There also does not appear to be a clear rule for Slovakia. Nothing was done to implement this rule in Slovenia.

5. Mandatory Nature of the provisions

Article 7 para. (1) states that any contract term excluding or restricting a consumer’s rights under this Directive before a lack of conformity is drawn to the seller’s attention will be ineffective. All the member states, except Latvia, have adopted provisions giving effect to this provision, or rely on existing provisions, which have this effect.

1918 CC Art. 1649 sexies.
Moreover, Article 7(2) makes the provisions of this Directive mandatory, i.e., the choice of the law of a non-EU member state must not deprive consumers of the protection under this Directive. This has been given effect in most member states, but there are some variations in respect of this provision. Thus, in CYPRUS, a proviso has been added according to which the choice of a non-member state law will only then be void if that law provides a lower level of protection than under the law implementing the Directive, and/or the consumer had, at the time of the conclusion of the contract, his habitual residence in Cyprus or another member state and the contract was concluded or performed in Cyprus or another member state. In GREECE, if a case involving a sale of goods to consumers is brought before a Greek court, Greek provisions must be applied irrespective of any choice of law clause if Greek law would provide a higher level of protection.

In a number of countries, no specific steps towards implementing this provision have been taken (FINLAND, LATVIA, LITHUANIA, and SLOVENIA), although it seems that there are equivalent rules already in place coming to a similar result.

The only country in respect of which there are serious shortcomings is the UNITED KINGDOM. It relies on existing provisions in the Unfair Contract Terms Act 1977, but these only have the effect that this Act will apply notwithstanding a choice of law clause. The Act only prevents the use of a choice of law clause to evade its application. Consequently, a choice-of-law clause selecting a non-Member State law would render ineffective a term seeking to exclude the controls under the Unfair Contract Terms Act. However, the same clause would have the effect of excluding the legislation implementing the Directive. UK law therefore does not ensure the application of the legislation implementing the Directive where a non-EU law is chosen. Moreover, even this provision does not apply where the contract is an international supply contract (i.e., where goods to be carried across borders; or offer & acceptance occur in different countries; or goods to be delivered to a state other than where offer and acceptance took place).

1921 Sec. 26 and 27 of the Unfair Contract Terms Act 1977.
IV. Use of the Minimum Harmonisation Clause (Art. 8 para. (2))

1. Higher level of protection for consumers

Some member states have relied on Art. 8(2) in order to retain existing rules which are more generous towards consumers than those in the Directive (CYPRUS, DENMARK, FRANCE, HUNGARY, UNITED KINGDOM). In GERMANY, the implementation of the Directive initiate an extensive reform of the entire law of obligations (“Schulbrechtsreform”), and the conformity requirement is applicable to all contracts of sale. Other provisions introduced to comply with the Directive also extend to other contracts, which may result in a general increase of the level of protection outside the field of consumer sales, although this may depend on the extent to which the provisions are interpreted in accordance with the Directive in a non-consumer case. In IRELAND, the consumer can rely on the rules implementing the Directive as well as other legislation applicable to the sale of goods; it is possible that existing rules may provide better protection to consumers although no case-law to support this is available at the time of writing. In the United Kingdom, some changes were made in respect of contracts of hire, hire-purchase, and other contracts involving the supply of goods, but only in respect of the rules corresponding to the conformity requirement.

a. Scope of Application

The AUSTRIAN legislation extends the rules in the Directive significantly beyond its scope, and applies these also to purely private (“consumer-to-consumer” sales) and business-to-business sales. Moreover, the limited definition of “goods” in Art. 1(2)(b) has not been transposed and the Austrian legislation applies not only to goods, but also to immovables. In DENMARK, the definition of “goods” has also not been restricted and it includes all the matters listed as exclusions in Art. 1(2)(b); moreover, the Danish law applies to all types of sales with the exception of real estate. HUNGARIAN law extends beyond the sale of goods and also includes the provision of services.

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1922 Reg. 3(1) and 3(3) of the ECR SI 11/2003.
1923 CC Art. 922.
1924 Art. 76(1),(3) of the Sales of Goods Act.
In PORTUGAL, immovables are included in the scope of the implementing legislation. In SLOVENIA, the objective scope of application of the legislation has not been limited to consumer goods as defined in the Directive, and the exclusions in Art. 1(2)(b) have not been transposed. SPAIN excludes only goods sold through “judicial sales”, rather than all sales “by way of execution or otherwise by authority of the Law”, and the option to exclude goods sold at public auction (Art. 1 para. (3)) is limited to “administrative auctions”.

As discussed above, there are variations in the definition of “consumer”. This is wider e.g., in GERMANY, and can include activities during a person’s employment;\(^{1925}\) also, some companies are treated as consumers in some instances.\(^{1926}\) Legal persons can also be consumers in SPAIN insofar as the goods are not to be used for production and the recipient is the final user of the goods. Similarly, in the UNITED KINGDOM, a professional or a company may be treated as a consumer provided that the goods in question are of a type ordinarily supplied for private use or consumption.\(^{1927}\)

In the NETHERLANDS, the rules extend to contracts of barter,\(^{1928}\) and there is an extension also to intangible goods.\(^{1929}\) Some provisions are available to non-consumers.\(^{1930}\) Similarly, in SLOVENIA, the rules on consumer sales are also applied to contracts for services.\(^{1931}\)

**aa. Liability of the Producer**

Some countries extend liability towards the consumer for a lack of conformity beyond the immediate seller and impose this on the producer.

In FRANCE (‘action directe’) and BELGIUM\(^{1932}\) (kwalitatieve rechten / droits qualitatifs), the courts, in case-law developed under the Civil Code, have created the possibility for a buyer to sue any previous supplier in the chain of distribution in contract, thereby permitting a

\(^{1925}\) CC Art. 13.
\(^{1926}\) It had been thought that those founding a new business may also be covered, but this has now been rejected by the Federal Supreme Court: BGH [Bundesgerichtshof] NJW 2005, 1273.
\(^{1927}\) Sec. 12 of the Unfair Contract Terms Act [UK].
\(^{1928}\) CC Art. 7:50.
\(^{1929}\) CC Art. 7:47.
\(^{1930}\) CC Art. 7:17, 7:21(1)-(3) and 7:23(2).
\(^{1931}\) Art. 38 of the Consumer Protection Act.
consumer to sue not only the final seller, but also a distributor or retailer. All the parties in the
distribution chain are jointly liable towards the buyer, but there is a possibility for the seller
actually sued to seek an indemnity from the party actually responsible for the loss.\textsuperscript{1933}

In PORTUGAL, liability can also be imposed on the producer or the producer’s representative
in the area where the consumer lives.\textsuperscript{1934} This is subject to a range of defences, some of which
appear to resemble those found in Directive 85/374.\textsuperscript{1935} A claim against a producer is also
possible in LATVIA (at the consumer’s choice)\textsuperscript{1936} and LITHUANIA. SPAIN also permits a
consumer to claim directly against a producer for repair or replacement of non-conforming
goods, where it would be impossible or excessively costly for the consumer to pursue the
seller (but the consumer cannot claim price reduction or rescission as against the producer).
Case law appears to accept a degree of joint and several liability of seller and producer.

In SLOVENIA, the producer is not liable for a non-conformity of the goods as such. However,
as noted earlier, there is a parallel regime of mandatory guarantees for the “proper
functioning” of so-called “technical goods”. The list of the goods, which must be sold with a
guarantee, is very extensive. The minimum time-limit of a guarantee is one year. Both the
producer and seller are liable under such guarantees.

\textbf{b. Conformity Requirement}

DENMARK has retained a rule requiring the seller to disclose to the consumer any information
relevant to the consumer’s assessment of the goods of which the seller was aware or ought to
have been aware.\textsuperscript{1937} The duty of disclosure developed in the law in FRANCE is also very
strong, particularly in the consumer context. POLAND has a general rule requiring a seller to

\begin{footnotes}
\item[1933] See e.g., S.Whittaker, Liability for Products, Oxford: Oxford University Press, 2005, pp.96-8.
\item[1934] Art. 6 Decree Law 67/2003.
\item[1935] These are: the non-conformity is based on statements about the goods or their fitness for purpose made by
the final seller; the goods have not been used for their normal purposes; the producer did not put the goods into
circulation; taking account of all the circumstances, it was not possible to identify the non-conformity before
putting the goods on the market; the goods were not made for sale or with a view to financial gain; the goods
were not made in the course of the producer’s professional activity, or were put on the market more than 10
years previously.
\item[1936] Art. 28(1) of the Consumer Rights Protection Law.
\item[1937] Correspondent’s Report, page 4.
\end{footnotes}
provide all the required information to a buyer;\textsuperscript{1938} moreover, a seller must confirm in writing all the important contract terms where the contract is one sale by instalments, to order, based on a sample, involving a trial period or in excess of PLN 2,000.\textsuperscript{1939} For other sales, the consumer can ask for written confirmation of the contract.\textsuperscript{1940} The seller must provide user instructions in Polish, and the goods must feature information about the name of the goods, producer or importer, country of origin, safety and compliance marks, and information about relevant licenses.\textsuperscript{1941}

Additional factors which can render goods non-conforming have been introduced or retained in several countries. In FINLAND and CYPRUS, incorrect user instructions and a failure of the goods to correspond with applicable regulations can result in the goods being deemed defective.

In the NETHERLANDS, there are specific provisions regarding the use of samples or models; where this is done, it is presumed that the goods delivered should conform with the sample, unless the seller can prove that what had been shown to the consumer was a mere indication.\textsuperscript{1942} Moreover, it is not necessary for the seller to have “accepted” the particular purpose, but also where that purpose was foreseen in the contract.\textsuperscript{1943}

In MALTA, if the goods are of a nature which makes it likely that maintenance or the replacement of parts may be required, then the trader is required to make available for “a reasonable time” such replacement parts and appropriate repair services. The trader or producer can escape from this obligation if he expressly and in writing informs the consumer before the conclusion of the contract that he does not supply such replacement parts or repair service.\textsuperscript{1944}

\textsuperscript{1938} Art. 2.1 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

\textsuperscript{1939} Art. 2.2 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

\textsuperscript{1940} Art. 2.3 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

\textsuperscript{1941} Art. 3.1 and Art. 3.5 of the Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the Civil Code.

\textsuperscript{1942} CC Art 7:17(4).

\textsuperscript{1943} CC Art 7:17(2).

\textsuperscript{1944} Art. 93 of the Consumer Protection Act.
In SLOVENIA, there appears to be no possibility for the seller to avoid his liability for public statements (as per Art. 2(4) of the Directive), which has the effect of increasing consumer protection, but it is assumed that this was rather the result of poor implementation. However, as noted, several other countries have also not implemented Art. 2(4) (LATVIA, LITHUANIA, PORTUGAL). Note also that LUXEMBOURG, GREECE and FRANCE only include the first of the three defences for the seller.

The UNITED KINGDOM relies on its pre-existing rules regarding the notion of conformity, although there is also a special definition of conformity for the purposes of the new remedies introduced for consumer transactions only. That definition is broader than the Directive, referring to the “implied terms in sec. 13, 14 or 15” of the Sale of Goods Act 1979 and any express term of the contract. This could significantly broaden the circumstances that could give rise to a lack of conformity. It also seems to be the case that in respect of particular purposes made known by the buyer, UK law is more favourable than the Directive by allowing a purpose to be made known by implication as well as expressly, and not requiring acceptance by the seller, but rather reasonable reliance on the seller’s skill or judgment. There is also a more detailed list of factors to be considered in establishing the goods’ conformity with the contract.

The exclusion in Art. 2(3) of the Directive is only given a limited effect in respect of the UNITED KINGDOM’s requirement that goods must be of satisfactory quality, and only covers matters specifically drawn to the buyer’s attention. In GREECE, the exclusion applies only where the consumer had actual knowledge of the lack of conformity.

c. Remedies

GREECE did not adopt the two-stage hierarchy of remedies, and all four remedies are available, subject to restrictions. This is also the case in LITHUANIA and PORTUGAL.

As noted above, some member states have chosen not to transpose Art. 3(6) of the Directive, which would deprive a consumer of the right to rescind the contract where the lack of conformity is minor (CZECH REPUBLIC, ESTONIA, PORTUGAL, and the UNITED KINGDOM). In these countries, the right to rescind the contract is therefore available in a wider range of
circumstances. SLOVENIA has also not implemented this provision, but under national legislation in that country, a minor defect is not regarded as a defect at all, and the end result is in line with Art. 3(6).

In most member states, it remains possible to bring a claim for damages/compensation instead of, or as well as, a claim under the provision implementing Art. 3. Thus, in AUSTRIA, a claim in damages is possible, in particular for consequential losses arising from a lack of conformity in the goods. In BELGIUM, there is a right to claim compensation for any losses suffered as a result of the defective performance of the contract. It remains unclear whether the distinction as to the scope of the compensation operated by CC Art. 1645 and 1646, based on whether the seller at the time of the sale was aware of should have been aware of the latent defect, also applies in case of consumer sales. In that regard, it must be submitted that the Belgian Court of Cassation, in presence of a professional seller, applies the presumption that he was or should have been aware of the defects. A right to damages is also stated explicitly in FRANCE. In GERMANY, damages remain available, but this depends on a degree of fault on the part of the seller.

Compensation for losses or payment of a contractual penalty is also available in LATVIA. In MALTA, damages are available for consequential losses suffered as a result of the lack of conformity in the goods; moreover, compensation for ‘moral’ damages (capped at one hundred Maltese liri) may be claimed for any ‘pain, distress, anxiety and inconvenience’. In the CZECH REPUBLIC, the consumer is entitled to replacement of goods or termination (rescission) of the contract even if the goods are repaired, should the consumer not be able to use the goods properly due to the occurrence of defects following repair, or due to a greater number of defects.

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1945 CC Art.1649 quinquies.
1948 Art. 21(2) of the Consumer Protection Act.
1949 CC Art. 622(2).
In HUNGARY, a consumer is entitled to withhold a proportion of the purchase price until repair or replacement has been completed.\textsuperscript{1950}

In the NETHERLANDS, a consumer is also entitled to demand delivery of any missing parts.\textsuperscript{1951} Furthermore, if a seller in the Netherlands fails to repair the goods within a reasonable time, the consumer can ask a third party to do so and hold the seller liable for the costs.\textsuperscript{1952} The same is the case in FINLAND, SWEDEN and DENMARK.

SPAIN permits a consumer to opt for rescission/price reduction where \textit{either} of repair/replacement is not available, rather than where \textit{both} are unavailable. A failure to cure the lack of conformity using repair or replacement grants the consumer the choice of all three remaining remedies.\textsuperscript{1953} Moreover, damages are also available as a further remedy.

SLOVENIA gives the seller eight days within which to implement a remedy (or a written reply if there is a dispute regarding the consumer’s claim), rather than relying on the notion of “reasonable time”.

In IRELAND and the UNITED KINGDOM, a consumer can exercise the general right available in all contracts of sale to reject goods that do not comply with the implied terms and terminate the contract, provided that the consumer is not deemed in law to have accepted the goods. In addition, the consumer can rely on the general provisions to claim damages, which includes both the loss of value in the non-conforming goods and reasonably foreseeable consequential losses.

\textbf{d. Time limits}

In BELGIUM, the two-year period in Art. 5 para. (2) has been introduced and applies both to identifiable and latent defects. Once the two-year period has expired, the existing Belgian

\textsuperscript{1950} CC Art. 306(4)-(5).
\textsuperscript{1951} CC Art.7:21(1).
\textsuperscript{1952} CC Art. 7:21(6).
\textsuperscript{1953} Art. 6 and 7 of the Law 23/2003.
rules regarding latent defects remain applicable, and these are not subject to a specific time-limit.\textsuperscript{1954}

In \textsc{Finland}, the liability of a trader is without time-limit, rather than being restricted to two years.\textsuperscript{1955} Similarly, in the \textsc{Netherlands}, the two-year period has not been implemented; however, the starting point for the limitation period (which is two years) is the moment of notification of the non-conformity to the seller, and not that of delivery.

\textsc{Hungary} appears to permit an extension of this time limit if there is an “excusable reason”, especially where the lack of conformity, due to its character or the nature of the goods, does not appear until later. If goods are to be used on a long-term basis (durable goods), the time period is three years.\textsuperscript{1956}

As noted above, \textsc{Spain} suspends the two-year period whilst the goods are being repaired or replaced. In addition, goods, which have been repaired/replaced, are subject to six-month period during which a seller will be liable for any further lack of conformity.\textsuperscript{1957}

\textsc{Ireland} and the \textsc{United Kingdom} have not introduced a specific time limit, and instead relies on the general limitation period for a breach of contract, which is currently six years.

As already noted above, \textsc{Portugal} has extended the reversed burden of proof from the six months required by the Directive to the full period of two years, and is therefore significantly more generous to consumers than required.

d. Guarantees

In \textsc{Austria}, the transparency obligation in Art.6 has been extended to cover guarantees for which a consumer has to pay separately (so-called “extended warranties”).\textsuperscript{1958} \textsc{Spanish} law

\textsuperscript{1954} CC Art.1649 \textit{quater} para. (5) CC.
\textsuperscript{1955} It is argued in the preparatory works that if one for example buys a car, there could be a hidden defect that appears after two years. Nevertheless, there may be procedural rules which can limit the liability of the seller.
\textsuperscript{1956} CC Sec. 308/A.
\textsuperscript{1957} Art. 6, rules c and d, re of the Art. 9 of the Law 23/2003.
\textsuperscript{1958} Art. 9b of the Consumer Protection Act.
also applies to such guarantees; in addition, it imposes slightly more extensive information obligations. Additional rules on guarantees are also found in Germany, where there is a general provision on guarantees not limited to consumer transactions, combined with no-fault liability.

In Estonia, there is a presumption that a guarantee grants the consumer the right to repair or replacement, that a new guarantee of the same duration will be issued for goods replaced under the guarantee, and that the guarantee period is extended where items are repaired, by the time taken to effect this.

In Finland, the guarantee must put the consumer into a more advantageous position than under sales law. Moreover, a trader is liable for guarantees given by a producer unless this is expressly excluded at the time of sale.

Hungary has retained its system of binding guarantees, which were introduced by government decree and provide a statutory regulation of guarantees going beyond the rules in Art. 6 of the Directive. The prior regime of so-called “binding guarantees” continues to apply. These are “guarantees” which must be given by law and are regulated by a Government decree.

In Latvia, a guarantee must provide something in addition to the Consumer Rights Protection Law and other regulatory enactments. A seller must not reduce the scope of a guarantee given by the manufacturer, and to shorten the time period of the guarantee. Moreover, it is prohibited to use the word ‘guarantee’ or other words of a similar meaning if the guarantee does not conform to the conditions of Art. 16 of the Consumer Rights Protection Law.

In Malta, there are more detailed information obligations, including provisions requiring information about transferability to subsequent owners of the goods, and, where this is not provided, an automatic presumption that guarantees are so transferable. Furthermore, no fee for dealing with a consumer claim under a guarantee may be charged unless this is stated.

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1959 CC Art. 443.
1960 CC Art. 276(1), sent. 1.
expressly in the guarantee. If there has been a recall of goods by the manufacturer, the guarantee period is automatically extended. The guarantor is unless stated in the guarantee required to assume the cost of any carriage of goods in the performance of the guarantee. The duration of the guarantee is automatically extended for period equal to the period during which the goods remain in the possession of the guarantor during the course of the execution of the commercial guarantee. Furthermore, even where a third party should provide a remedy under the guarantee, the guarantor remains bound to his obligations towards the consumer. The court may make an order requiring the guarantor to comply with the obligations undertaken in a guarantee, to take remedial action to observe the terms of the guarantee, or to perform his obligations imposing a civil penalty for each day of non-compliance.

In SLOVENIA, rules of mandatory guarantees continue to exist. There is a considerable overlap with the legal rights made available under the Directive. Guarantees have a minimum duration of one year, and there is an obligation on the producer to keep spare parts beyond that period. A consumer is entitled to compensation for the period during which he could not use the goods.

The method of implementation chosen by the UNITED KINGDOM has had an unexpected effect. If the person giving the guarantee repairs defective goods under the guarantee, then a failure to repair the goods with reasonable care can permit the consumer to claim against the guarantor for up to six years (and therefore beyond the expiry of the guarantee). Similarly, any new parts provided during the repair, or goods replaced under the guarantee, have to meet the general rules on conformity (the implied terms), and a consumer may be able to claim for up to six years if a latent fault, which existed at the time of the replacement, manifests itself.

1963 Art. 88 et. seq. of the Consumer Affairs Act.
1964 Art. 87 of the Consumer Affairs Act.
1968 This is the effect of Regulation 15(1) SSGCR 2002, combined with the rules in the Supply of Goods and Services Act 1982.
V. General Comments on Adequacy of Implementation of the Directive

1. Difficulties encountered during the transposition process

Correspondents were asked to point out any particular difficulties that, in their view, were encountered during the process of implementing this Directive. The main challenge, identified by several correspondents, has been to absorb the specific rules introduced by the Directive into an existing system of sales law. The use of concepts in the Directive, which were unfamiliar to particular domestic legal systems, posed a significant hurdle in the transposition process. A related difficulty has been the drafting style of the Directive: there are some ambiguities (e.g., regarding Art. 3(3) or Art. 4), which caused difficulties during the implementation process.

Some correspondents raised very specific questions of interpretation, some of which might be clarified by amending the Directive, although others may better be left to interpretation by the courts, particularly the European Court of Justice.

Questions were raised about the scope of the various definitions, and where exactly the limits of the terms “consumer”, “seller” and “consumer goods” were. The question of the status of computer software is not addressed, for example; nor is the position of animals.

A major difficulty for many member states has been the “right of redress” in Article 4. This has given rise to a significant body of academic literature, with quite divergent opinions regarding the scope of this section. Thus, correspondents have noted that there is an ambiguity in Article 4 regarding the extent of the member states’ obligations to introduce a specific right of redress (i.e., can they rely on existing contract law with consequent use of exclusion clauses; must they introduce an absolute right for the final seller, but leaving the nature of his claim and procedural matters only for domestic law?)

In some countries, the hierarchy in the remedies, and the relegation of “rescission” to a remedy of last resort has been the cause of concern. Where a right to terminate the contract is available immediately, this permits a consumer who has lost confidence and wishes to take
his business elsewhere to do so, whereas the system in the Directive requires the consumer to give the seller a further opportunity to perform his obligations.

2. Gaps in the Directive

Correspondents were asked for their opinion as to whether they perceive there to be any gaps in the Directive in its current format. Several issues were identified. As noted, there are clear difficulties with the drafting style of the Directive, and there are some ambiguities in the text itself.

The Directive uses the notion of “delivery”, but does not address aspects of this concept, such as late delivery and delivery of the wrong quantity. Some member states take the view that “quantity” could be regarded as an aspect of conformity, for example.\(^{(1969)}\)

There are also no provisions on the right to claim damages/compensation, which therefore remains a matter for domestic law – and the relationship between such domestic rules and the remedies in the Directive remains unclear. Moreover, the consequences of exercising the right to rescind the contract remain unclear.

The Directive only imposes liability on the final seller. This has been commented on negatively by a number of correspondents. A major criticism is that the Directive is designed to encourage consumer participation in the internal market, but then does not promote obtaining redress by widening the parties against whom a consumer might enforce his rights. As a minimum, the liability of the producer is proposed (although there exist arguments in favour of a wider “network liability”).

It is also apparent from some country reports that there remains an issue about the treatment of “after-sales” services, with some countries requiring the availability of spare parts for a period of time after sale, and others requiring at least some information about the availability of after-sales services or spare parts.

\(^{(1969)}\)But see the views of Tenreiro, “La proposition de directive sur la vente et les garanties des biens de consommation”, Revue européenne de droit de la consommation, 187 [1996].
In this regard, there appears to be a degree of incoherence between the Directive and the Eco-Label Regulation.\textsuperscript{1970} In order to qualify for an eco-label, it is often necessary to provide a guarantee of minimum duration. Moreover, spare parts and after-sales services are also often required.

**VI. Conclusions and Recommendations**

The following matters could be considered as part of reviewing the Directive:

- Options: it is apparent that all options have been used by some of the member states, but in no instance has there been an overwhelming tendency to use, or to disregard, any of the options given in the Directive (see table at end of this section). Consequently, no clear recommendation regarding the removal of any of the options can be given.
- Definition of ‘consumer’ (refer to the general discussion of this matter)
- Definition of ‘seller’ (refer to the general discussion of this matter)
- Definition of ‘goods’, in particular whether software and other digital products should be included in the definition. A related question is whether any licences associated with the supply of software, or other digital products, should be covered by the rules of this Directive, too – for example, when the licence is not extensive enough. It may not be possible to address this issue in the context of this Directive, but there may be questions of drawing the line in the correct place if digital products are to be included in the definition of ‘goods’.
- Clarification in the text of the Directive that the proportionality criterion should not permit a comparison of repair/replacement with price reduction, to avoid confusion on this matter.
- Clarification of who bears the burden of proof in respect of some of the provisions (e.g., Art. 2 para. (3)).
- Right of redress for the seller: consider whether this could be clarified further, and consider, in particular, whether a clear ‘action directe’ approach could be adopted.

- The introduction of direct producer liability, and, possibly, distribution network liability, could be considered again. In the context of the internal market, it may be particularly important that a consumer can seek a remedy from somebody based in his own country. The Directive does not address this matter at present, and it should be considered if a system of producer liability, possibly combined with distribution network liability, should be adopted.

- The relationship of the remedies in Art. 3 and the national rules on the award of damages: it may be considered whether the Directive should address this. That would raise the questions which forms of damage should be covered. Broadly speaking, four heads of damages can be identified: (i) Equivalence (to the remedies in the Directive); (ii) consequential losses; (iii) loss of profit; and (iv) additional costs incurred as a result of buying replacement. This matter may best be considered once the Common Frame of Reference has been completed.

- Related supply transactions: there are other supply transactions, such as hire-purchase or conditional sale, as well as hire and leasing, which are frequently used by consumers buying more expensive goods. Conditional sale may be included within the scope of the Directive, although the position is not clear. Other supply transactions were explicitly excluded during the legislative process leading up to the adoption of the Directive, but this could bring about the different treatment of similar transactions. The nature of the risk in the context of a hire or leasing arrangement is different from that in sale, or conditional sale; nevertheless, it may be desirable to consider including a wider range of transactions within the scope of the Directive.
**Overview: Use of Options by the member states**

<table>
<thead>
<tr>
<th>Member State</th>
<th>Art. 1 para. (3)</th>
<th>Art. 5 para. (2)</th>
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1971 During the implementation process in Sweden it was, however, held by the Government that a requirement to provide guarantees in a particular language (i.e. Swedish) already followed from Art. 6 (2) (“plain intelligible language”).
Part 4. Common structures in the Directives

A. The notion of “consumer”

*Martin Ebers*

I. Introduction

1. European Community Law

**Notion of consumer in Community Law**

<table>
<thead>
<tr>
<th>Directive</th>
<th>Notion of Consumer</th>
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<tbody>
<tr>
<td>Directive 85/577, Art. 2</td>
<td>“consumer” means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession</td>
</tr>
<tr>
<td>Directive 90/314, Art. 2(4)</td>
<td>“consumer” means 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')</td>
</tr>
<tr>
<td>Directive 93/13, Art. 2 lit. (b)</td>
<td>“consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession</td>
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<tr>
<td>Directive 94/47, Art. 2</td>
<td>“purchaser” shall mean any natural person who, acting in transactions covered by this</td>
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A. The notion of “consumer”

<table>
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<th>Directive</th>
<th>Notion of consumer</th>
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<tr>
<td>Directive 97/7, Art. 2(2)</td>
<td>“consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession</td>
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<td>Directive 98/6, Art. 2 lit. (e)</td>
<td>consumer shall mean any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity</td>
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<td>Directive 99/44, Art. 1(2) lit. (a)</td>
<td>consumer: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession</td>
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**Notion of consumer in Directives not covered by this study**

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<th>Directive</th>
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<tr>
<td>Directive 87/102, Art. 1(2) lit. (a)</td>
<td>“consumer” means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession</td>
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<tr>
<td>Directive 2000/31, Art. 2 lit. (e)</td>
<td>“consumer”: any natural person who is acting for purposes which are outside his or her trade, business or profession</td>
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<tr>
<td>Directive 2002/65, Art. 2 lit. (d)</td>
<td>“consumer” means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are...</td>
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### Consumer Law Compendium

#### Comparative Analysis

**A. The notion of “consumer”**

<table>
<thead>
<tr>
<th>Directive 2005/29, Art. 2 lit. (a)</th>
<th>outside his trade, business or profession</th>
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<tbody>
<tr>
<td>“consumer” means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession</td>
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</table>

According to the English version of Directive 85/577, a consumer is “a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession”. Directive 87/102 uses literally the same definition.

Slightly deviating from this are Directives 93/13, 97/7, 99/44, 2000/31 and 2002/65, which define a consumer as a natural person who is acting for purposes which are outside his “trade, business and/or profession”. Also Directive 94/47 follows this definition, even though it does not use the term “consumer”, but instead mentions “purchaser”, who is a natural person acting “for purposes which may be regarded as being outside his professional capacity”. Finally, Directive 98/6 also defines consumer as a “natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional capacity”.

In other language versions, the notion of consumer is likewise defined using deviating terms. However, they all share a common core, as they all provide that a consumer is:

- a natural person
- who is acting for purposes which are outside some kind of business, commercial or trade activity

These common features can be found not only in most consumer protection EC directives but also in European procedural law (Art. 13-15 of the Brussels I Convention, now Arts. 15-17 Brussels I Regulation No. 44/2001) and European rules on conflict of laws (Art. 5 of the Rome I Convention).

Directive 90/314 by contrast contains a very different definition. It describes consumer as one “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’). Directive 90/314 accordingly also protects those who conclude package travel contracts for business related purposes. Business trips are thus also within the scope of the directive.

2. Overview

The following observations address the question of how the notion of “consumer” has been defined in the member states in transposing Directives 85/577, 93/13, 97/7, 94/47, 98/6 and 99/44.

The transposition of Directive 90/314 on the other hand will not be addressed further here. Since this Directive uses a different notion of consumer from the other directives, many member states have declined to use the term “consumer” and opted instead for the term “traveller” or “purchaser”.

The following expositions initially give an overview of the legislative techniques used by the member states to transpose the notion of consumer and pay particular attention to the question of which member states have implemented a general definition of consumer, being applicable for several consumer contracts (II.). Attention will then turn to the issue of the extent to which the consumer definitions chosen in the member states differ from European law. A series of member states have not transposed the notion of consumer in the aforementioned directives literally, but rather based their notion of consumer on deviating concepts, which extend the protection of the directives to further groups of persons. This concerns above all the notion of the final addressee which is employed in some member states (III.1.), the extension to businesspersons concluding atypical contracts (III.2.), the extension to legal persons (III.3.) as well as the incorporation of employees into the sphere of protection of the Community law provisions (III.4.). Finally, the question of how “dual-use” contracts are treated in Community law and the member states will be addressed (IV.) and whether activities associated with founding a business are covered by the notion of consumer (V.). The study shows that the member state definitions of consumer are in accordance with the minimum requirements of Community law. Many member states go beyond the minimum level of protection required by

Community law by adopting a wide definition of consumer and extending the protection to other groups of persons. Nevertheless, at Community level a series of individual questions remain unanswered. In the context of the acquis consumer law review the different definitions of consumer should be harmonised and important issues addressed (VI.).

II. Legislative techniques in Member States

Many member states have harmonised the notion of consumer found in the various directives and established a definition in national law, which is equally applicable in various consumer protection acts. A systematic overview produces the following picture:

**Overarching consumer definitions in Member States’ Law**

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<tr>
<th>Member State</th>
<th>Consumer Definitions in Member States’ Law</th>
<th>Transposed Consumer Definition of Directive</th>
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<td>Austria</td>
<td>Art. 1(1) no. 2 in conjunction with (2) of the Consumer Protection Act</td>
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<tr>
<td>Belgium</td>
<td>Art. 1 No. 7 of the Act of 14 July 1991 on trade practices and consumer information and protection</td>
<td>85/577; 93/13; 97/7; 98/6</td>
</tr>
<tr>
<td></td>
<td>Art. 2 No. 2 of the Act of 2 August 2002 on misleading and comparative advertising, unfair contract terms and distance marketing in respect of liberal professions</td>
<td>93/13; 97/7</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Art. 52(3) Civil Code as amended by Act 367/2000</td>
<td>85/577; 93/13; 94/47; 97/7; 99/44</td>
</tr>
<tr>
<td>Denmark</td>
<td>Art. 3 (1) of the Act no. 451 of 9 June 2004 on certain consumer contracts</td>
<td>85/577; 97/7</td>
</tr>
<tr>
<td>Country</td>
<td>Legal Provision</td>
<td>Relevant Dates</td>
</tr>
<tr>
<td>-------------</td>
<td>----------------------------------------------------------------------------------</td>
<td>-------------------------</td>
</tr>
<tr>
<td>Estonia</td>
<td>Art. 2 no. 1 of the Consumer Protection Act</td>
<td>93/13; 97/7, 98/6; 99/44</td>
</tr>
<tr>
<td></td>
<td>Art. 34 of the Law of Obligations Act</td>
<td>85/577; 93/13; 94/47; 97/7; 99/44</td>
</tr>
<tr>
<td>Finland</td>
<td>Chapter 1 Art. 4 of the Consumer Protection Act 20.1.1978/38</td>
<td>85/577; 93/13; 94/47; 97/7; 98/6; 99/44</td>
</tr>
<tr>
<td>Germany</td>
<td>CC Art. 13</td>
<td>85/577; 93/13; 94/47; 97/7; 99/44</td>
</tr>
<tr>
<td>Greece</td>
<td>Art. 1(4) lit. (α) of the Consumer Protection Act 2251/94</td>
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</tr>
<tr>
<td>Italy</td>
<td>Art. 3(1) lit. (a) and (b) of the Consumer code</td>
<td>85/577; 93/13; 97/7; 98/6; 99/44</td>
</tr>
<tr>
<td>Latvia</td>
<td>Art. 1(1) sec. 3 of the Consumer Rights Protection Law</td>
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</tr>
<tr>
<td>Lithuania</td>
<td>Art. 2(1) of the Law on Consumer</td>
<td>85/577; 93/13; 94/47; 97/7; 98/6; 99/44</td>
</tr>
<tr>
<td></td>
<td>CC Art. 6.350(1)</td>
<td>85/577; 93/13; 94/47; 97/7; 98/6; 99/44</td>
</tr>
<tr>
<td>Malta</td>
<td>Art. 2 of the Consumer Affairs Act</td>
<td>93/13; 97/7; 99/44</td>
</tr>
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<td>Netherlands</td>
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</tr>
<tr>
<td>Poland</td>
<td>CC Art. 22¹</td>
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<tr>
<td>Portugal</td>
<td>Art. 2(1) of the Consumer Protection Act No. 24/96</td>
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<tr>
<td></td>
<td>Art. 1(3)(a) of the Decree-Law 143/2001 of 26 April</td>
<td>85/577; 97/7</td>
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<tr>
<td>Slovakia</td>
<td>Art. 1, 2nd part of the Act No. 108/2000 on consumer protection in doorstep selling</td>
<td>85/577; 97/7</td>
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</tbody>
</table>
The above overview makes clear not only that many countries know a general consumer definition, equally applicable to various consumer protecting legislative acts, but also that in certain countries (Belgium, Estonia, Lithuania, Portugal, Slovakia) several overarching consumer definitions exist. In some countries (Denmark, Portugal, Slovakia and Sweden) a general notion of consumer has emerged from a combined regulation of doorstep and distance selling in a single statute.

The countries not listed in the table (Cyprus, France, Hungary, Ireland, Luxembourg, United Kingdom) do not on the other hand know any legal definition of consumer overarching the directives, rather they either define the consumer separately in every transposing act and/or abstain from such a definition in whole or in part. In France the term consumer is not defined in legislation at all, but case-law has developed a notion of consumer. The French legislator meanwhile explicitly abstains from defining the term consumer, as in this way better account can be taken of different situations.\(^{1973}\)

In Malta, any other class or category of persons whether natural or legal may, from time to time, be designated as "consumers“ for all or for any of the purposes of the Consumer Affairs

Act by the Minister responsible for consumer affairs after consulting the Consumer Affairs Council.

So long as the term consumer is defined in different legal acts in the member states, this does not necessarily mean that these definitions differ from each other in substance. On the contrary, it can be stated that in most member states, in spite of the scattered rules in separate legislative acts, the definitions by and large accord, as they are orientated on Community law and the Community law for its own part exhibits a common core. Difficulties in applying consumer protection legislative acts do of course arise when a member state uses differing definitions of consumer and it is not clear whether one or the other is applicable in each individual case. Generally, however, this does not affect the proper transposition of the relevant directives, since those member states go beyond the minimum level of protection. In HUNGARY, the notion of consumer is regulated differently in the CC, the Consumer Protection Act, the Government Decree on Doorstep Selling, the Hungarian Competition Act and the Business Advertising Activity Act, and it is often not clear which definition is applicable. However, the planned modifications of the Hungarian CC could clear up these ambiguities.

### III. Extension of the notion of consumer in Member States

#### Overview: Extension of the notion of consumer in Member States

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<th>Notion of the final addressee</th>
<th>ES, EL, HU, LU</th>
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<td>FR, LU, LV, PL, (UK)</td>
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<tr>
<td>Protection of employees</td>
<td>DE</td>
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</tbody>
</table>

#### 1. Notion of the final addressee

In SPAIN it is an essential prerequisite that the consumer or user “acquires, uses or enjoys as final addressee some goods”, and without “the aim of integrating them in production,
transformation, commercialisation processes”. A comparable notion exists in GREECE, although with the difference that Greek law does not have any limitation for private purpose. According to Art. 1(4)(a) of the Consumer Protection Act 2251/1994 a consumer is every “natural or legal person, to whom products or services on a market are aimed, and who makes use of such products and services, so long as the person is the end recipient.” Also in HUNGARY the notion of end recipient is applied; according to Art. 2 lit. (i) of the Consumer Protection Act a “consumer transaction” is the supply of goods or the provision of services and, furthermore, the supply of free samples of goods directly to the consumer as final recipient. The LUXEMBOURG Consumer Protection Act uses the term final addressee (consommateur final privé) in some cases as well, without defining what this term means.

The notion of “final addressee” in SPAIN and GREECE is wider than the term “consumer” established in the directives, since it also includes atypical transactions which are not related to a further transfer. However, in both countries it is acknowledged that in practice such a broad definition of “consumer” can lead to difficulties in applying the law. In SPAIN, the “Motives Explanation” of the Law 7/1998 on Standard Terms in Contracts – which in Spain is a non binding part of the Law –, mentions that the consumer is “any natural person who (...) is acting for purposes which are outside his trade, business or profession”. Against this background, it is supposed that the General Law for the Protection of Consumers and Users should be interpreted according to those sentences in the Preamble.

Also in GREECE the need for a teleological reduction is stressed in academic literature and the view is propounded that the regulations should not apply to every final addressee. Rather, in each case it should be verified that the relevant person or entity is in need of protection. In order to qualify as being in need of protection, the end consumer must not be acting within a business or commercial capacity in concluding the transactions in question.

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1974 See Art. 1(2) and (3) of the Law 26/1984, General Law for the Protection of the Consumers and Users.
1976 As for example in Art. 1-2 and Art. 2 No. 20 in relation to the control of unfair terms.
2. Extension to businesspersons concluding atypical contracts

In France, according to well-established case-law, a consumer is a (natural or legal) person concluding contracts which are not directly related (qui n’ont pas de rapport direct) with his or her profession. The leading decision in this regard was that of the Cass. civ. of 28 April 1987. In the case under dispute an estate agency purchased an alarm system for its business premises, which was not in good working order. A clause in the general conditions of business however declared that the buyer may not rescind the contract or claim damages. In the view of the Cass. civ. the French Consumer Code was nonetheless applicable, because the subject matter of the contract did not bear any direct relation to the substance of the business activity and because the technical expertise of an estate agency did not encompass the technology of alarm systems, by reason of which the buyer must be treated just as any other consumer. In later decisions the Cass. civ. has distanced itself from its wide interpretation and pointed out, that the decisive criterion for the applicability of the Consumer Code is not the technical competence of the “professional”, but rather whether the contract has a direct relation to the business activity. This case-law has been affirmed in numerous decisions.

Protection for businesses who conclude contracts outside of their usual field of business also exists in Poland and Latvia. This thinking underlies the Luxembourg Consumer Sales Act; according to its Art. 2 No. 2 a “consommateur” is “une personne physique qui agit à des fins qui n’ont pas de rapport direct avec son activité professionnelle ou commerciale”. The practical relevance of this group of persons depends on the respective interpretation of the notion of “usual field of business”. If this is limited to elementary core activities, then businesses will frequently profit from consumer protection rules. Conversely, if “usual field of business” comprises all transactions which are not completely atypical, businesses will rarely be considered consumers.

In the United Kingdom under section 12(1) of the Unfair Contract Terms Act (UCTA) 1977 businesses engaged in a transaction outside their normal business purposes can claim to be

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“dealing as consumer” since the decision in *R & B Customs Brokers Ltd v United Dominions Trust Ltd.*¹⁹⁸⁰. In this case, the plaintiff, a shipping brokerage, purchased a second-hand car for the personal and business use of the company’s directors. Several similar purchases had been made before. The contract excluded liability for breach of certain statutory implied terms. According to UCTA sec. 6 (2)(b), where a business sells to a consumer, terms as to quality and fitness for purpose implied by statute (namely sec.13-15 of the Sale of Goods Act 1979) cannot be excluded or restricted by reference to any contract term. Therefore, it was to be decided whether the buyer was “dealing as consumer”. The CA held that no sufficient degree of regularity had been shown by the defendant so as to establish that the activity was an integral part of the plaintiff’s business. Rather, the purchase was only incidental to the company’s business activity. The plaintiff was therefore dealing as a consumer within the terms of UCTA sec. 12(1). Thus the defendant could not exclude liability for breach of the implied term. Whether this wide definition of consumer can be applied beyond the context of UCTA for other consumer protection legal acts, is questionable however. Firstly it must be noted that UCTA only partly serves the implementation of directive law (namely in relation to the Consumer Sales Directive) and UK otherwise uses a notion of consumer which is closely orientated towards Community law. Secondly, the cited decision has in the meantime been placed in doubt, as in *Stevenson v Rogers* the CA held that for the purposes of the Sale of Goods Act 1979 sec. 14 any sale by a business is “in the course of a business”¹⁹⁸¹. Thus a solicitor selling off a computer no longer needed in his office would, for this purpose, be selling the computer in the course of business.

In **ITALY** some courts similarly propounded the view for a time, that a person should be protected as a consumer, if the relevant transaction does not belong to his core business activities¹⁹⁸². The Cass. on the other hand rejected this view and established a narrow definition of consumer¹⁹⁸³. This view is consistent with the case-law of the ECJ.

The ECJ has construed the notion of consumer under Directive 85/577 narrowly in C-361/89 - *Di Pinto*¹⁹⁸⁴. The ECJ regarded the French notion of consumer as permissible; but at the same

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¹⁹⁸¹ *Stevenson v Rogers* [1999] 1 All ER 613.
time highlighted that Community law does not “draw a distinction between normal acts and those which are exceptional in nature”\textsuperscript{1985}. This view is also confirmed by the preparatory work for Directive 99/44: whereas the original proposal for Directive 99/44 of 18 June 1996\textsuperscript{1986} regarded as consumer a person who “is acting for purposes which are not directly related to his trade, business or profession”, the amended directive proposal\textsuperscript{1987} omitted the words “not directly”.

3. Extension to legal persons

Under the above-mentioned directives only natural persons are regarded as consumers. In the joined cases C-541/99 and C-542/99 - Idealservice\textsuperscript{1988} the ECJ expressly stated (concerning the consumer definition of Art. 2 of the Directive 93/13) that Community law in this respect is not to be given a wider interpretation:

“It is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision.”

A number of member states follow this concept and expressly limit the scope of consumer protection provisions to natural persons: CYPRUS, GERMANY, ESTONIA, FINLAND, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, SLOVENIA and SWEDEN. In ITALY the Italian constitutional court clarified in its judgment of 22 November 2002 that an extension of protection to legal persons is not provided for in Italian constitutional law either\textsuperscript{1989}. In LATVIA, there has recently been a reform, so that from now on legal persons are excluded from the notion of consumer\textsuperscript{1990}. In the UNITED KINGDOM by contrast the law varies: whereas the case-law has declared that a company may “deal as a

\textsuperscript{1985} Ibid, para. 15.
\textsuperscript{1986} COM 95, 520 final.
\textsuperscript{1987} COM 1998, 217 final.
\textsuperscript{1988} ECJ judgment of 22 November 2001, joined cases C-541/99 and C-542/99 - Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl [2001], ECR I-9049, para 16.
\textsuperscript{1989} Corte Costituzionale 22 November 2002, No. 469, Giustizia civile 2003, 290 et seq.
\textsuperscript{1990} Amendment of the Consumer Protection Law, which came into force on 11 November 2005.
consumer” within the meaning of UCTA,\(^{1991}\) in other consumer protection instruments only a natural person can be a consumer.

Through the limitation to natural persons small and medium sized enterprises and charitable associations e.g. sporting associations or church parishes, are without protection. Thus there are norms in AUSTRIA, BELGIUM,\(^{1992}\) CZECH REPUBLIC, DENMARK, FRANCE, GREECE, HUNGARY, SLOVAKIA (with some exceptions) and SPAIN,\(^{1993}\) which treat legal persons as consumers, providing the purchase is for private use (or in Greece, Hungary and Spain the legal person is the final addressee). In FRANCE the Cass. Civ. with judgment of 15 March 2005 has clarified, that the notion of “consumer” (consommateur) according to the ECJ decision in Idealservice cannot be carried over to legal persons, whereas on the other hand, the notion “non-professionel” (used in the context of the articles concerning unfair contract terms; vid. Art. L 132-1 Consumer Code) can also be a legal person under French law.\(^{1994}\) HUNGARY is currently planning to limit the notion of consumer to natural persons. In PORTUGAL, it is unclear whether legal persons can be protected as “consumers”, however, a draft of a new Consumer Code acknowledges that legal persons may, in certain circumstances, benefit from the protection conferred to consumers.

\[4. \text{Inclusion of employees}\]

A peculiarity of GERMAN law is that it generally regards an employed, who is also acting within his professional capacity as “consumer”. According to CC Art. 13 “consumers” are those persons who “enter into a transaction which can be attributed neither to their business

\(^{1991}\) E.g. R & B Customs, above.

\(^{1992}\) See Art. 1 No. 7 of the Act of 14 July 1991 on Trade Practices and Consumer Protection (TPA): « Consommateur: toute personne physique ou morale qui acquiert ou utilise à des fins excluant tout caractère professionnel des produits ou des services mis sur le marché » and Art. 2 No 2 of the Act of 2 August 2002 on misleading and comparative advertising, unfair contract terms and distance marketing in respect of liberal professions (LPA): « toute personne physique ou morale qui, dans les contrats visés par la présente loi, agit à des fins qui n'entrent pas dans le cadre de son activité professionnelle ». By contrast, under Art. 2 No. 5 of the Act of 11 April 1999 on the purchase of the right to use immovable properties on a time-share basis only natural persons are protected: « acquéreur : toute personne physique qui, agissant dans les transactions visées au point 1, à des fins dont on peut considérer qu'elles n'entrent pas dans le cadre de son activité professionnelle, soit se voit transférer le droit objet du contrat, soit voit créé à son bénéfice le droit objet du contrat. »

\(^{1993}\) In SPAIN, however, the “Motives Explanation” of the Law 7/1998 on Standard Terms in Contracts mentions that the consumer is “any natural person”. Against this background, it is supposed that the General Law for the Protection of Consumers and Users should be interpreted according to this.

nor their self-employed capacity”. Accordingly, the German Federal Labour Court considered an employee to be a consumer\textsuperscript{1995}.

This does not however mean that all consumer laws in Germany can automatically be applied to the protection of the employee. Rather, case-law makes the following distinction: whereas standard business terms in contracts of employment are in principle subject to the controls of provisions which serve the transposition of the Directive 93/13\textsuperscript{1996}, an agreement concluded at the place of work to end an employer-employee relationship is not subject to the withdrawal provisions of doorstep sales. In the view of the Federal Labour Court such an agreement does not represent a doorstep selling situation within the meaning of CC Art. 312\textsuperscript{1997}. The right of withdrawal in doorstep selling situations is – according to the court – a consumer protection right related to the type of contract and encompasses only “particular forms of marketing”. Accordingly, the right of withdrawal provided by law does not apply to contracts which are not a form of marketing, such as a contract of employment or contract to terminate employment. Therefore, the employee does not enjoy a right of withdrawal in these situations. Whether the European notion of consumer also includes employed persons is contentious in German literature\textsuperscript{1998}.

IV. “Mixed” transactions

1. Community Law

For contracts that serve both a private and business purpose (e.g. the acquisition of a motor vehicle for a freelancer), the directives at issue contain no express rule, in contrast to Directive 85/374 (see Art. 9 lit. (b) ii: “used by the injured person mainly for his own private use or consumption”). The judgment of the ECJ in C-464/01 – \textit{Gruber}\textsuperscript{1999} has brought no clarification in this regard. The Court stressed in this decision that a person can invoke the special rules of jurisdiction of Art. 13-15 of the Brussels I Convention (now Art. 15-17

\textsuperscript{1996} See the judgment of the BAG of 25 May 2005, cited above.
\textsuperscript{1997} BAG, judgment of 27 November 2003, 2 AZR 135/03, NJW 2004, 2401.
Brussels I Regulation No. 44/2001) in respect of dual use contracts only if the trade or professional purpose is so limited as to be negligible in the overall context of the transaction (para. 54). However, this decision related only to European procedural, not substantive law. One might nevertheless wonder whether the procedural notion of consumer can be useful for substantive consumer protection law. Whereas in procedural law terms it can be completely justified on grounds of legal certainty to give standing only in respect of contracts concluded entirely for use for private purposes, in substantive law terms it could be thoroughly justified in the interests of consumer protection to concentrate on the primary use purpose\(^{2000}\). Thus for the directives at issue it remains open, how dual use cases are to be treated.

2. Classification in Member States

<table>
<thead>
<tr>
<th>“Mixed” Purpose Transactions as Consumer Contract</th>
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<tbody>
<tr>
<td>Purely private purpose</td>
</tr>
<tr>
<td>Also “mixed” purpose, preponderant purpose</td>
</tr>
<tr>
<td>Also “mixed” purpose – unclear whether private</td>
</tr>
<tr>
<td>transactions discernible</td>
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</tbody>
</table>

Member states found different solutions for classifying mixed transactions. The differentiation according to the criteria of the primary use purpose is expressly stated in the DANISH, FINNISH and SWEDISH provisions. GERMAN courts also focus on the question of whether the private or business use is predominant\(^{2001}\). In ITALY, recent case-law tends towards the same direction, so that a small tobacconist was regarded as a consumer when concluding a contract for hire of a vehicle which was for both private and business use.


\(^{2001}\) OLG Naumburg judgment of 11 December 1997, NJW-RR 1998, 1351, on the applicability of the consumer credit act in relation to motor vehicle leasing.
However, it is not clear from this judgment whether the private use was predominant. In AUSTRIA and BELGIUM on the other hand only contracts concluded exclusively for private purposes are encompassed.

V. Founding Activities

1. Community Law

Whether a person who makes transactions in the course of preparing professional activity (founding activities) is likewise “consumer”, is not expressly regulated in the directives at issue.

The ECJ decided in C-269/95 - Benincasa 2003 that Art. 13 Brussels I Convention (now Art. 15 of the Brussels I Regulation No. 44/2001) is not applicable if a party has concluded a contract for future professional or business activity. In its reasoning the ECJ stated that “[t]he specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character” (para. 17).

Thus, for Community law the predominant view is that also transactions which serve the founding of a business are generally not to be regarded as consumer contracts. This view is confirmed by Directive 2002/65. In recital (29) of this Directive it is stated that “[t]his Directive is without prejudice to extension by member states, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs.”

2. Member States’ Law

In most countries the issue of founding activities is not addressed either in legal acts or by case-law. AUSTRIA alone regulates the matter in a legislative act. Art. 1(3) of the Consumer Protection Act provides that transactions by which a natural person, prior to commencing a business, obtains the necessary goods or services do not qualify as business transactions. Founders of new businesses therefore enjoy the protection of consumer laws. In GERMANY, by contrast, courts have regarded founders of businesses not as consumers, but as businesses2004.

VI. Final conclusions

1. Issues to be considered for a review of the Acquis

The above remarks show that while the member state consumer definitions at times considerably diverge from one another, they are nevertheless by and large in accordance with the minimum requirements of Community law. Difficulties in application of the consumer protection norms in practice arise above all from the unclear requirements of Community law. In the context of the review therefore the following aspects should be considered:

- Although the consumer definitions in European law exhibit a common core, the wording of the directives uses different definitions, which furthermore diverge in the individual language formulations. Therefore, a harmonised definition for all consumer protecting directives should be found.
- The definition of consumer used in the Directive 90/314 is confusing, as according to this definition people who book business trips are also protected. The Community legislator should therefore either avoid the term consumer or restrict the scope of application of the directive to consumer travel services.
- How should mixed contracts be treated? Is a person to be protected as a consumer where the good or service is purchased *predominantly* for private use? Or only if the business use is so limited as to be negligible in the overall context of the transaction?

A. The notion of “consumer”

- Is the employed person to be considered a “consumer”?
- Must a person also be protected as a “consumer” if, at conclusion of contract, he is represented by a person who is to be considered a “business”?
- Must the consumer prove that he is acting for purposes which are outside of his trade, business or profession? What are the requirements for such proof?

2. Maximum harmonisation?

If the Community legislator decides to regulate consumer protecting norms wholly or in part according to the concept of maximum harmonisation, special care with the definition of consumer is necessary. The first experiences with Directive 2002/65 are vivid proof of this. According to recital (13) the Directive aims at maximum harmonisation:

“Member States should not be able to adopt provisions other than those laid down in this Directive in the fields it harmonises, unless otherwise specifically indicated in it.”

Recital (29) furthermore emphasises that “This Directive is without prejudice to extension by member states, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs.”

From this, one could draw the conclusion that the directive is conclusive in respect of the question of who comes within its scope of protection. Recital (29) would otherwise be superfluous. If one takes this view, then the member states would be prohibited from using a wide consumer definition and extending the protection to other groups of persons (for example to businesspersons concluding atypical contracts). Ultimately, the Community legislator probably did not wish such a far reaching specification. However, this example clearly shows that with a full harmonisation it must be clear whether the member states are allowed to extend the protection to further groups of persons.

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2005 This view is also taken by Schinkels, GPR 2005, 109 at 110.
**B. The notion of “business”**

_Martin Ebers_

### I. European Community Law

**Notion of business in Community Law**

<table>
<thead>
<tr>
<th>Directive</th>
<th>Notion of Business</th>
</tr>
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<tr>
<td>Directive 85/577, Art. 2</td>
<td>“trader” means 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.</td>
</tr>
<tr>
<td>Directive 90/314, Art. 2(2) and (3)</td>
<td>“organizer” means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer; “retailer” means the person who sells or offers for sale the package put together by the organizer;</td>
</tr>
<tr>
<td>Directive 93/13, Art. 2 lit. (c)</td>
<td>“seller or supplier” means 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</td>
</tr>
<tr>
<td>Directive 94/47, Art. 2</td>
<td>“vendor” shall mean any natural or legal person who, acting in transactions covered by this Directive and in his professional capacity, establishes, transfers or undertakes</td>
</tr>
</tbody>
</table>
### B. The notion of “business”

<table>
<thead>
<tr>
<th>Directive</th>
<th>Notion of business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 97/7, Art. 2(3)</td>
<td>“supplier” means any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity</td>
</tr>
<tr>
<td>Directive 98/6, Art. 2 lit. (d)</td>
<td>trader shall mean any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity</td>
</tr>
<tr>
<td>Directive 99/44, Art. 1(2) lit. (c)</td>
<td>“seller”: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession</td>
</tr>
</tbody>
</table>

### Notion of business in Directives not covered by this study

<table>
<thead>
<tr>
<th>Directive</th>
<th>Notion of business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Directive 87/102, Art. 1(2) lit. (b)</td>
<td>“creditor” means a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons</td>
</tr>
<tr>
<td>Directive 2000/31, Art. 2 lit. (b)</td>
<td>“service provider”: any natural or legal person providing an information society service</td>
</tr>
<tr>
<td>Directive 2002/65, Art. 2 lit. (c)</td>
<td>“supplier” means any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts</td>
</tr>
</tbody>
</table>
Directive 2005/29, Art. 2 lit. (b)  “trader” means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader

1. Common Features

Unlike for consumer, Community law does not use a uniform term for the other party to a consumer contract. That party (hereinafter: business) is variously described as “trader” (Directive 85/577; 98/6; 2005/29), “supplier” (Directive 93/13; 97/7; 2002/65), “seller” (Directive 93/13; 99/44), “vendor” (Directive 94/47), “service provider” (Directive 2000/31) or “creditor” (Directive 87/102). A common feature of these directives, however, is that the business can be either a natural or a legal person, who, for the transactions in question, acts in its commercial or professional capacity. The terms “commercial/professional capacity” presuppose that the business is acting on a more regular basis and in a capacity for which it requires payment.

2. Intention of the business to make profit (animo lucri)

Whether the Directives at issue additionally require an intention of the business to make a profit is questionable however. Several reasons support the view that a profit motive is irrelevant\textsuperscript{2006}. The intention to make a profit relates to an internal business factor, which in some circumstances can be proven only with difficulty and which businesses can manipulate (for example by transferring profits within a corporate group). Directive 93/13 also supports the view that a profit motive is immaterial, since this Directive relates to public bodies (see below, 4.). Internal factors of the business should therefore have no bearing on whether consumers are protected. Rather, objective factors should decide whether a person acts in its commercial or professional capacity. However, legal certainty in this issue can ultimately only be achieved by the ECJ or by the acquis review.

\textsuperscript{2006} See also Micklitz, MüKo\textsuperscript{4}, § 14 para 16.
3. “Acting in the name or on behalf of a trader”

Community law sometimes contains an extended definition of “business”. Thus a “trader” in doorstep sales is also a person who is “acting in the name or on behalf of a trader” (Art. 2 of Directive 85/577). In the same way Directive 2005/29 provides that “trader” is also anyone acting in the name of or on behalf of a trader”. Also the first proposal for Directive 97/7 contained such a definition\footnote{COM(92) 11 final.}, however, the amended proposal of 7 October 1993\footnote{COM(93) 396 final.} by contrast refused an express inclusion of auxiliary agents, without the reasons for that exclusion being apparent. Finally, according to Art. 1(2) lit. (b) of the Directive 87/102 a “creditor” is not only a person who grants credit in the course of his trade, business or profession, but also “a group of such persons”.

When a person is acting “in the name or on behalf of a trader” has not hitherto been clarified by the ECJ. In C-229/04 - \textit{Crailsheimer Volksbank}\footnote{ECJ judgment of 25 November 2005, C-229/04 - \textit{Crailsheimer Volksbank eG v Klaus Conrads, Frank Schulzke and Petra Schulzke-Löschke, Joachim Nitschke} [2005] ECR I-9273.} the Court of Justice did at least clarify that Directive 85/577 “must be interpreted as meaning that when a third party intervenes in the name of or on behalf of a trader in the negotiation or conclusion of a contract, the application of the Directive cannot be made subject to the condition that the trader was or should have been aware that the contract was concluded in a doorstep-selling situation” (para. 45).

4. Inclusion of legal persons/bodies of public law

Some directives (such as the Directive 93/13 and the Directive 2002/65) make explicitly clear that public bodies can also be “businesses”. Directive 93/13 emphasises in recital 14 that the Directive also applies to trades, businesses or professions of a public nature. Art. 2 lit. (c) of the Directive makes additionally clear in the English language version that the nature of ownership of the “trader or supplier” is immaterial (Art. 2 lit. (c): „'seller or supplier' means
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.\(^\text{2010}\). In the German language version, on the other hand, it has been underlined that the Directive is also applicable if the business or professional activity is attributable to the area if public law, (“dem öffentlich-rechtlichen Bereich zuzurechnen ist”), whereas the French version speaks of the professional activity, whether public or private (“activité professionnelle, qu’elle soit publique ou privée”). In view of these formulations it must be assumed that the Directive in any event extends to private law contracts between consumers and public legal persons/bodies. Whether in addition not only private law, but also public law contracts are encompassed, is by contrast uncertain. In support of this is the fact that the public/private divide is drawn differently in each country and therefore it cannot be at the discretion of the national legislator whether contractual clauses are subject to Directive 93/13 or not. Legal certainty can in turn only be achieved if the ECJ decides the issue, or the Community legislator in the context of the acquis review undertakes a corresponding clarification.

II. Legislative Techniques in Member States

Most member states have used the terms “trader”, “supplier”, “seller”, “vendor”, “service provider” or other terms (like “Unternehmer” in AUSTRIA and GERMANY or “professionista” in ITALY) in accordance with the Directives at issue; for more detail see Part 3 of this study. Some member states have introduced a uniform definition for the counterpart of the consumer, in particular AUSTRIA\(^\text{2010}\), CZECH REPUBLIC\(^\text{2011}\), FINLAND\(^\text{2012}\), GERMANY\(^\text{2013}\), ITALY\(^\text{2014}\) and SLOVENIA\(^\text{2015}\). LATVIA and LITHUANIA define the terms “seller” and “service provider” generally for all kinds of consumer contracts\(^\text{2016}\). SLOVAKIA introduced general definitions for “seller” and “supplier” in its Consumer Protection Act\(^\text{2017}\).

\(^\text{2010}\) Art. 1(2) of the Consumer Protection Act.
\(^\text{2011}\) CC Art. 52(2).
\(^\text{2012}\) Chapter 1 Art. 5 of the Consumer Protection Act.
\(^\text{2013}\) CC Art. 14.
\(^\text{2014}\) Art. 3(1) lit. (c) of the Consumer Code.
\(^\text{2015}\) Art. 1(3) of the Consumer Protection Act.
\(^\text{2016}\) Art. 1(1) sec. 4-5 of the Latvian Consumer Protection Act; Art. 2(2) and (3) of the Lithuanian Consumer Protection Act.
\(^\text{2017}\) Art. 2(1) lit. (b) and (e).
Other member states by contrast (above all FRANCE) abstain from express definitions, relying instead on their case-law.

In MALTA any category or class of persons can be designated as a “trader” by Order of the Minister responsible for consumer affairs after consulting the Consumer Affairs Council, and publication in the Gazette.

III. Content of the definitions in Member States

The notion of business is in many member states defined in more concrete terms than in the relevant directives. Many member states have tried to clarify details or give examples.

1. Intention of the business to make profit (animo lucri)

Some member states have regulated the issue not addressed in the directives, of whether a person which does not intend to make profit is included in the notion of business. In AUSTRIA business is described in Art. 1(2) of the Consumer Protection Act as “every organisation on a continuing basis of independent economic activity”, even if this organisation does not intend to make a profit. In GERMANY, the BGH (judgment of 29 March 2006) clarified for consumer goods sales, that the only relevant factors for qualifying as business are whether the seller offers products on the market against payment, normally over a certain period of time. The court stated expressly that it does not matter whether the seller pursues his business activity with the intention of making profit\(^{2018}\). In GREECE, it is likewise recognised that non-profit-making organisations or institutions as well as public corporations and local authorities can act as suppliers. In the NETHERLANDS and SWEDEN the notion business/corporation also includes those enterprises that have no profit motive.

The position is different, however, in FINLAND, SLOVENIA and SPAIN. According to Art. 1:5 of the FINNISH Consumer Protection Act the trader has to act “in order to gain income or with another economic interest.” According to Art. 1(3) of the SLOVENIAN Consumer Protection Act, a “trader” is defined as a legal or natural person, who is “engaged in a profitable activity”

\(^{2018}\) BGH judgment of 29 March 2006, VIII ZR 173/05.
regardless of its legal form or ownership. Spain uses the term “retail trade” in transposition of Directive 97/7, which is defined in Art. 1(2) of the Law 7/1996 on retail trade as “the activity professionally undertook with will of earning” (ánimo de lucro).

2. “Acting in the name or on behalf of a trader”

The issue addressed in Community law in some directives of whether a person acting in the name or on behalf of a trader is to be regarded as a business, is partly regulated in the member states generally for all or several consumer protecting acts. The Belgian Trade Practices Act refers to the term “seller” which is defined in Art. 1.6 as “any other person, whether acting in its own name or on behalf of a third party”. The Cypriot notion of “supplier” clarifies as well, that the supplier acts “either personally or through his representative”. The Latvian Consumer Protection Act defines as a “seller” any natural or legal person who offers or sells goods to consumers by means of entrepreneurial activity, as well as a person who acts in the name of the seller or at his or her instruction.

In other legal systems this issue is not expressly regulated, but it does however follow from the general definition of consumer and the rules on agency that conduct by a third party is attributed to the business and that a business does not lose its character as such by engaging a representative, who himself would be classed as a consumer (such as in particular for Austrian law).

By contrast the legal situation in Greece and Poland is unclear. In Greece - in contrast to Directive 85/577 – not any person acting in the name of and on behalf of a trader is viewed as a trader. The same applies for Polish law. According to CC Art. 43 the nature of the activity of the trader must be exercised in the “own name” of the person. This seems to be a narrower definition than the one provided in Art. 2 of Directive 85/577.

Furthermore, the issue of whether consumer protection laws apply if a private person is represented by a business is addressed differently. In Austria and Germany it generally depends on the identity of the contractual partner. A contract between two private persons

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2019 OGH judgment of 5 August 2003, 7 Ob 155/03z.
does not therefore fall within the ambit of consumer protection provisions if it is brokered by a person acting in a business or professional capacity. By contrast in Denmark, Italy and Portugal it is clarified that for timeshare contracts, if the vendor is not a professional, but the contract is concluded for the vendor by a professional, then it is regarded as a contract covered by the act as well.  

3. Inclusion of legal persons/bodies of public law

In some member states it is additionally (beyond the scope of application of Directive 93/13) expressly regulated that “business” includes legal persons under public law. In Austria legal persons under public law always qualify as businesses. In Belgium, the term “seller” (used in the Trade Practices Act for doorstep and distance selling and price indication) includes governmental institutions that pursue commercial, financial or industrial activity and sell or offer for sale products or services. In Cyprus, according to Art. 2 of the Consumer Protection Act the word “business” includes “a trade or profession and the activities of any government department or local or public authority”, “courts” and “directors”. Greek law also emphasises in Art. 1(3) of the Consumer Protection Act that public sector suppliers qualify business. Italian law includes (for sales contracts) under the definition of “seller” every natural or legal person of private and public law. In Slovenia, a “trader” is defined as a legal or natural person “regardless of its legal form or ownership”. Similarly in the United Kingdom in the context of transposing the Consumer Sales Directive it is clarified that “business” includes the profession and activity of any government department (including a Northern Ireland department) or local or public authority. In other member states such as Germany it follows from the general definition of legal person that public bodies are also included.

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2022 Art. 128(2) lit. (b) of the Consumer Code.
2023 Art. 1(3) of the Consumer Protection Act.
IV. Final Conclusions

Most member states do not have a uniform definition for the contractual partner of the consumer (business). It might nevertheless be useful to bear in mind that the main purpose of the notion of business is merely to make clear that the directives apply to B2C transactions, not to C2C relationships. Variations in the notion of business between the member states do not therefore have a great bearing on the correct transposition of the directives, so long as the definition of consumer is precise and the definition of business is not such as to fail to provide protection in transactions where the directives intended the consumer to be protected. This study only shows a deviation from Community law requirements in this respect in GREECE and POLAND with their transpositions of Directive 85/577, as in both countries not any person acting in the name of and on behalf of a trader is viewed as a business.\textsuperscript{2025}

In the context of the review the following aspects above all should be considered:

- Although the definitions of business in European law exhibit a common core, the respective wordings of the directives use different definitions, which furthermore diverge in the individual language versions. Therefore, a uniform definition of business for all consumer protecting definitions should be found.
- In so doing, it should be clarified if the criterion of whether the relevant transaction is made “in the course of a person’s profession” should be defined objectively, or more subjectively as being made for purposes relating to the profession.
- Is a person/entity without profit motive included in the notion of business?
- How are cases in which the business is acting for or on behalf of a third person to be treated?
- Besides the Unfair Contract Terms Directive, are also legal persons/bodies of public law covered by the scope of the directives?
- Who has the burden of proving that the contractual partner of the consumer was acting in its commercial or professional capacity? What are the requirements for discharging this burden?

\textsuperscript{2025} See ante, Part 4.B.III.2.
C. Right of withdrawal

Hans Schulte-Nölke

I. Introduction

Another aspect common to some of the Directives within the focus of this study is a right of withdrawal granted to the consumer in certain situations and certain contracts. In this part of the study, we examine the current status of withdrawal rights in the eight Directives, and consider whether there is room for improvement. In order to establish clear, concise and coherent terminology the term “withdrawal” is used in this study even in those cases where the English version of the Directives uses other terms.

II. Existing withdrawal rights in the Acquis

1. Doorstep Selling Directive

On the right of withdrawal, this Directive does not contain much more than what is set out in Art. 4 (duty to inform consumer about this right), Art. 5 (content and basic effect of right to withdraw), Art. 6 (mandatory law clause) and Art. 7 (unravelling of the contract). The terminology used is rather incoherent: “right of cancellation” (recital 5, Art. 4(1); Art. 5(2)), “right to renounce” (Art. 5(1)), “right of renunciation” (Art. 7).

2. Package Travel Directive

Directive 90/314 contains no right of withdrawal. Even when marketed via distance selling, package travel contracts are normally excluded from the withdrawal right granted under Directive 97/7 (Art. 3(2) 2nd indent of this Directive).

No reference to a right of withdrawal exists within this Directive.

4. Timeshare Directive

Besides an extensive catalogue of information duties, Directive 94/47 contains a right of withdrawal in Art. 5 (partially also called “right to cancel”, see also “cancellation and withdrawal” in the 2nd and 13th recital; “right to cancel or withdraw” in Art. 7 and in lit. (l) of the Annex). This right is flanked by a duty to inform the consumer about his right (Art. 3, Art. 4 and lit. (l) of the Annex), a prohibition of advance payments during the withdrawal period (Art. 6), an extension of the withdrawal to cover credit agreements related to the timeshare contract (Art. 7), some basic provisions on the unravelling of the contract (Art. 5(3) and (4)), a mandatory law clause (Art. 8) and a provision protecting the consumer in case of a choice of law clause (Art. 9).

5. Distance Selling Directive

Directive 97/7 contains a right of withdrawal in Art. 6. There is also a duty to inform the consumer about this right (Art. 4, Art. 5), an extension of the withdrawal to cover related credit agreements (Art. 6(4)), some basic provisions on the unravelling of the contract (Art. 6(2)), a mandatory law clause (Art. 12(1)) and a provision protecting the consumer in case of a choice of law clause (Art. 12(2)).

6. Price Indications Directive

There is no reference to a right of withdrawal in this Directive.
7. **Injunctions Directive**

No reference to a right of withdrawal. The Directive is relevant to the extent that it provides a mechanism to deal with a failure to grant the withdrawal rights foreseen in duties in other Directives, e.g. Directive 85/577, Directive 94/47 and Directive 97/7.

8. **Consumer Sales Directive**

This Directive contains no withdrawal right.

9. **Other Directives outside the Scope of this Study**

Directive 2002/65 contains a right of withdrawal in Art. 6. There is a duty to inform the consumer about this right (Art. 3, requiring the supplier also to inform the consumer about the absence of a withdrawal right), an extension of the withdrawal to cover related (credit) agreements (Art. 6(7)), some basic provisions on the unravelling of the contract (Art. 7), a mandatory law clause (Art. 12(1)) and a provision protecting the consumer in case of a choice of law clause (Art. 12(2)).

Directive 2002/83 contains in Art. 35(1) a right to cancel an individual life-assurance contract. Directive 2002/65 refers to this cancellation right in its Art. 6(1). The policy holder must be informed about this right according to Art. 36(1) and Annex III (A) of Directive 2002/83. The Directive also provides some very basic rules on the effect of cancellation and on the unravelling of the contract (Art. 35(1)).

The Directive 87/102 does not grant a right of withdrawal to the consumer, but the annex refers under 1.2. (vii) to a “cooling-off period, if any”. By contrast, the proposals for a revision of the Directive foresee a right of withdrawal.

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2026 Directive 2002/65 refers to Directive 90/619, which has been replaced by Directive 2002/83; the withdrawal period of normally 14 calendar days is extended to 30 calendar days in distance contracts relating to life insurance covered by Directive 90/619 (now Directive 2002/83) and personal pension operations.
10. ECJ Case-law with general importance for a Right of Withdrawal

There are at least three ECJ judgments which may have some importance for a general understanding of a withdrawal right, although they all exclusively apply to Directive 87/577. The C-481/99 - *Heininger*[^2027] judgment established that one consequence of non-compliance with the duty to inform the consumer about his right of withdrawal is that the period for withdrawal is extended indefinitely, i.e., the seven-day ‘withdrawal period’ will not commence until the consumer has been adequately informed. The judgments in C-229/04 - *Crailsheimer Volksbank*[^2028] and C-350/03 - *Schulte*[^2029] cases also deal, among other issues, with the unravelling of a withdrawn contract.

III. Issues to be considered for a review of the Acquis

The withdrawal rights in the Directives have been drafted and enacted one by one. It is nevertheless obvious, that the earlier have influenced the later ones. There is a clear tendency in the Directives to follow in the footsteps of the pre-existing withdrawal rights in order to develop the Acquis coherently. The main issues regulated in the three withdrawal rights relevant for this study are outlined in the following table.

## Consumer Law Compendium

### Comparative Analysis

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td><strong>Length of period</strong></td>
<td>not less than 7 days</td>
<td>within 10 calendar days</td>
<td>at least 7 working days</td>
</tr>
<tr>
<td>2</td>
<td><strong>Beginning of period</strong> (as to sanctions in case of breach of information obligations see No. 8)</td>
<td>from receipt of the notice [unclear: even before conclusion of contract, with the consequence that period may have expired before the contract is concluded, cf. No. 7 of this table]</td>
<td>both parties' signing the contract or both parties' signing a binding preliminary contract</td>
<td>in the case of goods, from the day of receipt by the consumer - in the case of services, from the day of the conclusion of the contract - from the day on which the information obligations were fulfilled if fulfilled after the conclusion of the contract</td>
</tr>
<tr>
<td>3</td>
<td><strong>Computation of period</strong></td>
<td></td>
<td>if the 10th day is a public holiday, the period shall be extended to the first working day thereafter</td>
<td></td>
</tr>
<tr>
<td>4</td>
<td><strong>Dispatch rule</strong>: pure timeliness rule or legal fiction of receipt?</td>
<td>[unclear]: sufficient if the notice is dispatched before the end of period</td>
<td>[unclear, looks more like a legal fiction of receipt]: deadline shall be deemed to have been observed if the notification, if it is in writing, is dispatched</td>
<td>[no provision]</td>
</tr>
<tr>
<td>5</td>
<td><strong>Rights and obligations during the period for withdrawal</strong></td>
<td>[no provision]</td>
<td>prohibition of advance payments before the end of the period [unclear whether applicable only with regard to the 10 calendar days period or also to the 3 months plus 10 calendar days period]</td>
<td>[no provision]</td>
</tr>
<tr>
<td>#</td>
<td>Obligation to inform about right of withdrawal (also formal requirements for this information)</td>
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<tr>
<td>6</td>
<td>written notice of right of cancellation, together with name and address of a person against whom that right may be exercised, notice must be dated and shall state particulars enabling the contract to be identified</td>
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<tr>
<td>7</td>
<td>in writing (with regard to the contract, which must contain certain information)</td>
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<td>8</td>
<td>in the official language opted for by purchaser</td>
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<tr>
<td>9</td>
<td>Information about the existence of a right of withdrawal and other information (prior to the conclusion of the contract; and, if necessary, later confirmation in writing or on durable medium, cf. No. 7)</td>
<td></td>
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<tr>
<td>10</td>
<td>written information on the conditions and procedures for exercising the right of withdrawal</td>
<td></td>
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<tr>
<td>11</td>
<td>Point in time when information about right of withdrawal has to be given</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>12</td>
<td>- (in the case of Article 1 (1)): at the time of conclusion of the contract;</td>
<td></td>
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<tr>
<td>13</td>
<td>- (in the case of Article 1 (2)): not later than the time of conclusion of the contract;</td>
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<tr>
<td>14</td>
<td>- (in the case of Article 1 (3) and 1 (4)): when the offer is made by the consumer</td>
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<tr>
<td>15</td>
<td>provide any person requesting information with a document which shall provide brief and accurate information on lit. (1) of the Annex</td>
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<tr>
<td>16</td>
<td>- any advertising shall indicate the possibility of obtaining the document and where it may be obtained</td>
<td></td>
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<tr>
<td>17</td>
<td>- contract must include the items referred to in the Annex</td>
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<tr>
<td>18</td>
<td>in good time prior to the conclusion of any distance contract</td>
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<tr>
<td>19</td>
<td>- confirmation (written or on durable medium) in good time during the performance of the contract, and at the latest at the time of delivery, unless the information has already been given in such form</td>
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<tr>
<td>20</td>
<td>- in any event (in good time during the performance of the contract etc…): written information on the conditions and procedures for exercising the right of withdrawal</td>
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</tbody>
</table>
## Consumer Law Compendium

### Comparative Analysis

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<table>
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<tbody>
<tr>
<td>C. Right of withdrawal</td>
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</tbody>
</table>

#### 8 Sanctions in case of breach of this (and other) information obligation

- MS shall ensure appropriate consumer protection measures
- ECJ Heininger: period does not begin before information
- extension of period:
  - (up to 3 months delay): 10 calendar days period begins with receipt of information,
  - otherwise, 3 months, plus 10 calendar days
  - no defrayal of expenses
- extension of period
  - (up to 3 months delay): 7 working days period begins with receipt of information,
  - otherwise, 3 months plus 7 working days, beginning in the case of goods, from the day of receipt by the consumer, in the case of services, from the day of conclusion of the contract.

#### 9 Exercise of right of withdrawal, particularly formal requirements

- in accordance with the procedure laid down by national law.
- without giving any reason
  - notify the person whose name and address appear in the contract by means which can be proved in accordance with national law in accordance with the procedures specified in the contract pursuant to point (l) of the Annex.
- without giving any reason

#### 10 Effect of withdrawal for contractual

- renounces the effects of the
  - [no general provision]
- [no general provision]
| 11 | Effect of withdrawal with regard to credit agreements | [no provision] | - if price is fully or partly covered by credit granted by the vendor, or  
- if the price is fully or partly covered by credit granted to the purchaser by a third party on the basis of an agreement between the third party and the vendor,  
the credit agreement shall be cancelled, without any penalty  
MS shall lay down detailed arrangements to govern the cancellation of credit agreements. | - if the price of goods or services is fully or partly covered by credit granted by the supplier, or  
- if that price is fully or partly covered by credit granted to the consumer by a third party on the basis of an agreement between the third party and the supplier,  
the credit agreement shall be cancelled, without any penalty  
MS shall determine the detailed rules for cancellation of the credit agreement. |
| 12 | Rules for the unravelling of the contract after withdrawal | legal effects shall be governed by national laws, particularly regarding the reimbursement of payments for goods or purchaser must defray only those expenses which, in accordance with national law, are incurred as a result of | - without penalty  
- supplier shall be obliged to reimburse the sums paid by the |
| 13 | Relation of withdrawal to other remedies | [no provision, but the ECJ Travel Vac case, C-423/97, illustrates, that the Directives may be applicable in parallel to one another] | In addition to the possibilities available to the purchaser under national laws on the nullity of contracts | The provisions of this Directive shall apply insofar as there are no particular provisions in rules of Community law governing certain types of distance contracts in their entirety. Where specific Community rules contain provisions governing only certain aspects of the supply of goods or provision of services, those provisions, rather than the provisions of this Directive, shall apply to these specific aspects of the distance contracts. |
The preceding table reveals a number of issues that may require some consideration. The order and numbering of the information laid out below follows the layout of the information presented in the table.

1. **Length of period**

It is obvious that the different periods cause incoherence within the acquis which may constitute a barrier to trade and an unnecessary burden to businesses. The Commission has already pointed out that it will examine the possibility and desirability of harmonising the existing cooling-off periods.\(^{2030}\) It also seems that the 14 calendar days period stipulated in Art. 6 of the Directive 2002/65 (apart from life assurance) has been designed as a model for the other rights of withdrawal in the Acquis. Therefore, it seems most plausible that the different periods in Directives 85/577, 94/47 and 97/7 should be harmonised in this way. It would have to be considered whether such a harmonised 14 calendar days period should be introduced as full a harmonisation measure. This could help businesses to set up cross-border marketing strategies, particularly in the field of distance selling. As only a few member states have provided longer periods\(^{2031}\), full harmonisation may seem rather unproblematic from a consumer protection standpoint. However, it would have to be assessed whether in certain cases (in particular with regard to time-sharing) a longer period (one up to three month) might be desirable in order to improve consumer protection.

2. **Beginning of period**

A common feature in all the Directives is that the ordinary (short) period, which is applicable when the business fulfils its information obligations, does not begin before the receipt of the information. Insofar, the Acquis is coherent.

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\(^{2031}\) See the individual reports in Part 3 of this Analysis under A III 2a (Doorstep Selling, e.g. 15 days in MALTA and SLOVENIA); D III 3b aa (Timeshare, e.g. 15 days in CYPRUS, CZECH REPUBLIK, HUNGARY and SLOVENIA; 15 working days in BELGIUM); E III 2c aa (Distance Selling, e.g. 15 days in in MALTA and SLOVENIA); perhaps also the one month period in GERMANY in case of delayed information.
Directives 94/47 and 97/7 require, furthermore, that the contract has been concluded, while Directive 85/577 seems to foresee that in certain cases the period may begin (and even end) before a contract has been concluded (Art. 4 lit. (c)). The Directives are therefore incoherent. Moreover, the (non-) requirement of the conclusion of the contract may lead to unwanted results. On the one hand, a consumer may be interested to withdraw from an offer already before it has been accepted (e.g. in timeshare contracts where sometimes a binding offer is pending for months). It would be odd, if a consumer who is already determined to withdraw, were to wait until the acceptance. On the other hand, it may be dangerous for the consumer if the period is allowed to expire before the conclusion of the contract. This would seem strange and could cause unnecessary communication duties for both parties if a consumer, who has made an offer (binding or non-binding), were forced to withdraw from this purely for reasons of precaution in cases where his offer has not been accepted, and he perhaps even suspects that the offer will never be accepted (e.g. an offer made by a consumer who knows that he may not be considered as creditworthy). This issue could be solved easily by a clarification, that the period never begins before the conclusion of the contract, but that the consumer is entitled to withdraw from an offer or another binding declaration also before the period begins, i.e. before a contract is concluded.

A further requirement for the beginning of the period, only foreseen in Directive 97/7, is the receipt of goods to be delivered under the contract. This requirement allows the consumer to examine the goods before deciding whether to withdraw. It is a policy question whether a similar requirement also makes sense for doorstep contracts and, in particular, time-share contracts.

3. Computation of period

The computation of the period is governed by Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits. Therefore, the express provision in Art. 5(1) 1st indent of the Directive 94/47 is superfluous. It may be useful to refer in future legislation to this regulation, which is perhaps sometimes overlooked.
4. Dispatch rule

Strikingly, Directive 97/7 is (together with Directive 2002/83) the only Directive which does not contain a dispatch rule. Even the later Directive 2002/65 comprises such a rule in Art. 6(6). This seems to be an error which should be removed.

As already indicated in the table, the wording of the existing dispatch rules is non-uniform and also unclear with regard to the effect of a timely dispatch. They allow a different interpretation in the case of a letter which was timely dispatched, but got lost and therefore never reached the addressee. If the rule regulates only the calculation of the period, but leaves the consumer to bear the risk of a successful transmission of the declaration, the contract is not withdrawn, if the letter gets lost. The rule that the declaration is deemed to be received could also be construed as being legal fiction. This could be clarified either way.

5. Rights and obligations during the period for withdrawal

Apart from Directive 94/47, which contains a prohibition of advance payments, the Acquis does not regulate the rights and obligations of the parties to the contract which the period for withdrawal is pending. Per argumentum e contrario, one could therefore conclude that in all other cases the Directives allow the business to claim payments during the period. This interpretation is supported by the rules on unravelling the contract (cf. No. 12 of the above table), which foresee reimbursement of sums paid by the consumer. It goes without saying that the consumer must also be entitled to claim performance during the pending period. The only question to decide for all withdrawal rights could be, whether the member states should be allowed to regulate more restrictive consumer protection rules like a general prohibition to claim payment before the period has expired.

With regard to advance payments under timeshare contracts, it could be clarified whether the prohibition is applicable only until the end of the regular (10 calendar days) period or also, in case of breach of information obligations, to the 3 months plus 10 calendar days period.
6. Obligation to inform about right of withdrawal

The EC legislator should focus attention on this issue especially due to the fact that this information obligation has enormous importance both for the position of the consumer on the one hand, and the business, which may suffer harsh consequences as a result of a breach of this obligation, on the other. This is also true, because differences of the member states’ laws in this field may constitute very effective barriers to trade. The following issues might be considered in this context:

a. Formal requirements

It should be clarified that the information should be in writing (meaning practically on paper) or on a durable medium; the latter only in cases where electronic communication has been established between business and consumer.

b. Language

The language requirement in Directive 94/47 is unique and especially designed for such contracts. As to the other directives, the requirement of information in clear and intelligible language might in some cases amount to an obligation to use a certain (official) language. A general regulation of this issue is hardly imaginable, as the variety of cases and situations is too broad. Therefore, this issue might be left for the courts to decide.

c. Content of the information

The common core of the Directives is the requirement to inform the consumer about the existence of a withdrawal right and the name and the address of the person against whom that right may be exercised. It could also be argued that the length of the period must be indicated. Many member states have stated further requirements with regard to the content of the information about the withdrawal right. This difference may constitute a barrier to trade because it might force businesses to draft special information notices for specific member states. Therefore, the Acquis should seek to regulate this area in a way which allows for cross-border use of information. Such a regulation could, for example, foresee a form which the
business can use in order to inform the consumer about his right of withdrawal. EC law could,
furthermore, foresee that a business fulfils its obligation to inform the consumer about the
withdrawal right by using this form, notwithstanding any other deviating national law. It is a
policy question whether such a full harmonisation measure would displace the applicable
national law in all cases or only in cross border situations.

The content of the information to be provided with the help of such a form should at least
encompass

• the existence of a withdrawal right
• the length of the period; and
• the name and the address of the person against whom that right may be exercised

Further information desirable to be included in the form could be the beginning of the period.
This issue is connected with the general question when the period begins. If the Acquis
foresees a solution along the lines of the suggestion made under No. 2, it should also be
possible to find a wording which explains at least the basic rules governing the beginning of
the withdrawal period.

An additional element could be to provide the consumer with a form which could be used by
him in order to exercise the withdrawal.

7. **Point in time when information about the right of withdrawal has to be given**

When the Acquis offers a form as described under No. 6, the point in time when the consumer
has to be provided with such a form (in writing or - if appropriate – on a durable medium)
would be, at the latest, at the conclusion of the contract. The actual obligations to inform the
consumer about the existence of a right of withdrawal at an earlier point in time could be
maintained.

8. **Sanctions in case of breach of the information obligation**

The Acquis is rather incoherent, because it comprises two different approaches. On the one
hand, the ECJ decision *Heininger* has clarified that in doorstep selling cases the period does
not begin before the consumer has been informed about his right of withdrawal. This may lead to an eternal withdrawal right. Directive 2002/65, which is a full harmonisation measure, seems to follow the same pattern. On the other hand, Directive 94/47 and Directive 97/7 only stipulate a “3 months plus” rule, i.e. a prolongation of the withdrawal period up to a maximum of 3 months. This issue should be solved by choosing either the one or the other whereby it may seem more plausible to bring the sanction in line with the ECJ case-law. It is a political question whether the eternal period in such cases is really an appropriate sanction, having also in mind that the period might in practice be cut off by national rules on prescription or procedural law. With regard to the laws of the member states, a maximum withdrawal period of one year could be considered as being more reasonable than the eternal period created by the ECJ in the *Heiniger* ruling.

9. **Exercise of right of withdrawal, in particular formal requirements**

The Directives do not foresee a formal requirement for the withdrawal, however, some member states do. This difference may constitute a barrier to trade, because it might force the business to include any formal requirement for the exercise of the withdrawal right into the information of the consumer about his right (cf. e.g. Art. 5(1) 1st indent of Directive 97/7). Therefore, EC law could clarify that the consumer need not fulfil any formal requirement when he withdraws from a contract.

10. **Effect of withdrawal for contractual obligations**

The Directives contain only rather incomplete provisions on the effects of withdrawal. As the ECJ cases *Crailsheimer Volksbank* and *Schulte* have illustrated, a basic provision along the lines of Art. 5(2) of Directive 85/577 or Art. 35(1) of Directive 2002/83 might be useful for the national legislators to assess the general effect of withdrawal.

11. **Effect of withdrawal with regard to credit agreements**

Apart from Directive 85/577 (and Directive 2002/83 where it is not appropriate) all the other Directives which contain a withdrawal right, comprise a rather similar provision on credit
agreements. Therefore, such a rule could be seen as a general principle and thus be extended to doorstep contracts as well.

12. Rules for the unravelling of contract after withdrawal

While Directive 85/577 expressly leaves the rules on the unravelling of a withdrawn contract to the member states, Directive 94/47 does not comprise a general provision, but regulates some details on the costs of legal formalities. By contrast, Directive 97/7 already contains some basic general rules on reimbursements. The ECJ cases Crailsheimer Volksbank and Schulte have clarified some further issues. In the course of a review of the Acquis these lines could be completed to a set of basic rules for the unravelling of withdrawn contracts. Such rules would state the general obligation of both parties to return goods and money received and could clarify which defrayals and costs the consumer would have to bear. It would also have to be considered to what extent such a set of rules, which might interfere with national rules on unjustified enrichment, should be enacted in a way of full harmonisation in order to achieve further progress in market integration.

13. Relation of withdrawal to other remedies

Following the model of Art. 5(1) of Directive 94/47, a general rule could be stated, that a right of withdrawal does not prejudice other remedies available to the consumer, such as the invalidity of the contract or the right to terminate a contract because of its breach. This may lead to the somewhat surprising result that a consumer could be entitled to withdraw from an invalid contract. Such a remedy can make sense in those cases where the rules applicable for unravelling of the invalid contract would be less favourable than the rules for the unravelling of a withdrawn contract.
D. Information duties

Christian Twigg-Flesner

I. Introduction

One aspect common to several of the Directives within the focus of this study is the requirement to provide information to a consumer, either before a contract is concluded, or immediately afterwards. In some instances, information has to be provided both before and after the conclusion of a contract. In this part of the study, we examine the current extent of these information duties, and consider whether there is room for improvement.

The first section of this part will outline the existing information obligations in all the directives under consideration. The second section will then turn to the particular issues that arise from the current state of these duties, and will consider possible suggestions for improvement. This aspect is now firmly tied into the development of the Common Frame of Reference on European contract law, and any suggestions we make here need to be set in the context of the CFR.

II. Existing information obligations in the 8 directives

1. Doorstep Selling Directive

This Directive imposes only a very basic information requirement, but the jurisprudence of ECJ has revealed that the consequences of non-compliance can be rather complicated. Under Article 4(1), a consumer must be given information about his right to withdraw from a contract concluded in the circumstances to which the Directive applies within a period of no less than 7 days from concluding the contract, as well as the name and address of the person against who this right may be exercised.
This information must be given in writing. No further requirement, such as the quality of the language used in providing this information, or the clarity of the information, is imposed.

There is no provision in this Directive regarding the sanctions that might be attached to a failure by a trader to give the consumer this information. Case-law before the ECJ has established that one consequence is that the period for extending the right of withdrawal is extended indefinitely, i.e., the seven-day ‘withdrawal period’ will not commence until the consumer has been informed adequately.

The position regarding sanctions in the member states is therefore rather diffuse. In Belgium, failure to provide this information results in the nullity of the contract.\(^{2032}\) This is also the case e.g., in Hungary,\(^{2033}\) Luxembourg,\(^{2034}\) Malta,\(^{2035}\) the Netherlands,\(^{2036}\) and Spain.\(^{2037}\) The same may happen in Greece under generally applicable rules. In the United Kingdom, it is clarified that the contract remains enforceable by the consumer against the trader, but not by the trader against the consumer,\(^{2038}\) although the position will be similar in the other countries mentioned.

In Ireland, a criminal penalty is imposed for failing to comply with this information obligation.\(^{2039}\) Slovenia also imposes criminal liability.\(^{2040}\) The United Kingdom also provides for a detailed system of criminal penalties in addition to the sanction of non-enforceability against the consumer.\(^{2041}\)

In Italy, if this information is not supplied (or supplied incorrectly), the period for exercising the right to withdrawal is extended to 60 days from the conclusion of the contract (for contract

\(^{2032}\) Art. 88, sent. 3 of the Law on Trade Practices and Consumer Information.

\(^{2033}\) Art. 3(3) of the Government Decree on Doorstep Selling.

\(^{2034}\) Art. 10(1) of the Doorstep Selling Act.

\(^{2035}\) Art. 7 of the Doorstep Contracts Act.

\(^{2036}\) Art. 24(1) of the Canvassing law.

\(^{2037}\) Art. 4 of the Law 26/1991 of 21 November, on consumers’ protection in case of contracts executed out of the commercial premises.

\(^{2038}\) Reg. 4 Consumer Protection (Cancellation of Contracts concluded away from business premises) Regulations 1987.

\(^{2039}\) Reg. 4A-4H Consumer Protection (Cancellation of Contracts concluded away from business premises) Regulations 1987.

\(^{2039}\) Art. 77(1) no. 24, (2) of the Consumer Protection Act.

\(^{2040}\) Reg. 4A-4H Consumer Protection (Cancellation of Contracts concluded away from business premises) Regulations 1987.
of services) or from the delivery of goods,\textsuperscript{2042} whereas in LITHUANIA, the period is 3 months from the date of concluding the contract.\textsuperscript{2043}

\textbf{2. Directive 90/314/EEC (Package Travel)}

This Directive requires that information is provided to a consumer at four different stages, and the type of information required varies accordingly.

The first stage is where a brochure about a package holiday is given to a consumer. The Directive states that such a brochure must contain information about the following aspects of the holiday:\textsuperscript{2044}

\begin{itemize}
  \item[(i)] the price
  \item[(ii)] adequate information concerning:
    \begin{itemize}
      \item[(i)] destination and means, characteristics and categories of transport used;
      \item[(ii)] type of accommodation, its location, category or degree of comfort and its main features; its approval and tourist classification under the rules of the host Member State concerned;
      \item[(iii)] the meal plan;
      \item[(iv)] the itinerary;
      \item[(v)] general information on passport and visa requirements for nationals of the member state or states concerned and health formalities required for the journey and the stay;
      \item[(vi)] either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance;
      \item[(vii)] whether a minimum number of persons is required for the package to take place and if so, the deadline for informing the consumer in the event of cancellation
    \end{itemize}
\end{itemize}

\textsuperscript{2042} Art. 65(3) of the Consumer Code.
\textsuperscript{2043} Art. 8, sent. 3 of the Order of the Minister of Economy of the Republic of Lithuania on the Approval of the Rules of Sale of Goods and Provision of Services in Premises not Designated for this Activity.
\textsuperscript{2044} Article 3(2).
This information has to be included in the brochure. This term is not defined, but it seems likely that the intention was to refer to a written document. Consequently, it is implicit that the information listed above must be provided in writing. In addition, Art.3(1) requires that this information must not be misleading.

It is also not entirely clear if information about package holidays displayed on a website would be a ‘brochure’. If this were not so, then these particular information obligations might not apply, although it would then have to be considered to what extent the obligations in the Directive 97/7 might require the provision of the equivalent items of information under its provisions. This matter is considered further in Part 2, below.

The second stage at which information has to be provided is at a point before the contract is concluded. Art. 4(1) lit. (a) states that the consumer has to be provided with information about (i) passport and visa requirements applicable to nationals of the member state(s) concerned, in particular on the periods for obtaining these; and (ii) information on the health formalities required both for the journey and the stay. This information must be provided ‘in writing or any other appropriate form’.

The third stage is the period ‘in good time before the start of the journey’, which, presumably, means that a contract has already been concluded. Here, the consumer must be given information – again ‘in writing or any other appropriate form’ about the following:

(i) times/places of intermediate stops and transport connections
(ii) details of the travel accommodation (‘place to be occupied by the traveller’), such as the cabin/berth on a ship or sleeper compartment on a train
(iii) name/address/telephone number of organiser’s and/or retailer’s local representative; alternatively, of local agencies who could assist the consumer in cases of difficulty. If none of these is available, the consumer must be given an emergency contact number for the organiser/retailer.
(iv) Where journeys/stays abroad by minors: information enabling contact with the child/person responsible for the child

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2045 Article 4(1) lit. (b).
2046 Article 4(1) lit. (b).
(v) Optional insurance policy to cover the cost of cancellation by the consumer; or of assistance, including repatriation, in the event of accident/illness.

The fourth, and final, stage at which the Directive mandates the provision of specific information to the consumer is in the contract document itself. Article 4(2) lit. (a) requires that the contract includes at least all the items listed in the Annex to the Directive, which are:

(a) the travel destination(s), and, where periods of stay are involved, the relevant periods with dates;
(b) the means, characteristics and categories of transport to be used, the dates, times and points of departure and return;
(c) where the package includes accommodation, its location, its tourist category or degree of comfort, its main features, its compliance with the rules of the host member state concerned and the meal plan;
(d) whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation;
(e) the itinerary;
(f) visits, excursions or other services which are included in the total price agreed for the package;
(g) the name and address of the organiser, the retailer, and, where appropriate, the insurer;
(h) the price of the package, an indication of the possibility of price revision under Article 4(4) and an indication of any dues, taxes or fees chargeable for certain services (landing, embarkation or disembarkation fees at airports, tourist taxes) where such costs are not included in the package;
(i) the payment schedule and method of payment;
(j) special requirements which the consumer has communicated to the organiser or retailer when making the booking, and which have been accepted;
(k) periods within which the consumer must make any complaint concerning failure to perform or improper performance of the contract.
The terms of the contract must be in writing, or ‘in such other form as is comprehensible and accessible to the consumer’. All the information also has to be ‘communicated’ to the consumer before the conclusion of the contract, which does not seem to require that the consumer is given this information in writing before the contract is concluded. Article 4(2) lit. (b) goes on to say that the consumer must be given a copy of these terms.

The table on the next page seeks to indicate how the various items of information that may have to be provided in the course of concluding a contract for a package holiday are distributed across the four stages mentioned above. It will be seen from this that despite the rather extensive list of items, there is only a limited amount of duplication. The only noticeable duplication arises where a consumer is given a brochure and subsequently books a contract based on that brochure. However, in circumstances where a consumer does not rely on a brochure, there will be almost no duplication at all.
<table>
<thead>
<tr>
<th>Item of information</th>
<th>Brochure 2047</th>
<th>Before contract 2048</th>
<th>Before journey 2049</th>
<th>Contract 2050</th>
</tr>
</thead>
<tbody>
<tr>
<td>Price</td>
<td>✔</td>
<td></td>
<td></td>
<td>✔</td>
</tr>
<tr>
<td>(including information about price revision)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Indication of any dues, taxes or fees chargeable for certain services (landing,</td>
<td></td>
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<tr>
<td>embarkation or disembarkation fees at airports, tourist taxes) where such costs</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>are not included in the package</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2047 It is assumed that the information here must be given in writing.
2048 This information has to be given in writing or any other appropriate form.
2049 In writing or any other appropriate form
2050 In writing or such other form as is comprehensible and accessible to the consumer.
<table>
<thead>
<tr>
<th>Item of information</th>
<th>Brochure 2047</th>
<th>Before contract 2048</th>
<th>Before journey 2049</th>
<th>Contract 2050</th>
</tr>
</thead>
<tbody>
<tr>
<td>Destination and means, characteristics and categories of transport used</td>
<td>✓</td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(times/places of intermediate stops and transport connections and details of place to be occupied by traveller)</td>
</tr>
<tr>
<td>Type of accommodation, its location, category or degree of comfort and its main features; its approval and tourist classification under the rules of the host member state concerned</td>
<td>✓</td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Meal plan</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Itinerary</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Item of information</td>
<td>Brochure(^{2047})</td>
<td>Before contract(^{2048})</td>
<td>Before journey(^{2049})</td>
<td>Contract(^{2050})</td>
</tr>
<tr>
<td>-------------------------------------------------------------------------------------</td>
<td>----------------------</td>
<td>-----------------------------</td>
<td>---------------------------</td>
<td>----------------------</td>
</tr>
<tr>
<td>General information on passport and visa requirements for nationals of the member state or states concerned</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Health formalities required for the journey and the stay</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance / payment plan</td>
<td>✓</td>
<td></td>
<td></td>
<td>✓ (payment schedule and method of payment)</td>
</tr>
<tr>
<td>Whether a minimum number of persons is required for the package to take place and if so, the deadline for informing the consumer in the event of cancellation</td>
<td>✓</td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Name and address of the organiser, the retailer, and, where appropriate, the insurer</td>
<td></td>
<td></td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Item of information</td>
<td>Brochure</td>
<td>Before contract</td>
<td>Before journey</td>
<td>Contract</td>
</tr>
<tr>
<td>-----------------------------------------------------------------------------------</td>
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<td>----------</td>
</tr>
<tr>
<td>Name/address/telephone number of organiser’s and/or retailer’s local representative; alternatively, of local agencies who could assist the consumer in cases of difficulty. If none of these is available, the consumer must be given an emergency contact number for the organiser/retailer</td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Where journeys/stays abroad by minors: information enabling contact with the child/person responsible for the child</td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Optional insurance policy to cover the cost of cancellation by the consumer; or of assistance, including repatriation, in the event of accident/illness</td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Visits, excursions or other services which are included in the total price agreed for the package</td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Special requirements which the consumer has communicated to the organiser or retailer when making the booking, and which have been accepted</td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Periods within which the consumer must make any complaint concerning failure to perform or improper performance of the contract</td>
<td></td>
<td></td>
<td>✓</td>
<td></td>
</tr>
</tbody>
</table>

This Directive does not mandate that any particular information is given to a consumer. It may be that the requirement that a term is not contrary to ‘good faith’\textsuperscript{2051} embodies the obligation to disclose particularly onerous terms to the consumer before a contract is concluded. This is possibly reinforced by one of the indicative terms in the Annex: term (i) states that a term which binds a consumer to all the terms of in the contract without having had an opportunity to become acquainted with them before the conclusion of the contract is potentially unfair. This, in turn, suggests that adequate transparency regarding the terms of a contract before its conclusion would reduce the likelihood of a particular term being found to be unfair subsequently. The Directive also imposes a form requirement in that all written contract terms must be in ‘plain and intelligible language’\textsuperscript{2052}.

4. Timeshare Directive

The Directive 94/47 contains an extensive catalogue of items of information which must be disclosed to a consumer at two stages in the process of acquiring a property on a time-share basis: (i) when information about a property is requested; and (ii) when the contract is drawn up. The Annex to the Directive contains a minimum list of information that must be provided to a consumer. The table below illustrates when these items are to be provided.

There is no requirement in this Directive that the information must be given in any particular form; crucially, there is no mention of information having to be in plain and intelligible language. A consumer who requests information about a timeshare property under Article 3(1) is entitled to receive ‘brief and accurate’ information. The contract for the acquisition of a timeshare right has to be in the language of the member state where the purchaser resides or of which he is a national. Also, the relevant information, both at the time of enquiring and in the contract itself, must be written – but there is no mention of alternative forms such as a ‘durable medium’.

\textsuperscript{2051} Article 3(1).
\textsuperscript{2052} Article 5.
The Directive 94/47 contains a sanction for circumstances where some of the required information is not given. Thus, Article 5(1) permits an extension of the withdrawal period to up to 3 months from conclusion of the contract where the items listed in that article are not provided. The final column in the table identifies the items of information which must be provided to avoid triggering the extension of the withdrawal period under Article 5(1). Where there is an omission to provide any other item of information required under Articles 3 and/or 4, no specific sanction is envisaged in the Directive.

As the Comparative Analysis of this Directive reveals, member states have adopted sanctions of varying kinds to deal with a failure to comply with the information duties.
### Item of Information

<table>
<thead>
<tr>
<th>Request</th>
<th>Contract</th>
<th>Withdrawal</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

(a) The identities and domiciles of the parties, including specific information on the vendor's legal status at the time of the conclusion of the contract and the identity and domicile of the owner.

(b) The exact nature of the right which is the subject of the contract and a clause setting out the conditions governing the exercise of that right within the territory of the member state(s) in which the property or properties concerned relates is or are situated and if those conditions have been fulfilled or, if they have not, what conditions remain to be fulfilled.

(c) When the property has been determined, an accurate description of that property and its location.
<table>
<thead>
<tr>
<th>Item of Information</th>
<th>Request</th>
<th>Contract</th>
<th>Withdrawal</th>
</tr>
</thead>
<tbody>
<tr>
<td>(d) Where the immovable property is under construction:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1) the state of completion;</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
</tr>
<tr>
<td>(2) a reasonable estimate of the deadline for completion of the immovable property;</td>
<td>✔️</td>
<td>✔️</td>
<td>✔️</td>
</tr>
<tr>
<td>(3) where it concerns a specific immovable property, the number of the building</td>
<td>✔️</td>
<td>✔️</td>
<td>✗</td>
</tr>
<tr>
<td>permit and the name(s) and full address(es) of the competent authority or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>authorities;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(4) the state of completion of the services rendering the immovable property fully</td>
<td>✔️</td>
<td>✔️</td>
<td>✗</td>
</tr>
<tr>
<td>operational (gas, electricity, water and telephone connections);</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(5) a guarantee regarding completion of the immovable property or a guarantee</td>
<td>✔️</td>
<td>✔️</td>
<td>✗</td>
</tr>
<tr>
<td>regarding reimbursement of any payment made if the property is not completed</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>and, where appropriate, the conditions governing the operation of those</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>guarantees.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(e) The services (lighting, water, maintenance, refuse collection) to which the</td>
<td>✔️</td>
<td>✔️</td>
<td>✗</td>
</tr>
<tr>
<td>purchaser has or will have access and on what conditions.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(f) The common facilities, such as swimming pool, sauna, etc., to which the</td>
<td>✔️</td>
<td>✔️</td>
<td>✗</td>
</tr>
<tr>
<td>purchaser has or may have access, and, where appropriate, on what conditions.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(g) The principles on the basis of which the maintenance of and repairs to the</td>
<td>✔️</td>
<td>✔️</td>
<td>✗</td>
</tr>
<tr>
<td>immovable property and its administration and management will be arranged.</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Item of Information

<table>
<thead>
<tr>
<th>Item of Information</th>
<th>Request</th>
<th>Contract</th>
<th>Withdrawal</th>
</tr>
</thead>
<tbody>
<tr>
<td>(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.</td>
<td>✗</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>(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).</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>(j) A clause stating that acquisition will not result in costs, charges or obligations other than those specified in the contract.</td>
<td>✗</td>
<td>✓</td>
<td>✗</td>
</tr>
<tr>
<td>(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 organized by the vendor or by a third party designated by him in the contract.</td>
<td>✗</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>(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.</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>(m) The date and place of each party's signing of the contract.</td>
<td>✗</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>
5. Distance Selling Directive

The Directive 97/7 also requires the provision of specific items of information, both before and after a contract is concluded. Unlike the Directives 90/314 and 94/47, the Directive 97/7 specifies broad categories of information, because the Directive applies to the sale of a wide range of goods and services at a distance and can therefore only state generally applicable items of information.

Article 4 specifies a list of items which must be given before a contract is concluded. This information must be provided in a ‘clear and comprehensible manner in any way appropriate to the means of distance communication used’. These items are:

(a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
(b) the main characteristics of the goods or services;
(c) the price of the goods or services including all taxes;
(d) delivery costs, where appropriate;
(e) the arrangements for payment, delivery or performance;
(f) the existence of a right of withdrawal, except in the cases referred to in Article 6 (3);
(g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
(h) the period for which the offer or the price remains valid;
(i) 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.

Article 5 requires written confirmation of the information listed in paragraphs (a)-(f) above ‘in good time during the performance of the contract’, and no later than the delivery of goods. Instead of in writing, the information may be provided in a ‘durable medium available and accessible’ to the consumer. However, it is acknowledged that this provision can result in the duplication of information which has already been given in pursuance of Article 4, and Article 5 therefore provides that where the consumer has already received this information in
writing or in another durable medium before the contract was concluded, there is no need to repeat this information. However, there is a requirement to provide information on the following in addition to the items already mentioned:

(i) written information on the conditions and procedures for exercising the right of withdrawal, within the meaning of Article 6, including the cases referred to in the first indent of Article 6(3),

(ii) the geographical address of the place of business of the supplier to which the consumer may address any complaints,

(iii) information on after-sales services and guarantees which exist,

(iv) the [conditions]\(^{2053}\) for cancelling the contract, where it is of unspecified duration or a duration exceeding one year.

The Directive does not provide any specific sanctions for failing to provide the information required by Article 4. A failure to provide written confirmation of the information as required by Article 5 will, however, result in an extension of the period during which the consumer may exercise the right of withdrawal provided by Article 6 from the basic 7-day period to 3 months.

6. Price Indications Directive

This Directive requires the provision of pricing information in a particular format: the provision of the selling price and the unit price. Thus, in situations within the scope of this Directive, pricing information must comply with the requirements of this Directive. Where the price is given, it must be ‘unambiguous, easily identifiable and clearly legible.’\(^{2054}\) Again, no specific sanctions for failing to comply with this Directive are provided, and this matter is left to the member states.\(^{2055}\)

\(^{2053}\) Note: In the official text of the Directive, the word “conclusions” is used. This seems to be a mistake, albeit one that appears not to have been corrected so far. The German version of the Directive uses the term “Kündigungsbedingungen” (our emphasis), and the French version refers to “les conditions de résiliation”, which strongly suggests that the English word here ought to be “conditions”, as substituted in the list in the main text.

\(^{2054}\) Article 4(1).

\(^{2055}\) Article 8.
7. **Injunctions Directive**

This Directive does not contain any information duties. It is relevant to the extent that it provides a mechanism to deal with a failure to comply with the information duties in other Directives, because it enables qualified entities to take action to prevent a continuing failure by a trader to provide information that is required by a particular directive.

8. **Consumer Sales Directive**

This Directive contains specific information requirements only in respect of ‘guarantees’.\(^\text{2056}\)

This provision requires that a guarantee must contain information about:

(i) the consumer’s legal rights under the national legislation on the sale of goods, and make clear that these rights are unaffected by the guarantee;

(ii) the contents of the guarantee, including duration and territorial scope of the guarantee

(iii) the essential particulars for making a claim, including the name and address of the guarantor.

A guarantee must be made available on request in writing or in another durable medium available and accessible to the consumer. It also has to set out the contents and essential particulars in plain and intelligible language. Somewhat strangely, the requirement of plain and intelligible language does not appear to extend to the first item (the reference to the consumer’s legal rights). However, if the guarantee is enforceable as a contract, the corresponding requirement in the Directive 93/13 may fill this gap in any event.

It may also be noted that it has been suggested by various commentators that Article 2 on ‘conformity with the contract’ could be read as containing an implied information obligation. This is because a seller who makes a consumer aware of a particular lack of conformity will not be liable for the goods’ non-conformity. Commentators have interpreted this in different

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\(^{2056}\) Article 6.
ways, including as an obligation to disclose information,\textsuperscript{2057} an “indirect information requirement”,\textsuperscript{2058} or a simple “encouragement to disclose information”.\textsuperscript{2059}

\textsuperscript{2057} See e.g., \textit{Riesenhuber}, Party Autonomy and Information in the Sales Directive” in: Grundmann/Kerbet/Weatherill, Party Autonomy and the Role of Information in the Internal Market.

\textsuperscript{2058} See \textit{Wilhelmsson}, Remedies against Breach of Information Requirements, in Schulze/Ebers/Grigoleit in: Informationspflichten und Vertragsschluss in Acquis communautaire.

III. Issues Common to Several Directives

The preceding overview of the various information duties in the 8 Directives under review in this study reveals a number of issues that may require consideration. Key matters in respect of which there is divergence between the directives relate to the form in which information is presented, and sanctions for failing to comply with these information obligations. Moreover, there may be circumstances where a transaction comes within the scope of more than one directive (e.g., where a package travel holiday is booked via a website), which may result in unnecessary duplication of information. We will consider these issues in turn.

1. Form in which information to be provided

The Directives which impose information duties also specify the form in which this information has to be given. However, as the directives were adopted over a period of 15 years, there is a degree of incoherence/inconsistency in the form requirements. The table below lists the various form requirements found in the directives.

<table>
<thead>
<tr>
<th>Directive</th>
<th>Form Requirement(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Doorstep Selling (85/577)</td>
<td>Written Notice (Art. 4)</td>
</tr>
<tr>
<td>Package Travel (90/314)</td>
<td>Legible, comprehensible and accurate (Art. 3(2)) [brochure]</td>
</tr>
<tr>
<td></td>
<td>In writing or other appropriate form (Art. 4(1)) [pre-contract]</td>
</tr>
<tr>
<td></td>
<td>In writing or such other form as is comprehensible and accessible to the consumer (Art. 4(2)(b)) [contract]</td>
</tr>
<tr>
<td>Unfair Terms (93/13)</td>
<td>If contracts in writing, must be in plain and intelligible language (Art. 5)</td>
</tr>
<tr>
<td>Timeshare (94/47)</td>
<td>Contract in writing and language of member state (Art. 4)</td>
</tr>
</tbody>
</table>
This overview demonstrates that there is a degree of variation in the form requirements for the provision of information. It would be desirable to consider a uniform approach to the question of form of information, to improve overall coherence and to reduce the risk of compliance difficulty for business.

### 2. Sanctions for failing to provide information

One of the glaring gaps in all the directives imposing information obligations is a consistent scheme of sanctions for a failure to comply with such an obligation. In the directives imposing a right of withdrawal, not providing some of the information, may result in an extension to the period during which the right of withdrawal may be exercised. However, even in those Directives, this sanction does not extend to all failures to comply with an information duty.

Beyond these situations, the consumer *acquis* in its present format does not envisage any particular sanctions, leaving the matter for the member states to resolve. In considering whether to improve the *acquis*, the question of sanctions for failing to correspond with information duties may be one matter that may need to be given some attention. It was not apparent from the reports by the national correspondents whether the lack of sanctions is an obvious barrier to trade. A divergence in the various national laws in this matter does, however, create at least the potential of creating a barrier to trade. Introducing uniform

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2060 See further the section on ‘withdrawal’ in this study.
2061 See the table on the Directive 94/47.
sanctions would, in that case, increase the likelihood of reducing such barriers. A clearer system of sanctions in this regard might also benefit consumer confidence, and therefore the operation of the internal market. However, this study has not discovered sufficiently strong evidence clearly to support the introduction of a coherent system of sanctions from the perspective of benefiting the internal market.

3. Overlapping information obligations

One of the matters which has not been resolved in the directives which impose information obligations is the problem that more than one directive may apply to particular types of contracts, with the consequence that a trader may be subject to more than one set of information rules. Of the Directives under consideration in this study, this problem is most likely to occur in respect of either package holiday contracts or timeshare contracts concluded at a distance. The Directive 97/7 provides broad pre-contractual information duties, combined with a requirement to confirm information in writing or in another durable medium once a contract has been concluded. The Directives 90/314 and 94/47 contain detailed itemisations of the information to be provided in respect of these particular types of contract. Where both Directives apply at the same time, the two respective sets of information duties overlap and the overall amount of information to be provided is extended. In some instances, information that is required by the Directives 90/314 and 94/47 may correspond to one of the broad headings in the Directive 97/7, which reduces the overall overlap. However, there will be aspects in respect of which there is no such overlap. The following two tables concentrate on the overlap between Distance Selling and Package Travel (grey shaded areas indicate areas where one of the directives adds to the information obligations in the other).

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2062 It may be asked whether timeshare contracts come within the scope of the Distance Selling Directive at all. Article 3(1) of the Directive 97/7 excludes “contracts for the construction and sale of immovable property or relating to other immovable property rights, except for rental”. Although the provision is not settled, the ECJ judgment in C-423/97 - Travel-VAC S.L. v Sanchis [1999] ECR I-2195, which involved an exclusion in very similar terms from the scope of the Directive 85/577, suggests that at least those timeshare contracts which provide more than a basic property right are covered in their entirety by the Directive 97/7 where the transaction falls within the scope of that Directive.
a. Pre-contractual information where package holiday sold by distance selling

<table>
<thead>
<tr>
<th>Information items in Distance Selling Directive</th>
<th>Corresponding information items in Package Travel Directive</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address</td>
<td>No corresponding requirement in this Directive</td>
</tr>
<tr>
<td>(b) the main characteristics of the goods or services;</td>
<td>(i) destination and means, characteristics and categories of transport used;</td>
</tr>
<tr>
<td></td>
<td>(ii) type of accommodation, its location, category or degree of comfort and its main features; its approval and tourist classification under the rules of the host member state concerned;</td>
</tr>
<tr>
<td></td>
<td>(iii) the meal plan;</td>
</tr>
<tr>
<td></td>
<td>(iv) the itinerary;</td>
</tr>
<tr>
<td>(c) the price of the goods or services including all taxes</td>
<td>Price (Art. 3(2) does not elaborate further on the exact information to be provided)</td>
</tr>
<tr>
<td>(d) delivery costs, where appropriate</td>
<td>(not appropriate)</td>
</tr>
<tr>
<td>Information items in Distance Selling Directive</td>
<td>Corresponding information items in Package Travel Directive</td>
</tr>
<tr>
<td>------------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>(e) the arrangements for payment, delivery or performance</td>
<td>either the monetary amount or the percentage of the price which is to be paid on account, and the timetable for payment of the balance; whether a minimum number of persons is required for the package to take place and if so, the deadline for informing the consumer in the event of cancellation</td>
</tr>
<tr>
<td>(f) the existence of a right of withdrawal, except in the cases referred to in Article 6 (3);</td>
<td>No corresponding requirement in this Directive – there is no right of withdrawal from package holidays under the Directive.</td>
</tr>
<tr>
<td>(g) the cost of using the means of distance communication, where it is calculated other than at the basic rate</td>
<td>No corresponding requirement in this Directive - this provision is specific to the Distance Selling Directive</td>
</tr>
<tr>
<td>(h) the period for which the offer or the price remains valid</td>
<td>No corresponding requirement in this Directive</td>
</tr>
<tr>
<td>(i) 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</td>
<td>(not appropriate)</td>
</tr>
</tbody>
</table>
### b. Confirmation of information where package holiday sold by distance selling

<table>
<thead>
<tr>
<th>Information items in Distance Selling Directive</th>
<th>Corresponding information items in Package Travel Directive</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address</td>
<td>the name and address of the organiser, the retailer, and, where appropriate, the insurer</td>
</tr>
</tbody>
</table>
(b) the main characteristics of the goods or services;

times/places of intermediate stops and transport connections
details of the travel accommodation (‘place to be occupied by the traveller’), such as the cabin/berth on a ship or sleeper compartment on a train
the travel destination(s), and, where periods of stay are involved, the relevant periods with dates
the means, characteristics and categories of transport to be used, the dates, times and points of departure and return
where the package includes accommodation, its location, its tourist category or degree of comfort, its main features, its compliances with the rules of the host member state concerned and the meal plan
the itinerary
visits, excursions or other services which are included in the total price agreed for the package
<table>
<thead>
<tr>
<th>Consumer Law Compendium</th>
<th>Comparative Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>D. Information duties</strong></td>
<td>740</td>
</tr>
</tbody>
</table>

- **(c) the price of the goods or services including all taxes**
  - the price of the package, an indication of the possibility of price revision under Article 4(4) and an indication of any dues, taxes or fees chargeable for certain services (landing, embarkation or disembarkation fees at airports, tourist taxes) where such costs are not included in the package.

- **(d) delivery costs, where appropriate**
  - (not appropriate)

- **(e) the arrangements for payment, delivery or performance**
  - whether a minimum number of persons is required for the package to take place and, if so, the deadline for informing the consumer in the event of cancellation.

- **(f) the existence of a right of withdrawal, except in the cases referred to in Article 6(3);**
  - No corresponding requirement in this Directive – there is no right of withdrawal from package holidays under the Directive.

written information on the conditions and procedures for exercising the right of withdrawal, within the meaning of Article 6, including the cases referred to in the first indent of Article 6(3),

- **No corresponding requirement in this Directive** – there is no right of withdrawal from package holidays under the Directive.
the geographical address of the place of business of the supplier to which the consumer may address any complaints | name/address/telephone number of organiser’s and/or retailer’s local representative; alternatively, of local agencies who could assist the consumer in cases of difficulty. If none of these is available, the consumer must be given an emergency contact number for the organiser/retailer

information on after-sales services and guarantees which exist | (not applicable)

the conditions\textsuperscript{2063} for cancelling the contract, where it is of unspecified duration or a duration exceeding one year | (not applicable)

\textsuperscript{2063} See comment made earlier about the use of this word.
<table>
<thead>
<tr>
<th>Information not required by the Distance Selling Directive</th>
<th>Where journeys/stays abroad by minors: information enabling contact with the child/person responsible for the child</th>
</tr>
</thead>
<tbody>
<tr>
<td>Optional insurance policy to cover the cost of cancellation by the consumer; or of assistance, including repatriation, in the event of accident/illness</td>
<td></td>
</tr>
<tr>
<td>Special requirements which the consumer has communicated to the organiser or retailer when making the booking, and which have been accepted</td>
<td></td>
</tr>
<tr>
<td>Periods within which the consumer must make any complaint concerning failure to perform or improper performance of the contract</td>
<td></td>
</tr>
</tbody>
</table>
The challenge for the *acquis* review is to consider whether the lengthy information catalogues in the Directives 94/47 and 90/314, in particular, are still required, or whether they can be shortened. In the Directive 90/314, there appears to be a limited amount of duplication in the way the particular items of information are expressed, but this is only a minor aspect.

**IV. Overall recommendations for the *acquis* review**

- There is an obvious need to consider whether the detailed lists of items of information to be provided need to be maintained.

- In particular, it is possible (i) to replace the detailed lists with more general requirements; or (ii) to consider whether particular items are not essential and could be deleted. An analysis of the various items of information found in the directives under review suggests that what is generally needed is information about the main characteristics of the goods or services, the price including delivery charges, taxes and other costs, the address and identity of the business with whom the consumer is transacting, the terms of the contract, the rights and obligations of both contracting parties, and any available redress procedures.

- Regard should also be had to the comparative analysis of the specific Directives, especially Directives 97/7, 90/314 and 94/47, for the national variations regarding the various information duties in these directives. In this regard, the question of overlapping information duties needs to be addressed.

- If it is desirable to retain more precise information catalogues, e.g., for Directive 90/314 or 94/47, it is recommended that consideration is given whether any of the additional items of information required by virtue of the implementing legislation in the member states should be added to the list (even if some existing items are removed).

- At the present time, the form requirements vary between the Directives. It should be made clear that information needs to be clear and precise, and expressed in plain and intelligible language. Moreover, unless a contract is concluded verbally in its entirety, the information should be provided in writing. In this context, it should be clarified that writing may be replaced by another textual form on a durable medium, provided this is reasonably accessible to the recipient.
Furthermore, there is no coherent system of sanctions for failing to comply with information duties in place. A special position is occupied by information about the right of withdrawal, where a failure to provide this information leads to an extension of the period during which this right may be exercised.\textsuperscript{2064} Beyond that, however, the situation is left unclear, and the member states have adopted rather diverse approaches (see the comparative reports on Directives 97/7, 90/314, and 94/47, in particular). A failure to comply with these obligations can be the subject of an action for an injunction (as per Directive 98/27). As far as individual consumers are concerned, a clearer rule regarding sanctions should be adopted; in this regard, it may be considered whether a failure to comply with information duties should result in the non-enforceability of contracts against a consumer (as is the case in many member states), or a claim for damages.

\textsuperscript{2064} See further, section on ‘right of withdrawal’.
Part 5.

**Recommendations**

_Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers_

The following conclusions and recommendations are based on the analysis of legal issues carried out in this study. The results of the analysis illustrate and confirm the need for action in the field of EC consumer law for several reasons.

Firstly, the Directives are often incoherent, and contain a significant number of ambiguities, which makes it difficult to transpose them into domestic law, and to ensure correct application by the courts. Consequently, one key recommendation is to remove such incoherencies and ambiguities and at the same time to consolidate and harmonise issues currently distributed across several Directives. This should make EC consumer law easier to access.

Moreover, the comparative analysis has revealed areas where the laws of the member states in the field of the Directives differ considerably. Often, the reason for such variations is that the corresponding provision of the respective Directive contains a gap which the member states have tried to fill with national laws. Many of the recommendations made in this study are based on this observation. Finally, other proposals seek to overcome barriers to trade, which are due to differences between the laws of the member states. Such differences are mainly due to the minimum clauses and options contained in the directives, but sometimes also due to gaps in the Directives, or incorrect transposition. It is suggested to remove these differences in particular in the field of information duties, withdrawal rights and formal requirements. This should considerably facilitate cross border business, especially for SMEs.

**A. Creating common uniform definitions and basic rules for all consumer law directives**

Certain definitions and consumer protection devices are to be found in all, or at least several, of the consumer protection directives. In addition to the definition of consumer and the other party to the contract, the business, these are mainly information duties, withdrawal rights and rules making consumer rights mandatory.
The relevant rules in the individual directives show significant differences in wording, style and content. There seem to be practically no differences due to peculiarities of the particular aspect of consumer protection addressed by a directive. The vast majority of these discrepancies are simply inconsistencies resulting from the piecemeal approach in adopting EC legislation over more than 20 years. Such inconsistencies cause difficulties in the transposition and application of EC consumer law, which should be removed. This would identify a ‘common core’ within the EC Consumer Acquis. Therefore it is suggested that the following matters should be treated uniformly in the Acquis:

- Definition of consumer
- Definition of business
- Some technical definitions like “in writing” or “durable medium”
- Some basic information duties common to the contract law directives
- General rules on the withdrawal period, the exercise of the withdrawal and its effect
- A rule making consumer rights generally mandatory
- Consumer rights in case of choice of law clauses

B. Re-structuring the consumer acquis through a horizontal consumer protection measure

One possible way forward is to bring together the common EC consumer acquis elements listed above in a horizontal measure (whether that be a new Directive, or a Regulation similar to Regulation 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits, which has horizontal application), which would then contain key general rules applicable also to all relevant consumer protection directives.

Such a horizontal measure should also include those provisions of the existing directives which are applicable to all contracts concluded between a business and a consumer. These provisions, applicable not only to a certain type of contract, but to all contracts for the supply of goods and services, are mainly to be found in the Unfair Contract Terms Directive, the Doorstep Selling and the Distance Selling Directive.
The proposed horizontal measure could have the following basic structure:

Definitions
- Definition of consumer *(along the lines sketched out in Part 4.A.; in particular clarification with regard to mixed purpose cases)*
- Definition of business *(along the lines sketched out in Part 4.B; in particular clarification with regard to non-profit organisations and clarification that public bodies can also be business)*
- Definition of “in writing”
- Definition of “durable medium” *(the latter along Art. 2 lit. f of Directive 2002/65)*

General rules
- Scope of application of the horizontal measure
- Rule spelling out which rules are full harmonisation and which are minimum *(along the lines sketched out below under Point IV)*
- A rule making consumer rights mandatory
- Consumer rights in case of choice of law clauses (or – if possible – leaving this to a future Rome I Regulation)

General Information Duties *(along the lines sketched out in Part 4.D.; an indicative draft of the Acquis Group is under preparation)*
- Pre-contractual information duties
- Contractual information duties
- Formal requirements of information
- Language in which information to be provided
- Sanctions for breach of information duties

Withdrawal *(along the lines sketched out in Part 4.C; a indicative draft of the Acquis Group is under preparation)*

Rights to withdraw from a contract
- Contracts concluded outside business premises (Doorstep and Distance Selling)
- Reference to other withdrawal rights granted outside the horizontal measure

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2065 To be published in June 2007; preliminary version delivered to the Commission in the course of the Common Frame of Reference Exercise in December 2005.
2066 To be published in June 2007; preliminary version delivered to the Commission in the course of the Common Frame of Reference Exercise in April 2006.
Exercise and Effects of Withdrawal

- Length of period
- Start and computation of period
- Rights and obligations during the period for withdrawal
- Obligation to inform about right of withdrawal
- Sanctions in case of breach of this obligation
- Exercise of right of withdrawal
- Effects of withdrawal
- Credit agreements
- Unravelling of contract after withdrawal

Unfair Terms (along the lines sketched out in Part 3.C.; an indicative draft of the Acquis Group is under preparation)^2067

- Definition
- General clause
- etc

It would then have to be decided whether the remaining contract law consumer acquis, mainly the Consumer Sales, Package Travel, Timeshare, and Consumer Credit Directives (the latter outside the scope of this study), but also, for example, the specific information duties in the field of Distance Selling and Distance Selling of Financial Services, should remain in separate directives or be included in the proposed horizontal measure.

In any case, such a horizontal measure would have to take into account some other fields of EC legislation related to consumer contract law, e.g. the Unfair Commercial Practices Directive, the E-Commerce Directive, the Product Liability Directive, the Insurance Law Directives, Investment Services Directive, the Brussels I Regulation, and the possible Rome I Regulation.

The Injunctions Directive, the Enforcement Regulation and the Unit Prices Directive mainly deal with matters unrelated to contract law and therefore could remain as stand-alone

^2067 To be published in June 2007; preliminary version delivered to the Commission in the course of the Common Frame of Reference Exercise in March 2006.
measures. However, the definition of ‘consumer’ could be applied uniformly across all these measures.

C. Issues concerning individual Directives

The analysis has revealed a number of inconsistencies, as well as gaps and barriers to trade, affecting particular directives, which should be tackled in the course of the consumer acquis review. These proposals are summarised at the end of the Executive Summaries of the report on each of the Directives and therefore do not need to be repeated here in detail. Core proposals are

I. Doorstep Selling

- Incorporation of the Directive into the horizontal measure
- Inclusion of contracts concluded in public places outside business premises
- Uniform rules on withdrawal period, exercise of withdrawal, effects of withdrawal (see above)

II. Package Travel

- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the definition into the horizontal measure
- Definition of ‘organiser’: adaptation to a coherent definition of the business by incorporation of the Definition into the horizontal measure
- Inclusion of tailor-made packages offered by travel agencies in accordance with the ECJ ruling Club Tour
- Clarification that Article 5 also grants a right to compensation for non-material damage, in particular, that such compensation can arise from the loss of enjoyment (ECJ Simone Leitner)
III. Unfair Terms

- Incorporation of the Directive into the horizontal measure
- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law
- Definition of ‘seller or supplier’: adaptation to a coherent definition of the business
- Clarifications, e.g., with regard to the scope of application, the unfairness test and the consequences of unfairness and intransparency (as sketched out in Part 3 under C).

IV. Timeshare

- Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the Definition into the horizontal measure
- Definition of ‘vendor’: adaptation to a coherent definition of the business in EC consumer law by incorporation of the Definition into the horizontal measure
- Extension of the scope of application to contracts where timeshares rights are resold by another consumer through a professional agent
- Dropping or lowering the requirements of the minimum duration of 3 years and the minimum annual period of a 7 days
- Inclusion of timeshare objects other than buildings like camping grounds, caravans, boats mobile homes and other movable objects, which can be used for the purpose of accommodation
- Inclusion of holiday clubs
- Reducing the detailed lists of information to be provided by using a general clause (to be included in the Horizontal Directive), supplemented by an indicative list of core information; in particular on costs including maintenance costs
- In principle, uniform rules on withdrawal period, exercise of withdrawal, effects of withdrawal (to be included in the Horizontal Directive), but adaptations due to the peculiarities of timeshare contracts (possibly longer withdrawal period)

V. Distance Selling

- Incorporation of the Directive into the horizontal measure
• (New) definition of “auction”, clarifying that Ebay auctions do not fall under this exception
• Harmonisation of the pre-contractual information duties with Directive 2002/65 and the law of those member states which made use of the minimum clause
• Uniform rules on withdrawal period, exercise of withdrawal, effects of withdrawal (to be included in the Horizontal Directive)

VI. Consumer Sales

• Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the Definition into the horizontal measure
• Definition of ‘seller’: adaptation to a coherent definition of business in EC consumer law by incorporation of the Definition into the horizontal measure
• Definition of ‘goods’, in particular with regard to software and other digital products
• Further considering of a direct producer liability

VII. Injunctions Directive

• Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the Definition into the horizontal measure
• Clarification of the relationship with Directive-specific enforcement mechanisms such as Art.11 of Directive 97/7/EC and Art.7 of Directive 93/13/EEC; possibly deletion of the specific provisions

VIII. Unit Prices

• Definition of ‘consumer’: adaptation to a coherent definition in EC consumer law by incorporation of the Definition into the Horizontal Directive
• Establishing a definition of “small retail businesses” with the aim of achieving more coherent national legislation
D. Full Harmonisation and Remaining Scope for Member States

The study, in particular the analysis of the transposition measures enacted by the member states, shows to what extent member states have made use of minimum clauses and options. The results permit an assessment of the possible effects of moving towards full harmonisation in the areas covered by this study. Some, but not as many as may be expected, aspects are likely to be controversial for some member states, where full harmonisation would force them to reduce their established level of consumer protection. Should the shift to full harmonisation become reality, it would have to be considered whether these areas should not be subject to this approach, and remain subject to minimum harmonisation. Member states might also be keen to have an ‘safeguard procedure’, allowing them to enact urgent short term consumer protection measures in full harmonisation areas, as long as the EC does not act. The provisions of Article 95 EC would serve as a useful model; indeed, it is unfortunate that those provisions do not currently include consumer protection within its scope.

With regard to the Unit Prices Directive, it must be borne in mind that this Directive has been enacted on the basis (of the predecessor) of Art. 153 of the EC Treaty. Because of Art. 153 para 5 EC Treaty, the Directive would continue to be just a minimum harmonisation measure even if its Art. 10 were deleted.

The analysis reveals also that even a broad shift from minimum to full harmonisation in the field of the EC consumer directives would leave the member states regulatory freedom for all areas outside the scope of the directives or not regulated therein, e.g. with regard to persons other than consumers, other types of contracts or other consumer protection instruments not provided for in the directives.

With regard to all of these considerations, there is no, or at least not a very strong, argument against a selective shift to full harmonisation in those areas where the use of minimum clauses by the member states has clearly caused barriers to trade without substantially increasing consumer protection. Such fields may be, as already said, rules on pre-contractual information duties, in particular on brochures, and the information of the consumer about his right of withdrawal. The latter would consequently also require full harmonisation of certain general
elements of the technicalities of the withdrawal rights like the length, the beginning and the calculation of the period, and the formalities for exercising the withdrawal right.

E. Other Matters to be considered

I. Translation Issues

The analysis of the laws of the member states in the areas covered by the Directive revealed numerous instances of variation, which, as already noted above, tend to be caused by ambiguities or inconsistencies in the relevant directives. On occasion, it seems that these problems may have been caused also by variations in the substantive meaning of particular provisions in the different language versions of the directives. This may be the result of the inherent differences in legal terminology between the various member states, but may also, in part, be the consequence of the challenges posed by the task of having to translate the text of a directive into the many official languages of the EU, where there is a risk that inconsistencies may creep in. The full success of a wholesale reform to the consumer acquis might depend on addressing this risk during the review process.

II. A cross-border measure?

Some consideration could be given to the possibility of adopting a measure dealing specifically with cross-border consumer transactions, to give a boost to consumer utilisation of the internal market, particularly once the Common Frame of Reference project has come to fruition. Such a measure would apply across the EU, and any consumer transaction which is conducted across borders would be covered by this measure. A number of difficult questions would need to be addressed if that option were to be pursued, including (i) would such a measure be mandatory?; (ii) would consumers be permitted to opt-out in favour of a more protective domestic law; (iii) would this measure complement or replace the programme of harmonising domestic consumer law? This possibility would require further careful analysis which exceeds the boundaries of this project.
III. Improving cross-border redress

A gap in the current acquis which is often pointed out is that there continue to be difficulties in enforcing consumer rights across the EU. Although consumers can be confident that they enjoy a similar level of protection, no matter where they shop, they may be put off doing so by the difficulty of taking action if something they have bought is faulty. The question of cross-border redress in individual consumer cases also falls outside the scope of this study, but it may be desirable to investigate this further as part of the overall improvements to the consumer acquis.
ANNEX A: ABBREVIATIONS

ABGB  *Allgemeines bürgerliches Gesetzbuch*, Civil Code (Austria)

AMG  *Arzneimittelgesetz*, Medicines Act (Germany)

AT  Austria

ATOL  Air Travel Organiser’s licence (UK)

B2B  business-to-business

B2C  business-to-consumer

BE  Belgium

BGB  *Bürgerliches Gesetzbuch*, Civil Code (Germany)

BGB-InfoV  *Verordnung über Informations- und Nachweispflichten nach bürgerlichem Recht* (*BGB-Informationspflichten-Verordnung*), Regulation on duties to supply information in civil law (Germany)

BGH  *Bundesgerichtshof*, Federal Court of Justice (Germany)

C2C  consumer-to-consumer

CA  Court of Appeals

CA  Contracts Act (Finland, Sweden)

Cap.  Chapter (Malta)

Cass. civ.  Cour de cassation, Civil chamber (France)

CC  Civil Code

CCA  Civil Aviation Authority (UK)

CCSACCA  Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the CC (Poland)

cf.  confer (compare)


CO  Consumer Ombudsman (Finland)
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>CPA</td>
<td>Consumer Protection Act (Estonia, Portugal, Finland)</td>
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<td>CTA</td>
<td>Contract Terms Act (Sweden)</td>
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<td>CY</td>
<td>Cyprus</td>
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<td>CZ</td>
<td>Czech Republic</td>
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<td>Denmark</td>
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<td>DKK</td>
<td>Danish Krone</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECR</td>
<td>European Court Reports</td>
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<td>EE</td>
<td>Estonia</td>
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<td>EEA</td>
<td>European Economic Area</td>
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<td>EL</td>
<td>Greece</td>
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<td>ERPL</td>
<td>European Review of Private Law</td>
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<td>ES</td>
<td>Spain</td>
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<td>ESC</td>
<td>escudo (Portuguese currency before euro)</td>
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<td>et seq.</td>
<td>et sequence / et sequentia (and the following one or ones)</td>
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<td>F</td>
<td>Franc (Belgian currency before introduction of euro)</td>
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<td>FI</td>
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<td>FR</td>
<td>France</td>
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<td>HU</td>
<td>Hungary</td>
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<td>HWG</td>
<td>Heilmittelwerbegesetz, Medicine Advertisement Act (Germany)</td>
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<td>IE</td>
<td>Ireland</td>
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<tr>
<td>InvG</td>
<td>Investmentgesetz, Investment Act (Germany)</td>
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<td>IT</td>
<td>Italy</td>
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<tr>
<td>KSchG</td>
<td>Konsumentenschutzgesetz, Consumer Protection Act (Austria)</td>
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<td>lit.</td>
<td>litera/letter</td>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>Lm</td>
<td>Maltese lira</td>
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<tr>
<td>LOA</td>
<td>Law of Obligations Act (Estonia)</td>
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<td>LOCM</td>
<td><em>Ley del Comercio Minorista</em>, Law of Retail Trade (Spain)</td>
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<td>LPA</td>
<td>Liberal Professions Act (Belgium)</td>
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<td>LT</td>
<td>Lithuania</td>
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<td>LU</td>
<td>Luxembourg</td>
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<td>LV</td>
<td>Latvia</td>
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<td>MS</td>
<td>Member State</td>
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<td>MT</td>
<td>Malta</td>
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<td>NL</td>
<td>Netherlands</td>
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<td>No.</td>
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<td>OFT</td>
<td>Office of Fair Trading (UK)</td>
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<td>OGH</td>
<td><em>Oberste Gerichtshof</em>, Supreme Court of Justice (Austria)</td>
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<td>OWiG</td>
<td><em>Ordnungswidrigkeitengesetz</em>, Regulatory Offences Act (Germany)</td>
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<tr>
<td>PECL</td>
<td>Principles of European Contract Law</td>
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<tr>
<td>PL</td>
<td>Poland</td>
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<tr>
<td>PLN</td>
<td>złoty (Polish currency)</td>
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<tr>
<td>PrAG</td>
<td><em>Preisauszeichnungsgesetz</em> (<em>Bundesgesetz über die Auszeichnung von Preisen</em>), Price Indication Act (Austria)</td>
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<tr>
<td>ProdHaftG</td>
<td><em>Produkthaftungsgesetz</em>, Product Liability Act (Germany)</td>
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<td>PT</td>
<td>Portugal</td>
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<tr>
<td>RD</td>
<td>Royal Decree (Belgium)</td>
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<td>reg.</td>
<td>regulation</td>
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<tr>
<td>Reisebüroausübungs-VO</td>
<td>Verordnung des Bundesministers für wirtschaftliche Angelegenheiten über Ausübungsvorschriften für das Reisebürogewerbe, Regulation on travel agencies (Austria)</td>
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<tr>
<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>RSV</td>
<td><em>Reisebürosicherungsverordnung</em>, Regulation on travel agencies implementing Art. 7 of the Package Travel Directive (Austria)</td>
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<td>SE</td>
<td>Sweden</td>
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<td>sec.</td>
<td>section</td>
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<td>sent.</td>
<td>sentence</td>
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<tr>
<td>SI</td>
<td>Slovenia</td>
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<tr>
<td>SIT</td>
<td>(currency in Cyprus)</td>
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<tr>
<td>SK</td>
<td>Slovakia</td>
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<tr>
<td>SMEs</td>
<td>Small and medium enterprises</td>
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<td>sub(s)</td>
<td>subsection(s)</td>
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<tr>
<td>TA</td>
<td>Travel Act (Belgium)</td>
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<tr>
<td>TNG</td>
<td><em>Teilzeitenutzungsgesetz – Bundesgesetz über den Erwerb von Teilzeitenutzungsrechten an unbeweglichen Sachen</em>, Timeshare Act (Austria)</td>
</tr>
<tr>
<td>TPA</td>
<td>Trade Practices Act (Belgium)</td>
</tr>
<tr>
<td>UCTA</td>
<td>Unfair Contract Terms Act 1977 (UK)</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>UKlaG</td>
<td><em>Unterlassungsklagengesetz</em>, Injunctions Act (Germany)</td>
</tr>
<tr>
<td>UTCC</td>
<td>Unfair Terms in Consumer Contracts (UK)</td>
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<tr>
<td>UTCCCR</td>
<td>Unfair Terms in Consumer Contracts Regulations (UK)</td>
</tr>
<tr>
<td>UWG</td>
<td><em>Bundesgesetz gegen den unlauteren Wettbewerb</em>, Act against unfair commercial practices (Austria, Germany)</td>
</tr>
<tr>
<td>VVG</td>
<td><em>Versicherungsvertragsgesetz - Gesetz über den Versicherungsvertrag</em>, Insurance Contract Act (Germany)</td>
</tr>
<tr>
<td>WiStG</td>
<td><em>Wirtschaftsstrafgesetz</em>, Economy penal code (Germany)</td>
</tr>
<tr>
<td>ZPO</td>
<td><em>Zivilprozessordnung</em>, Civil Procedure Code (Germany)</td>
</tr>
<tr>
<td>ZVG</td>
<td><em>Zwangsversteigerungsgesetz</em>, Compulsory Auctions Act (Germany)</td>
</tr>
</tbody>
</table>
ANNEX B: EUROPEAN COMMUNITY SOURCES OF LAW

A. TREATIES AND CONVENTION

Chronological order

EC Treaty

Rome I Convention
(Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (80/934/EEC); OJ L 266 of 9 October 1980, 0001-0019)

Treaty of Accession
(Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (member states of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union; OJ L 236 of 23 September 2003, 17-31)
B. REGULATIONS

Chronological order

Regulation 1182/71
(Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits; OJ L 124 of 8 June 1971, 1-2)

Regulation 1980/2000 also referred to as the Eco-Label Regulation

Regulation 44/2001 also referred to as the Brussels I Regulation

Regulation 2006/2004 referred to as the Enforcement Regulation

C. DIRECTIVES

Chronological order

Directive 85/374 also referred to as the Product Liability Directive
Directive 85/577 also referred to as the **Doorstep Selling Directive**

Directive 87/102 also referred to as the **Consumer Credit Directive**

Directive 90/314 also referred to as the **Package Travel Directive**

Directive 90/619

Directive 93/13 also referred to as the **Unfair Contract Terms Directive**

Directive 94/47 also referred to as the **Timeshare Directive**

Directive 97/7 also referred to as the **Distance Sale Directive**
Directive 98/6 also referred to as the Unit Prices Directive

Directive 98/27 also referred to as the Injunctions Directive

Directive 99/44 also referred to as the Consumer Sales Directive

Directive 2000/31 also referred to as the E-Commerce Directive

Directive 2002/65 also referred to as the Distance Selling of Financial Services Directive

Directive 2002/83

D. EUROPEAN COURT OF JUSTICE JUDGMENTS

Ordered by case numbers


C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 (joined cases) Dillenkofer v Bundesrepublik Deutschland [1996] ECR I-04845

C-269/95 – Francesco Benincasa v Dentalkit Srl [1997] ECR I-3767


C-410/96 – André Ambry [1998] ECR I-07875

C-140/97 – Rechberger, Greindel. Hofmeister etc. v Republik Österreich [1999] ECR I-03499


C-240/98 to C-244/98 (joined cases) – Océano Grupo Editorial SA v Murciano Quintero [2000] ECR I-04941

C-319/98 – Commission v Belgium [1999] ECR I-01201


C-144/99 – Commission v Kingdom of the Netherlands [2001] ECR I-03541


C-541/99 and C-542/99 (joined cases) – Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl [2001] ECR I-9049

C-96/00 – Rudolf Gabriel [2002] ECR I-06367

C-167/00 – Verein für Konsumenteninformation v Henkel [2002] ECR I-08111

C-168/00 – Simone Leitner v TUI Deutschland GmbH & Co KG [2002] ECR I-02631

C-183/00 – María Victoria González Sánchez v Medicina Asturiana SA [2002] ECR I-03901

C-400/00 – Club-Tour, Viagens e Turismo SA v Alberto Carlos Lobo Gonçalves Garrido [2002] ECR I-04051


C-322/01 – Deutscher Apothekerverband eV v 0800 DocMorris NV and Jacques Waterval,


C-20/03 – Burmanjer, Van Der Linden, De Jong [2005] ECR I-4133

C-70/03 – Commission v Kingdom of Spain [2004] ECR I-0799

C-336/03 – easyCar (UK) Ltd v Office of Fair Trading [2005] ECR I-01947
C-350/03 – *Eisabeth Schulte, Wolfgang Schulte v Deutsche Bausparkasse Badenia AG* [2005] ECR I-09215


C-302/04 – *Ynos Kft v János Varga* [2006] ECR I-00371

C-441/04 – *A-Punkt-Schmuckhandel* [2006] ECR I-02093

C-168/05 – *Elisa Marí*a Mostaza Claro v Centro Móvil Milenium SL* (still unpublished)
ANNEX C: NATIONAL LEGISLATION

AUSTRIA

Act against unfair commercial practices (*Bundesgesetz gegen den unlauteren Wettbewerb* (UWG))

CC (*Allgemeines bürgerliches Gesetzbuch* (ABGB))

Consumer Protection Act (*Konsumentenschutzgesetz*)

Price Indication Act (*Preisauszeichnungsgesetz – PrAG* (Bundesgesetz über die Auszeichnung von Preisen))

Regulation on travel agencies (*Verordnung des Bundesministers für wirtschaftliche Angelegenheiten über Ausübungsvorschriften für das Reisebürogewerbe* (hier abgekürzt mit: Reisebüroausübungs-VO)).

Regulation on travel agencies implementing Art. 7 Package Travel Directive (*Reisebürosicherungsverordnung* (RSV))

Timeshare Act (*Teilzeitnutzungsbesetz – TNG* (Bundesgesetz über den Erwerb von Teilzeitnutzungsrechten an unbeweglichen Sachen))

BELGIUM
Act of 1/9/2004 on the protection of consumers in respect of the sale of consumer goods (amendment of CC) (Loi du 1/9/2004 relative à la protection des consommateurs en cas de vente de biens de consommation)

Act of 11/4/1999 on the injunction for infringements of the Act on the purchase of the right to use immovable properties on a time-share basis (Loi du 11/4/1999 relative à l'action en cessation des infractions à la loi relative aux contrats portant sur l'acquisition d'un droit d'utilisation d'immeubles à temps partagé.)

Act of 11/4/1999 on the purchase of the right to use immovable properties on a time-share basis (Loi du 11/4/1999 relative aux contrats portant sur l'acquisition d'un droit d'utilisation d'immeubles à temps partagé)

Act of 14 July 1991 on trade practices and consumer information and protection (Loi du 14/7/1991 sur les pratiques du commerce et sur l'information et la protection du consommateur)

Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts (Loi du 16/2/1994 régissant le contrat d'organisation de voyages et le contrat d'intermédiaire de voyages)

Act of 2/8/2002 on misleading and comparative advertising, unfair contract terms and distance marketing in respect of professional services. (Loi du 2/8/2002 relative à la publicité trompeuse et à la publicité comparative, aux clauses abusives et aux contrats à distance en ce qui concerne les professions libérales.)

Royal Decree of 1/2/1995 determining the assurance conditions of the liability of travel organizers and retailers (Arrêté royal du 1/2/1995 déterminant les conditions de l'assurance de la responsabilité professionnelle des organisateurs et intermédiaires de voyages envers les voyageurs)


Royal Decree of 18/11/2002 excluding certain distance contracts in respect of hotel accommodation, transport, restaurant and leisure services, from the scope of application of the articles 79 and 80 of the Act of 14 July 1991 (Arrêté royal du 18/11/2002 excluant certains contrats à distance de fourniture de services d'hébergement, de transports, de restauration et de loisirs, du champ d'application des articles 79 et 80 de la loi du 14 juillet 1991)

Royal Decree of 30/6/1996 concerning the indication of the price of products and services and the order form (as amended by R.D. 7/2/2000) (Arrêté royal du 30/6/1996 relatif à l'indication du prix des produits et des services et au bon de commande)


Royal Decree putting into effect Article 36 of the Act of 16 February 1994 regulating the package travel contracts and the travel intermediation contracts. (Arrêté royal du 25/4/1997 portant exécution de l'article 36 de la loi du 16 février 1994 régissant le contrat d'organisation de voyages et le contrat d'intermédiaire de voyages.)
Royal order of 6/9/1993 containing special provisions for the distance marketing of certain products or categories of products. (Arrêté royal du 6/9/1993 portant des modalités particulières pour la vente à distance de certains produits ou catégories de produits.)

**CYPRUS**

Misleading Advertising Law (Ο περί Ελέγχου των Παραπλανητικών και Συγκριτικών Διαφημίσεων Νόμος του 2000 εκδίδεται με δημοσίευση στην Επίσημη Εφημερίδα της Κυπριακής Δημοκρατίας σύμφωνα με το Άρθρο 52 του Συντάγματος)


The Law for the Conclusion of Consumer Distance Contracts of 2000, L.14(I)/2000, as amended by L. 237(I)/04 (Ο περί της Σύναψης Καταναλωτικών Συμβάσεων Εξ Αποστάσεως Νόμος του 2000, Ν. 14(Ι)/2000 ως τροποποιηθείκε από τον Νόμο 237(Ι)/04)


CZECH REPUBLIC

Act No. 159/1999 Coll. concerning conditions of entreprenneures in the area of tourism and travel agencies (Zákon č. 159/1999 Sb. O některých pod-mínkách podnikání v oblasti cestovního ruchu)


Act on general security of products No. 102/2001 Coll. (Zákon o obecné bezpečnosti výrobků č. 102/2001 Sb.)


GERMANY

Act against unfair competition (Gesetz gegen den unlauteren Wettbewerb (UWG))

CC (Bürgerliches Gesetzbuch (BGB))

Civil Procedure Code (Zivilprozessordnung (ZPO))

Commercial Code (Handelsgesetzbuch)

Compulsory Auctions Act (Zwangsversteigerungsgesetz (ZVG))

Economy penal code (Wirtschaftsstrafgesetz (WiStG))

Injunctions Act (Unterlassungsklagengesetz (UKlaG))

Insurance Contract Act (Gesetz über den Versicherungsvertrags-Versicherungsvertragsvertragsgesetz (VVG))
Introductory Act on the German CC (*Einführungsgesetz zum Bürgerlichen Gesetzbuch*)

Investment Act (*Investmentgesetz (InvG]*)

Medicine Advertisement Act (*Heilmittelwerbegesetz (HWG]*)

Medicines Act (*Arzneimittelgesetz (AMG]*)

Pharmacies Act (*Apothekengesetz*)

Pharmacy Operating Regulation (*Apothekenbetriebsordnung*)

Price indication regulation (*Preisangabenverordnung*)

Product Liability Act (*Produkthaftungsgesetz (ProdHaftG]*)

Regulation on duties to supply information in civil law (*Verordnung über Informations- und Nachweispflichten nach bürgerlichem Recht (BGB-Informationspflichten-Verordnung - BGB-InfoV]*)

Regulatory Offences Act (*Ordnungswidrigkeitengesetz (OWiG]*)

**DENMARK**

Act no. 1257/2000 on the protection of the consumers’ interests (*Lov nr. 1257/2000 om forbud til beskyttelse af forbrugernes interesser*)

Act no. 234 of 2 April 1997 on consumer contracts relating to the purchase of the right of use to real estate on timeshare basis (*Lov nr. 234 af 2. april 1997 om forbruger aftaler, der giver brugsret til fast ejendom på timesharebasis*)

Act no. 451 of 9 June 2004 on certain consumer contracts (Lov nr. 451 af 9. juni 2004 om visse forbrugeraftalter)

Act no. 472/1993 on Package Travels (Lov nr.472/1993 om pakkerejser)

Consolidated Act no. 237/2003 on Sales of Goods (Lovbekendtgørelse nr. 237/2003 om køb)


Consolidated Act no. 781/1996 on Formation of Contract (Lovbekendtgørelse nr. 781/1996 om aftaler og andre retshandler på formuerettens område)

Consolidated Act on Means of Payment (Bekendtgørelse af lov om visse betalingsmidler)

Executive Order no. 866 of 18 September 2000 on information on sales price and price per unit for consumer goods (Bekendtgørelse nr. 866 af 18. september 2000 om oplysning om salgspris og enhedspris for forbrugsvarer)

Regulation no. 503/2004 on registration and security etc.in the Travel Guarantee Fund (Bekendtgørelse nr. 503/2004 om registrering og sikkerhedsstillelse mv. i Rejsegarantifonden)

Regulation no. 776/1993 on Package Travels (Bekendtgørelse nr. 776/1993 om pakkerejser)

ESTONIA

Consumer Protection Act (Tarbijakaitseseadus)
Electronic Communication Act *(Elektroonilise side seadus)*

General Part of the CC Act *(Tsiviilseadustiku üldosa seadus)*

Law of Obligations Act *(Võlaõigusseadus)*

Private International Law Act *(Rahvusvahelise eraõiguse seadus)*

Product Safety Act *(Toote ohutuse seadus)*

Regulation No. 130 of 10.05.2004 *(Majandus- ja kommunikatsiooniministri 10. mai 2004. a määrus nr 130)*

Regulation No. 66/2004 *(Majandus- ja kommunikatsiooniministri 8. aprilli 2004. a määrus nr 66 Koduukselepingu teatise vormi kinnitamine)*

Regulation No. 76 of 14.04.2004 *(“Kauba ja teenuse hinna avaldamise nõuded” Vastu võetud majandus- ja kommunikatsiooniministri 14.aprilli 2004.a määrusega nr 76)*

Tourism Act *(Turismiseadus)*

Trading Act *(Kaubandustegevuse seadus)*

FINLAND


Com. data protection Act (Vi 121 Sähköisen viestinnän tietosuojalaki)


The Personal Data Act (Si 111 Henkilötietolaki)

GREECE

Act 2251/94 on Consumer Protection (Nomos 2251/94 Prostasia ton katanaloton)

Act 3927/2004 (Τραπεζα Νομικων Πληροφοριων: Intracom-Νομος)

Act against unfair competition (Τραπεζα Νομικων Πληροφοριων: Intracom-Νομος)

CC (Αστικος Κωδικας)

Decree 182/99 on implementing the Directive 94/47 into Greek law (Proedriko Diatagma 182/1999)


Ruling of the Ministry for Economy and Development Z1-404 (Koini Ipourgiki Apofasi ton Ypoyrgeion Ethnikis Oikonomias kai Anaptiksis)

FRANCE

Consumer Protection Act (Code de la Consommation)

Legislative Act n°98-566 of the 8th July 1998 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 (Loi n° 98-566 du 08/07/1998 concernant la protection des acquéreurs pour certains aspects des contrats portant sur l’acquisition d’un droit d’utilisation à temps partiel de biens immobiliers.)

Regulatory Act of the 16th November on consumer protection in the indication of the prices of certain products per unit and prewrapped products offered to consumers (Arrêté du 16 novembre 1999 relatif à la publicité, à l’égard du consommateur, des prix de vente à l’unité de mesure de certains produits préemballés)


Regulatory Act n°2005-136 of the 17th February 2005 on the guarantee of conformity to the contract of the good owed to the consumer by the seller (Ordonnance n° 2005-136...
du 17 février 2005 relative à la garantie de la conformité du bien au contrat due par le vendeur au consommateur)

Regulatory Act n°94-490 defining the conditions of exercise of the activities relating to the organisation and the sale of travels or journeys (Décret no 94-490 du 15/06/1994 pris en application de l'article 31 de la loi Numéro 92-645 du 13/07/1992 fixant les conditions d'exercice des activités relatives à l'organisation et à la vente de voyages ou de séjours)

Tourism Act (Code du tourisme)

HUNGARY


Act CXII of 1996 on Credit Institutions and Financial Enterprises (1996. évi CXII. tv a hitelintézetekről és a pénzügyi vállalkozásokról)

Act CXLI of 1997 on Real Estate Registration (1997. évi CXLI tv. az ingatlannyilvántartásról)


CC (1959. évi IV. törvény a Polgári Törvénykönyvről)


GM Decree No. 7/2001. (III.29.) on the indication of the prices of products and services offered to consumers (7/2001. (III. 29.) GM rendelet a fogyasztói forgalomba kerülő áruk és szolgáltatások árának feltüntetéséről)

Government Decree 20/1999. (II. 5.) on contracts for the purchase of the right to use immovable property on a timeshare basis (20/1999. (II.5.) Korm. rendelet. Az ingatlanok időben megosztott használati jogának megszerzésére irányuló szerződésekről)

Government Decree No. 17/1999. (II.5.) on Distance Contracting (17/1999. (II. 5.) Korm. rendelet távollevők között kötött szerződésekről)

Government Decree No. 18/1999. (II.5.) on Unfair Contract Terms (18/1999. (II.5.) Korm. rend. a fogyasztóval kötött szerződésben tisztelettel rendelkezők és minősülő feltételekről)


Government Decree No. 370/2004 (XII.26.) on Doorstep Selling (370/2004. (XII.26.) Korm rendelete az üzleten kívül fogyasztóval kötött szerződésekről és az üzleten kívüli kereskedés folytatásának egyes feltételeiről)


Government Decree. No. 151/2003. (IX.22.) on guarantees of consumer durables
(151/2003. (IX. 22.) Korm. rendeletaz egyes tartós fogyasztási cikkekre vonatkozó kötelező jótállásról)


Ministry of Justice Decree No 13/2004 (IV.16) IM listing the acts of legislation corresponding to the directives listed in the Annex to Directive 98/27/EC on injunctions for the protection of consumers' interests (13/2004. (IV. 16.) IM rendeleta fogyasztói érdekek védelme érdekében a jogsértés megszüntetésére irányuló eljárásokról szóló 98/27/EK irányelv mellékletében meghatározott irányelvekkel összeegyeztethetőséget teremtő jogszabályok felsorolásáról)


IRELAND

European Communities (Contracts for Time Sharing of Immovable Property—Protection of Purchasers) Regulations 1997 and 2000

European Communities (Cancellation of Contracts negotiated away from business premises) Regulations, 1989

European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003

Package Holidays and Travel Trade Act, 1995

Protection of Consumers' Collective Interests Regulations

Protection of Consumers in Respect of Contracts made by Means of Distance Communication Regulation

Requirements to Indicate Product Prices Regulations

ITALY


Legislative decree 9/11/1998, n. 427 “Implementation of the 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 one or more immovable properties on a timeshare basis” (Decreto legislativo. 9 novembre 1998, n. 427,,Attuazione della direttiva 94/47/CE concernente la tutela dell'acquirente per taluni aspetti dei contratti relativi all'acquisizione di un diritto di godimento a tempo parziale di beni immobili")


LATVIA

Cabinet Regulation No 163 “Regulations regarding Package Tourism Services (MK Noteikumi Nr. 163 “Noteikumi par kompleksiem tūrisma pakalpojumiem)

Cabinet Regulation No 178 “Procedures for Displaying Prices of Products and Services” (LR MK Noteikumi Nr. 178 “Kārtība, kādā norādāmas preču un pakalpojumu cenas”)

Cabinet Regulation No 207 “Regulations Regarding Distance Contracts (LR MK Noteikumi Nr. 207 “Noteikumi par distances līgumu”) 

Cabinet Regulation No 325 “Regulations regarding Contracts on Obtaining the Right to Temporary Use of a Residential Building or a Part Thereof” (LR MK Noteikumi Nr. 325 “Noteikumi par līgumu par dzīvošanai paredzētas ēkas vai ēkas daļas lietošanas tiesību iegūšanu uz laiku”)

Cabinet Regulation No. 1037/2004 (LR MK Noteikumi Nr. 1037 “Noteikumi par distances līgumu par finanšu pakalpojumu sniegšanu”)

Consumer Rights Protection Law (Patērētāju tiesību aizsardzības likums)

Regulation of 18.6.1994 (Par likumu un citu Saeimas, Valsts prezidenta un Ministru kabineta pieņemto aktu izsludināšanas, publicēšanas, spēkā stāšanās kārtību un spēkā esamību)

Republic of Latvia Cabinet Regulation No 327 “Regulations Regarding Contracts Entered Into Outside the Permanent Location of Sale or Provision of Services of an Undertaking (Company) (Noteikumi par līgumu, kas noslēgts ārpus uzņēmuma (uzņēmējsabiedrības) pastāvīgās tirdzniecības vai pakalpojumu sniegšanas vietas)

Tourism Law (Tūrisma likums)

LITHUANIA

CC of the Republic of Lithuania (Lietuvos Respublikos Civilinis Kodeksas)

Law on Consumer Protection of the Republic of Lithuania (Lietuvos Respublikos Vartotojų Teisių Gynimo Įstatymas)

Law on Tourism of the Republic of Lithuania (Lietuvos Respublikos Turizmo Įstatymas)

Order of the Minister of Economy of the Republic of Lithuania on the Rules of Labeling of Items (Goods) Sold in the Republic of Lithuania and Indication of Prices (Lietuvos Respublikos Ūkio Ministro Įsakimas dėl Lietuvos Respublikoje parduodamų daiktų (prekių) ženklinimo ir kainų nurodymo taisyklių)
Order of the Minister of Economy of the Republic of Lithuania on the Approval of the Rules of Sale of Goods and Provision of Services in Premises not Designated for this Activity (Lietuvos Respublikos Ūkio Ministro Įsakymas dėl prekių parduavimo ir paslaugų teikimo ne šiai veiklai skirtose patalpose taisyklių patvirtinimo)

Order of the Minister of Environment on the Approval of the Minimum List of the Mandatory Data to be Indicated in the Description of the Provided Residential Premises and Agreement when Buying the Right to Use the Residential Premises from Time to Time (Lietuvos Respublikos Aplinkos Ministro Įsakymas dėl privalomų duomenų, kurie turi būti pateikti suteikiamų gyvenamųjų patalpų aprašyme bei sutartyje, perkant teisę tam tikru laiku naudotis gyvenamosiomis patalpomis, minimalaus sąrašo patvirtinimo)

LUXEMBURG

CC (Code civil luxembourgeois)

Competition Act (Loi du 17 mai 2004 relative à la concurrence)


Consumer Sales Act of 21.4.2004 (Loi du 21 avril 2004 relative à la garantie de conformité due par le vendeur de biens meubles corporels)

Decree of 4.11.1997 on precontractual information for package travel (Règlement grand-ducal du 4 novembre 1997 déterminant les éléments de l’information préalable)

Decree of 4.11.1997 on security for the refund of money paid over (Règlement grand-ducal du 4 novembre 1997 déterminant le montant, les modalités et l’utilisation de la garantie financière)
Decree of 7.9.2001 on price indication (as amended by the decree of 29.07.2004) (Règlement grand-ducal du 7 septembre 2001 relatif à l’indication des prix des produits et services)

Distance Contracts Act (16.4.03) (Loi du 16 avril 2003 concernant la protection des consommateurs en matière de contrats à distance)


Package Travel Act (14.6.94) (Loi du 14 juin 1994 portant réglementation des conditions d’exercice des activités relatives à l’organisation et à la vente de voyage ou de séjours)

Timeshare Act (18.12.1998) (Loi du 18 décembre 1998 relative aux contrats portant sur l'acquisition d'un droit d'utilisation . temps partiel de biens immobiliers)

MALTA

Doorstep Contracts Act (Att dwar Kuntratti fuq l-Ghadba tal-Bieb)

Consumer Affairs Act (Att dwar l-Affarijiet tal-Konsumatur Kapitlu 378 tal-Ligijiet ta’ Malta)
**Malta Travel and Tourism Services Act** *(Att dwar Servizzi ta’ l-Ivvjaggar u tat-Turizmu ghal Malta)*

**Distance Selling Regulations, 2001** *(Regolamenti dwar il-Bejgh mill-Boghod)*

**Consumer Affairs Act (Price Indication) Regulations** *(Regolamenti dwar Prezzijiet Indikati skond l-Att dwar l-Affarijiet tal-Konsumaturi)*

**Protection of Buyers in Contracts for Time Sharing of Immovable Property Regulations, 2000** *(Regolamenti ta’ l-2000 dwar il-Protezzjoni ta’ Xerrejjja f’Kuntratti ta’ Time Sharing fi Proprejta’ Immobbli)*

**Package Travel, Package Holidays and Package Tours Regulations, 2000** *(Regolamenti ta’ l-2000 dwar Pakkett ta’ l-Ivvjaggar, Pakkett ta’ Vaganzi u Pakkett ta’ Tours)*

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**NETHERLANDS**

**Canvassinglaw** *(Colportagewet)*

**CC** *(Burgerlijk Wetboek)*

**Decree containing rules in regard to the indication of prices as replacement for the Decree of the 15th of January 1993, containing rules concerning data that organisers of organised trips must state on behalf of travellers** *(Besluit van 15 januari 1993, houdende regels inzake de gegevens die de organisatoren van georganiseerde reizen ten behoeve van de reizigers moeten vermelden)*
Decree of the 25th of June 1997, containing rules concerning data that sellers of the right of part-time use of real estate should mention in the contract on behalf of the buyer (Gegevensbesluit van 25 juni 1997 rechten van gebruik in deeltijd van onroerende zaken)

Decree price-indication on goods 1980 (Besluit prijsaanduiding producten)

General act on terms (Algemene termijnenwet)

Law of the 21st of December 2000 to the adaptation of Book 7 of the CC to directive number 97/7/EC of the European Parliament and the Council of Europe of 20 May 1997 regarding the protection of consumers by distance selling (Wet van 21 december 2000 tot aanpassing van Boek 7 van het Burgerlijk Wetboek aan richtlijn nr. 97/7/EG van het Europees Parlement en de Raad van de Europese Unie van 20 mei 1997)

Law of the 25th of April 2000 to the adaptation of Book 3 and 6 of the CC to the directive concerning to cease breaches on consumer-interests (Wet van 25 april 2000 tot aanpassing van de Boeken 3 en 6 van het Burgerlijk Wetboek aan de richtlijn betreffende het doen staken van inbreuken in het raam van de bescherming van de consumentenbelangen)

Law of the 28th of October 1999 to the adaptation of Book 6 of the CC to the directive unfair terms in consumer contracts (Wet van 28 oktober 1999 tot aanpassing van Boek 6 van het Burgerlijk Wetboek aan de richtlijn betreffende oneerlijke bedingen in consumentenovereenkomsten)

Mediawet (Mediawet)

Telecommunicatiewet (Telecommunicatiewet)

Wet bescherming persoonsgegevens (Wet bescherming persoonsgegevens)
Act of 2 March 2000 on the protection of certain consumer rights and liability for an unsafe product (Ustawa z dnia 2 marca 2000 o ochronie niektórych praw konsumentów oraz o odpowiedzialności za szkodę wyrządzoną przez produkt niebezpieczny)

Act of 27 July 2002 on specific terms and conditions of consumer sale and amendments to the CC (Ustawa z 27 lipca 2002, o szczegółowych warunkach sprzedaży konsumenckiej oraz o zmianie Kodeksu cywilnego)

Act on the Freedom of Economic Activity (Ustawa o swobodzie działalności gospodarczej)

CC (Kodeks Cywilny)

The Act of 13 July 2000 on the protection of purchasers in respect of the right to use buildings or dwellings during certain time each year (Ustawa z 13 lipca 2000 o ochronie nabywców prawa korzystania z budynku lub pomieszczenia mieszkalnego w oznaczonym czasie w każdym roku)

The Act of 15 December 2000 on the protection of consumers and competition. (Ustawa 15 grudnia 2000 o ochronie konkurencji i konsumentów)

The Act on prices of 5 July 2001 (Ustawa o cenach z 5 lipca 2001)

The Act on Tourist Services of 29 August 1997 (Ustawa o usługach turystycznych z 29 sierpnia 1997)

PORTUGAL

CC (Código Civil)

Constitution of the Portuguese Republic (Constituição da República Portuguesa)
Consumer Protection Act No. 24/96 (Lei nº 24/96 de 31 de Julho (Regime legal aplicável à defesa dos consumidores))

Decree Law No 67/2003 of 8 April (Decreto-Lei n.º 67/2003, de 8 de Abril)

Decree-Law 143/2001, of April 26 (Decreto-Lei nº 143/2001, de 26 de Abril (rectificado pela Declaração de Rectificação n.º 13-D/2001))

Decree-Law 446/85, of October 25, as amended by DL 220/95 of August 31, rectified by

Declaration 114-B/95, of August 31, and amended also by DL 249/99, of July 7, and by DL 323/2001, of December 17 (Decreto-Lei n.º 446/85, de 25 de Outubro, na redacção resultante do Decreto-Lei n.º 220/95, de 31 de Agosto, tal como rectificado pela Declaração de Rectificação n.º 114-B/95, de 31 de Agosto, do Decreto-Lei n.º 249/99, de 7 de Julho)

Decree-Law nr 198/93, of May 27, revoked by DL 209/97, of August 13, modified by DL 12/99, of January 11 (Decreto-Lei n.º 198/93, de 27 de Maio, revogado pelo Decreto-Lei n.º 209/97, de 13 de Agosto, alterado pelo Decreto-Lei n.º 12/99, de 11 de Janeiro)


Law 234/99 (Decreto-Lei n.º 234/99 de 25 de Junho)

Law No 25/2004 of 8 July (Lei n.º 25/2004, de 8 de Julho)
Law No 83/95 of 31 August *(Lei n.º 83/95 de 31 de Agosto)*

**SLOVAKIA**

Act No. 108/2000 Coll. on Consumer Protection in Doorstep Selling and in Distance Selling *(Zákon č. 108/2000 Z.z. o ochrane spotrebiteľa pri podomovom predaji a zásielkovom predaji)*

Act No. 258/2001 Coll. on Consumer Credit *(Zákon č.258/2001 Z.z. o spotrebičských úveroch)*

Act No. 281/2001 on Package Travel *(Zákon č. 281/2001 Z.z. o zájazdoch, podmienkach podnikania cestovných kancelárií a cestovných agentúr a o zmene a doplnení Občianskeho zákoníka v znení neskorších predpisov)*


**Bond Papers Act** *(Zákon č. 566/2001 Z.z. o cenných papieroch a investičných službách v znení neskorších predpisov)*

**CC** *(Zákon č. 40/1964 Zb. Občiansky zákoník v znení neskorších predpisov)*

**Code of international Law** *(Zákon č. 97/1963 Zb. o medzinárodom práve súkromnom a procesnom v znení neskorších predpisov)*

Constitution of Slovak Republic as amended (Zákon č. 460/1992 Zb. Ústava Slovenskej republiky v znení neskorších predpisov)

Non-Smoker-Protection-Act (Zákon č. 377/2004 Z.z. o ochrane nefajčiarov v znení neskorších predpisov)

Price Indication Decree (Vyhláška č. 545/2002 Z.z. o spôsobe označovania výrobkov cenam)

Systems of payments Act (Zákon č. 510/2002 Z.z. o platobnom styku v znení neskorších predpisov)

SLOVENIA

Code of Obligations (Obligacijski zakonik)

Consumer Protection Act (Zakon o varstvu potrošnikov)

Medicinal Products Act (Zakon o zdravilih, ZZdr, Ur.l. RS, št. 31/2006)

Rules on Price Indication for Goods and Services (Pravilnik o načinu označevanja cen blaga in storitev).

SPAIN

Law 1/2000, of 7th January, of Civil Procedure (Ley 1/2000, de 7 de enero, de enjuiciamiento civil)
Law 21/1995, of 6th of July, which regulates the package travels (Ley 21/1995, de 6 de julio, reguladora de los viajes combinados)

Law 23/2003, on guarantees in the sale of good for consume (Ley 23/2003, de garantías en la venta de bienes de consumo)

Law 26/1984, of 19 July, General for the Protection of the Consumers and Users (Ley 26/1984, de 19 de julio, General para la Defensa de los consumidores y usuarios)

Law 26/1991, of 21st November, on consumers’ protection in case of contracts executed out of the commercial premises (Ley 26/1991, de 21 noviembre, de protección de los consumidores en el caso de contratos celebrados fuera de los establecimientos mercantiles)

Law 32/2003, of 3rd November, General Law on Telecommunications (Ley 32/2003, de 3 de noviembre, General de Telecomunicaciones)

Law 34/2002, of 11th of July, on the services of the Information’s Society and on electronic commerce (Ley 34/2002, de 11 de julio, de los servicios de la sociedad de la información y de comercio electrónico)

Law 39/2002, of 28th of October, for the transposition into the Spanish legal system of some Community Directives on protection of the interests of consumers and users (Ley 39/2002, de 28 de octubre, de transposición al ordenamiento jurídico español de diversas directivas comunitarias en materia de protección de los intereses de los consumidores y usuarios)

Law 42/1998, of 15th December, on timesharing rights on immovable goods for tourist use and taxation norms (Ley 42/1998, de 15 de diciembre, sobre derechos de aprovechamiento por turno de bienes inmuebles de uso turístico y normas tributarias)

Law 7/1996, of 15th January on retail trade (according to its amendment by Law 47/2002) (Ley 7/1996, de 15 de enero, de ordenación del comercio minorista)

Law 7/1998, of 13th April, on Standard Terms in Contracts (Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación)

Norms of the Autonomous Communities about Travel (examples) (Normas de las Comunidades Autónomas sobre Viajes (ejemplos))

Royal Decree 3423/2000, of 15th December, on the regulation of the indication of prices of the products offered to the consumers and users (Real Decreto 3423/2000, de 15 de diciembre, por el que se regula la indicación de los precios de los productos ofrecidos a los consumidores y usuarios)

SWEDEN

Act on terms and conditions in consumer relations (1994:1512) (Lag (1994: 1512) om avtalsvillkor i konsumentförhållanden)

Consumer Credit Law (1992:830) (Konsumentkreditlag (1992:830))


The Law on Consumer Protection on Distance Contracts and Doorstep Selling Contracts (Lag(2005:59) om konsumentskydd vid distansavtal och hemförsäljningsavtal)


UNITED KINGDOM

Consumer Protection (Cancellation of Contracts concluded away from business premises) Regulations 1987

Consumer Protection (Distance Selling) Regulations 2000

Consumer Transactions (Restrictions on statements) Order 1976

Enterprise Act 2002, Part 8 and Schedule 13

Package Travel, Package Holidays and Package Tour Regulations 1992

Prices Act 1974

Privacy and Electronic Communications (EC Directive) Regulations

Sale of Goods Act 1979

Supply of Goods (Implied Terms) Act 1973
Supply of Goods and Services Act 1982

The Price Marking Order 2004

The Sale and Supply of Goods to Consumers Regulations 2002

Timeshare Act 1992

Unfair Contract Terms Act 1977

Unfair Terms in Consumer Contracts Regulations 1999