

SALES LAW REVIEW GROUP

**POSITION PAPER ON THE PROPOSAL
FOR A DIRECTIVE OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL
ON CONSUMER RIGHTS**

MAY 2009

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SUMMARY OF CONCLUSIONS OF REVIEW GROUP

Background

The terms of reference of the Sales Law Review Group require the Group, among other things, to ‘examine the provisions of the proposed EU Directive on consumer contractual rights in the light of existing Irish consumer law and assess its implications for Irish consumer rights and law, to contribute to the development of the Irish response to the proposed Directive, and to consider and make recommendations as to how the Directive and Irish contract and sales law may best be integrated.’ This summary presents the Review Group’s main conclusions on the proposal for a Directive on Consumer Rights. The Group’s proposals for amendments to, or clarifications of, the provisions of the proposed Directive are set out at Annex 1.

Introduction

The proposal for a Directive on Consumer Rights published in October 2008 was described by the European Consumer Commissioner, Meglena Kuneva, as ‘the most far reaching overhaul of consumer rights in 30 years’. Its publication followed a review of the Consumer Acquis (the main Directives aimed at protecting consumer rights) launched by the European Commission in 2004 and the publication of a Green Paper on the Review of the Consumer Acquis in 2007.

The proposed Directive on Consumer Rights seeks to replace four existing Directives that deal with different aspects of consumer contract rights - Directive 85/577/EEC on contracts negotiated away from business premises; Directive 93/113/EEC on unfair terms in business contracts; Directive 97/7/EC on distance contracts; and Directive 1999/44/EC on consumer sales and guarantees - by a single consolidated and updated instrument. Critically, the proposed Directive departs from the minimum harmonisation approach of the existing Directives that permits member states to maintain or adopt stricter national rules than those in the Directives in favour of a full harmonisation approach that would preclude member states from having legislative provisions that diverge from those in the Directive.

Scope

The consolidation of the main consumer contract law Directives in a single instrument is a welcome initiative and would help both traders and consumers better to understand their rights and obligations. The proposed Directive arguably falls short in several respects however of the original aims of the review of the Consumer Acquis. First, the acquis review was intended to be undertaken in tandem with the broader project of developing a more coherent framework for European contract law through the development of a Common Frame of Reference [CFR] for that law. Though the CFR project has advanced to the point where a full draft of the common frame of reference was published in 2007, the proposed Directive gives little evidence of having drawn on this work. In view of the substantial investment of expertise and resources in the CFR initiative, it is somewhat surprising and disappointing that more use was not made of its results in the drafting of the proposal, particularly as some of the provisions of the Draft Common Frame of Reference are arguably clearer and fuller than those of the proposed Directive. Secondly, Chapter IV of the proposed Directive applies, with the limited exception of cases where the installation of goods forms part of the sales contract, only to contracts for the sale of goods and excludes service contracts from its scope. Services are the largest component of GDP in the European Union and consumer willingness to engage in cross-border service transactions, and trader willingness to offer services on a cross-border basis, are affected by exactly the same concerns about regulatory inadequacy and fragmentation that the proposed Directive seeks to address. Thirdly, the exemption of digital services from the scope of Chapter IV is a matter of particular concern. The Green Paper on the Review of the Consumer Acquis placed particular emphasis on the need to update Community legislation in the light of technological and market developments. It is anomalous that software, music, books or other content provided in physical form is covered by Chapter IV of the proposal while the same content provided in digital form is excluded from its protections.

Full Harmonisation

The move from the minimum harmonisation basis of the existing Directives to the full harmonisation basis of the proposal represents a major change with far-reaching implications for consumer protection regimes in member states. The internal market arguments advanced in support of full harmonisation are not negligible and merit full

and careful consideration. As a small open economy highly reliant on external trade, Ireland has a strong interest in the further development of the internal market. Though the case for full harmonisation should not be dismissed, it cannot be uncritically accepted. The claim that regulatory differences are a major reason for consumer reluctance to make cross-border purchases has been plausibly challenged on the ground that other factors such as language differences and the practical difficulty of returning faulty goods across national borders are more significant deterrents. Consumer concerns about the adequacy of consumer protection rules in other member states could also be adequately met by minimum harmonisation Directives providing safeguards at a sufficiently high level. The claim that regulatory fragmentation deters businesses from cross-border trade also merits critical scrutiny. This argument has undoubted validity in the case of distance sales where the growth potential of trans-national transactions is evident and where the trader supplying the goods or services is likely to be the party with whom the consumer concludes the contract. Its validity is weaker, however, in the case of on-premises goods transactions where the consumer's contract is with the retailer and not with the producer of the goods. An Irish producer wishing to sell goods into other EU markets will face a range of challenges, but the need to take account of varying consumer protection rules in other member states will not feature prominently among them.

The case for full harmonisation appears weakest, therefore, in the case of in-store transactions for the sale of goods, the main focus of Chapter IV of the proposal. This is also the Chapter of the proposed Directive whose full harmonisation status has the greatest implications for the consumer protection regime in Ireland. In its present form, Chapter IV would relegate the primary domestic remedy to reject faulty goods and obtain a refund to the status of a second-tier remedy behind repair or replacement of the goods at the choice of the trader. The importance of this issue is evident from the fact that two-thirds of the 70,000 complaints received by the National Consumer Agency in 2007 related to faulty goods or services. Chapter IV of the proposal would also limit the liability period for faulty goods to two years compared with the current six-year limit for contractual claims under Irish law. Though a number of other aspects of the proposed Directive give cause for concern, these two provisions present the greatest threat to the protections currently enjoyed by Irish consumers. The full harmonisation character of Chapter III on distance and off-premises contracts

and Chapter V on unfair contract terms is less problematical from an Irish perspective. Prior to the adoption of the existing EU Directives, there was no domestic consumer legislation in these areas in Ireland. Though all of the existing Directives in these areas are minimum harmonisation instruments, in general their transposition into Irish law made little or no use of their minimum harmonisation status to supplement the provisions of the Directives.

Balance Between Consumer and Trader Interests

Recital 4 of the proposal states that the proposed Directive strikes ‘the right balance between a high level of consumer protection and the competitiveness of enterprises’. It is fair to say however that, while specific aspects of the proposed Directive such as the extension of the withdrawal period for distance and off-premises contracts are generally seen as enhancing consumer rights, the overall assessment of the proposal by consumer groups and independent commentators is that it tends to favour business interests and needs over those of consumers. The Consumer Commissioner has acknowledged the ‘understandable and legitimate concerns about crucial issues’ and expressed her willingness to address these concerns. It is important that this is done in order that the proposal can be adopted with the support of both consumer and business interests.

I GENERAL OBSERVATIONS ON THE PROPOSED DIRECTIVE

1. INTRODUCTION

1. The terms of the reference of the Sales Law Review Group include the following:

To examine the provisions of the proposed EU Directive on consumer contractual rights in the light of existing Irish consumer law and assess its implications for Irish consumer rights and law, to contribute to the development of the Irish response to the proposed Directive, and to consider and make recommendations as to how the Directive and Irish contract and sales law may best be integrated.

The proposal for a Directive on Consumer Rights was published in October 2008 and was described by the European Consumer Commissioner, Meglena Kuneva, as ‘the most far reaching overhaul of consumer rights in 30 years’¹ Its publication followed a review of the Consumer Acquis (the eight main Directives aimed at protecting consumer rights) launched by the European Commission in 2004 and the publication of a Green Paper on the Review of the Consumer Acquis in 2007.² This position paper examines the provisions of the Directive and assesses their implications for Irish consumer rights and law; in doing so, it seeks to contribute to the development of the Irish response to the proposal. Consideration of the manner of integration of the Directive and Irish contract and sales law must await both the legislative progress of the proposed Directive and the Group’s examination of the general provisions of Irish sales law and will be dealt with at a later stage of its work.

2. The proposed Directive on Consumer Rights seeks to replace four existing Directives that deal with different aspects of consumer contract rights by a single consolidated and updated instrument. The Directives in question are Directive 85/577/EEC on contracts negotiated away from business premises; Directive 93/113/EEC on unfair terms in business contracts; Directive 97/7/EC on distance contracts; and Directive 1999/44/EC on consumer sales and guarantees.³ Critically,

¹ Meglena Kuneva, European Consumer Commissioner, ‘**Contract Rights Directive**’, **Press Conference Speaking Points**, 8 October 2008. For a comprehensive critical account of the Directive, see Howells, G. & Schulze, R. (eds). 2009. **Modernising and Harmonising Consumer Contract Law** (Munich: Sellier).

² European Commission. **Green Paper on the Review of the Consumer Acquis**, COM (2006) 744.

³ The Directives have been given effect in Ireland by the following statutory instruments: European Communities (Cancellation of Contracts Negotiated away from Business Premises) Regulations 1989 (S.I. No. 224 of 1989); European Communities (Unfair Terms in Consumer Contracts) Regulations

the proposed Directive departs from the minimum harmonisation approach of the existing Directives that permits member states to maintain or adopt stricter national rules than those in the Directives in favour of a full harmonisation approach that would preclude member states from having legislative provisions that diverge from those in the Directive.

3. This paper looks first at a number of key general aspects of the proposed Directive, principally its scope, full harmonisation status, and the balance struck between consumer and business interests and concerns. It then examines and evaluates the five substantive Chapters of the proposal.

2. SCOPE OF THE PROPOSED DIRECTIVE

4. The consolidation of the main consumer contract law Directives in a single instrument is a welcome initiative and would help both traders and consumers better to understand their rights and obligations. Provided consumer protections are maintained at an adequate level, it would also provide an opportunity to bring greater coherence to Irish consumer sales law which is currently regulated by a confusing and not always consistent mix of domestic and EU legislation. The proposed Directive arguably falls short in several respects, however, of the aims set out at the commencement of the review of the Consumer Acquis and largely restated in the Green Paper on that review. First, the review of the consumer acquis was intended from the outset to be undertaken in tandem with the broader project of developing a more coherent framework for European contract law through the development of a Common Frame of Reference [CFR] for that law.⁴ The CFR project was sponsored by the European Commission and undertaken by academic experts (the Study Group for a European Civil Code and the Research Group on EC Private Law) with the input of business, consumer and other stakeholders. It was envisaged that the CFR would

1995 and 2000 (S.I No. 227 of 1995 and S.I. No. 307 of 2000); European Communities (Protection of Consumers in Respect of Contracts Made by Means of Distance Communication) Regulations (S.I. No. 207 of 2001); and European Communities (Sale of Consumer Goods and Associated Guarantees Regulations (S.I. No. 11 of 2003).

⁴ For an account on the background to and aims of the Common Frame of Reference project, see von Bar, C. 'A Common Frame of Reference for European Private Law: Academic Efforts and Political Realities', **Electronic Journal of Comparative Law** Vol. 12(1), May 2008. <http://www.ejcl.org/121/art121-127.pdf>.

establish common principles and terminology for European contract law and serve as a ‘toolbox’ and ‘source of best solutions’ in the revision of the consumer acquis.⁵ Though the CFR project has advanced to the point where a full draft of the common frame of reference was published in 2007 along with ancillary volumes in areas such as sales law, the proposed Directive gives little evidence of having drawn on this work. Though the text of the new Directive shows progress in areas such as the formulation of common definitions, many of its provisions remain close in substance to those in the Directives it is intended to replace. The wording of most of its provisions is also identical or very close to that in the existing Directives. In a significant number of instances, however, the provisions drafted under the CFR project are arguably clearer and fuller than those in the proposed Directive. It is the case that the Draft Common Frame of Reference has no official status and that there are also differences of view as to the role it will or should play in the future evolution of European contract law. In view, however, of the substantial investment of expertise and resources in the CFR initiative, and the Commission’s sponsorship of that initiative, it is somewhat surprising and disappointing that more use was not made of its results in the drafting of the proposed Directive.

5. Second, the proposal encompasses just four of the eight Directives covered by the review of the Consumer Acquis. The Acquis Directives outside the scope of the proposal are Directive 90/314/EEC on package travel and holidays; Directive 94/47/EC on timeshare contracts (which has recently been replaced by Directive 2008/122/EC on timeshare contracts); Directive 98/6/EC on price indications; and Directive 98/6/EC on injunctions for the protection of consumers’ interests. The European Commission has explained these exclusions on the ground that the package travel and timeshare Directives are sectoral in nature, that the price indication Directive is not a contract law instrument, and that the injunctions Directive is an enforcement measure. While this is a defensible argument, the exclusion of these Directives from the scope of the proposal may limit nevertheless its ability to address the regulatory fragmentation identified as a serious deficiency in the Green Paper on the Review of the Consumer Acquis. The Green Paper referred to the fact that ‘many

⁵ European Commission. **A More Coherent European Contract Law: An Action Plan**, COM (2003) 68. European Commission. **European Contract Law and the Revision of the Acquis: The Way Forward**. COM (2004) 651.

issues are regulated inconsistently between Directives' and that such differences 'usually trigger extra compliance costs for businesses'.⁶ Though the proposed Directive will help to reduce such differences in the case of the four Directives subject to consolidation, some divergences will remain with the Directives outside its scope. The proposed Directive's provisions on the extension of the withdrawal period where a trader fails to provide the consumer with information on withdrawal rights, for example, differ materially from those in the recently adopted Timeshare Directive. Its provisions on the pre-contractual information to be provided by traders to consumers also overlap with those in the Directive on price indications insofar as price information is concerned. Though the consolidation of four Directives in a single text will improve regulatory transparency and accessibility for consumers and traders, this gain should not be overstated. With the partial exception of the provisions on distance and off-premises contracts, the content of the existing Directives is essentially retained as discrete and stand-alone Chapters of the new text. The inter-relations between the constituent parts of the proposed Directive are not always readily apparent, moreover, and may prove a cause of confusion and difficulty for consumers and traders.

6. Third, there are significant issues with the restricted scope of Chapter IV of the proposal [Other Consumer Rights Specific to Sales Contracts]. With the limited exception of cases where installation of goods forms part of the sales contract, the Chapter applies only to contracts for the sale of goods and consequently excludes service contracts generally and contracts for digital services in particular. While cross-border trade in services is unlikely ever to equal that in goods due to the fact that the provision of many services requires the physical presence of the service provider, the exclusion of services from the scope of Chapter IV is at odds with the EU's wider policy aim of facilitating growth in cross-border demand for, and supply of, services. As the recitals to Directive 2006/123/EC on Services in the Internal Market note⁷:

A competitive market in services is essential in order to promote economic growth

⁶ European Commission. **Green Paper on the Review of the Consumer Acquis**, COM (2006) 744, para. 3.2.

⁷ Directive 2006/123/EC on Services in the Internal Market, recitals 2-3. European Commission. **An Internal Market for Services**, COM (2000) 888.

and create jobs in the European Union. At present numerous barriers within the internal market prevent providers, particularly small and medium-sized enterprises [SMEs] from extending their operations beyond their national borders and from taking full advantage of the internal market... Since services constitute the engine of economic growth and account for 70% of GDP and employment in most Member States, this fragmentation of the internal market has a negative impact on the entire European economy ... and prevents consumers from gaining access to a greater variety of competitively priced services.

Consumer willingness to engage in cross-border service transactions, and trader willingness to offer services on a cross-border basis, are affected by exactly the same concerns about regulatory inadequacy and fragmentation that Chapter IV seeks to address in the case of cross-border goods transactions.

7. The exemption of digital services from the scope of Chapter IV is, for several reasons, a matter of particular concern. First, digital services of their nature lend themselves to trans-national provision and are commonly traded on a cross-border basis. Second, their exemption reinforces the anomaly that software, music, books or other content provided in physical form is covered by Chapter IV of the proposal while the same content provided in digital form is excluded from the protections afforded by the Chapter.⁸ Third, the Green Paper on the Review of the Consumer Acquis placed particular emphasis on the need to update existing Directives in the light of new technological and market developments, noting as follows⁹:

Most Directives that are part of the Consumer Acquis ... no longer meet fully the requirements of today's rapidly evolving markets. This is particularly important in the face of the growing importance of digital technology and digital services (e.g. music downloads), which raise controversial issues relating to user rights, as compared to the sale of physical goods... The exclusion of software and data from the scope of the Consumer Sales Directive [i.e. the precursor of Chapter IV of the proposal] may prompt professionals to try to avoid responsibility for possible damages/non-conformity of such products through conditions in End User Licence Agreements (EULA), preventing consumers from making use of remedies for non-conformity and invoking damages.

In view of the rapid growth in the provision of digital services, this omission appears short-sighted and, if not addressed, will require rectification in the not too distant future. In a recent speech, Commissioner Kuneva acknowledged that consumer

⁸ Guibault, L. 'Accommodation the Needs of iConsumers: Making Sure They Get Their Money's Worth of Digital Entertainment', **Journal of Consumer Policy** Vol. 31(4) December 2008, pp. 409-423.

⁹ European Commission. **Green Paper on the Review of the Consumer Acquis**, COM (2006) 744, para. 3.1.

protection in contracts for digital services needs to be addressed and indicated that a study is being undertaken to ascertain the detriment faced by consumers in this area and to examine possible responses to this detriment.¹⁰ It is acknowledged that the inclusion of digital services in the proposed Directive would give rise to difficulties, not least that responsibility for these services is shared among several Directorates General of the European Commission. Some observers also take the view that consumer protection for digital services merits a dedicated code because of the special character and attributes of these services. The Group considers that, notwithstanding these considerations, both consumer protection and the coherence of the consumer acquis would be better served by the inclusion of digital services within the scope of the proposed Directive.

3. FULL HARMONISATION STATUS OF THE PROPOSED DIRECTIVE

8. If the proposed Directive breaks relatively little new ground in terms of its scope or substance, the change from the minimum harmonisation basis of the existing Directives to the full harmonisation basis of the proposal represents a major change with far-reaching implications for consumer protection regimes in member states. In the Commission's view, the minimum harmonisation basis of the existing Directives has led to substantial regulatory fragmentation due to the extensive additions and amendments to their provisions by member states.¹¹ The cost and complexity of coming to terms with twenty seven varying sets of national regulations has deterred traders, particularly SMEs, from offering goods and services to consumers in other member states. Lack of confidence in the consumer protection rules in force in other member states has similarly discouraged consumers from making cross-border purchases.

9. The internal market arguments advanced in support of full harmonisation are not negligible and merit full and careful consideration. As a small open economy highly reliant on external trade, Ireland has a strong interest in the further development of the internal market. The high price level of goods and services in Ireland suggests that

¹⁰ Meglena Kuneva, European Consumer Commissioner, '**Consumer Rights**': Address to EESC on **European Consumer Day**, 13 March 2009, p.4.

¹¹ Schulte-Nolke, H. et al (eds). 2008. **EU Consumer Law Compendium: Comparative Analysis**. Report Prepared for the European Commission.

competition is not working effectively in many sectors and that consumers would benefit directly and indirectly from greater access to goods and services from traders in other EU member states.

10. Though the case for full harmonisation should not be dismissed, it cannot be uncritically accepted. The claim that regulatory differences are a major reason for consumer reluctance to make cross-border purchases has been plausibly challenged by commentators who have argued that other factors such as language differences and the practical difficulty of returning faulty goods across national borders are more significant deterrents.¹² Others have pointed out that consumer concerns about the adequacy of consumer protection rules in other member states could adequately be met by minimum harmonisation Directives providing safeguards at a sufficiently high level. No consumer will be put off from engaging in a transaction with a trader in another member state by the existence of a **higher** level of consumer protection in that member state than in his home market.

11. The reality behind consumer transactions must also be kept in view in this context. Just ten per cent of the value of retail sales in shops in 2008 was accounted for by sales to customers from other EU countries; the corresponding figures for e-commerce sales and mail-order/telephone sales respectively were 17 per cent and 13 per cent.¹³ A separate study of e-commerce found that, while 33 per cent of EU consumers had purchased at least one item on the Internet, only 7 per cent had made a cross-border purchase online.¹⁴ Even if cross-border trade expands significantly in the period ahead, the national economies of the member states will remain the main locus of consumer transactions for the foreseeable future, particularly for on-premises transactions. Given these facts, it is difficult to see any case for a general trade-off between a known, definite reduction in consumer protection in member states as a result of full harmonisation and an uncertain, unascertainable increase in consumer

¹² Howells, G. 2006. 'The Rise of European Consumer Law: Whither National Consumer Law?', *Sydney Law Review*, vol. 28(1) March 2006, pp. 63-88.

¹³ Eurobarometer. 2008. **Synthesis Report on Consumer and Business Attitudes to Cross-Border Shopping and Consumer Protection in the Internal Market**, Figure 7.

¹⁴ European Commission. **Report on Cross-Border E-Commerce in the EU**. SEC (2009) 283, para. 3.1

welfare arising from greater consumer and/or trader willingness to engage in cross-border transactions.

12. The contention that regulatory fragmentation deters businesses from cross-border trade also merits critical scrutiny. This argument has undoubted validity in the case of distance sales where the growth potential of trans-national transactions is evident and where the trader supplying the goods or services is likely to be the party with whom the consumer concludes the contract. Its validity is weaker, however, in the case of in-store transactions for the sale of goods where the consumer's contract is with the retailer and not with the producer of the goods. An Irish producer wishing to sell goods into other EU markets will face a range of challenges – particularly that of securing distributor and retailer interest in his products - but the need to take account of varying consumer protection rules will not feature prominently among them. Different consumer contract law regimes in member states are unlikely consequently to constitute a material barrier to cross-border sales of goods, a point borne out by the high level of import penetration of the consumer goods market in most member states. The case for full harmonisation appears weakest, therefore, in the case of on-premises goods transactions, the chief focus of Chapter IV of the proposal. The argument for full harmonisation of the information requirements of Chapter II as these apply to on-premises sales of goods is open to question for the same reasons.

13. In line with these arguments, the responses to the Green Paper on the Review of the Consumer Acquis generally favoured a nuanced approach to the question of the degree of harmonisation to be adopted. As the preamble to the proposed Directive notes, the majority of respondents called for the adoption of a legislative instrument based on 'full targeted harmonisation; i.e. targeted at the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border.'¹⁵ The Directive itself however shows little or no sign of any targeting of the degree of harmonisation. The only express derogation from the scope of the proposed Directive permitted member states relates to the relatively marginal case of the sale of second-hand goods at public auctions, while no derogation whatever from maximum harmonisation is contemplated. This contrasts with other recent consumer protection

¹⁵ European Commission. **Proposal for a Directive on Consumer Rights**, COM (2008) 614, p.4.

instruments such as Directive 2005/29/EC on Unfair Commercial Practices and Directive 2008/48/EC on Consumer Credit, each of which makes provision for significant derogations from both the scope of the instrument and its full harmonisation character.

14. The implications of full harmonisation for the consumer protection regime in Ireland arise primarily from the provisions of Chapter IV on other consumer rights specific to sales contracts. As set out in more detail in the section dealing with that Chapter, the proposal as it currently stands would relegate the primary domestic remedy to reject faulty goods and obtain a refund to the status of a second-tier remedy behind repair or replacement of the goods at the choice of the trader. The importance of this issue is evident from the fact that two-thirds of the 70,000 complaints received by the National Consumer Agency in 2007 related to faulty goods or services.¹⁶ The proposed Directive would also limit the liability period for faulty goods to two years compared with the current six-year limit for contractual claims under Irish law. Though a number of other aspects of the proposed Directive give cause for concern, these two provisions present the greatest threat to the protections currently enjoyed by Irish consumers. In the Review Group's view, the impact of the proposed Directive on the rights of Irish consumers in the sale of goods area is at odds with the assurance given by Commissioner Kuneva on the launch of the proposal:¹⁷

I am fully aware that in establishing new EU-wide rules there are cases where consumers who gain many new rights will also find changes to their existing rules.

I want to assure that the issues have been studied in great detail for every member state. And in every case for every country, **overall the consumer very clearly will gain. That is my guarantee.** I will not have it any other way (emphasis in original.)

15. It should be noted, however, that recent speeches by Commissioner Kuneva have both raised questions about the effect of full harmonisation on consumer remedies in member states and suggested a willingness to take a flexible approach to the more contentious aspects of the proposal. In her address to the European Parliament Internal Market and Consumer Protection Committee on 2 March 2009, for example, the Commissioner stated that the Directive 'does not force Member States to give up

¹⁶ National Consumer Agency. 2008. **2007 Consumer Market Research Findings**, p. 15 et passim

¹⁷ Meglena Kuneva, European Consumer Commissioner, '**Contract Rights Directive**', **Press Conference Speaking Points**, 8 October 2008

their general contract law remedies in the case of faulty goods, for example the right to reject faulty goods in the UK or the latent defect guarantee in France or in Belgium.’¹⁸ She further acknowledged that there were ‘understandable and legitimate concerns about crucial issues’ in some member states, including the two-year time limit on trader liability for lack of conformity of goods and the hierarchy of remedies in Chapter IV of the Directive. Stating that she was ‘ready to work further on these questions’, the Commissioner added that ‘it may be that certain consumer rights need to be reinforced’.

16. The implications of the full harmonisation approach of the proposed Directive for Irish sales law extend beyond its effect on consumer rights. The broader content and coherence of that law are also at risk in several important respects. The preamble to the proposal notes among other things that the full harmonisation approach to consumer protection legislation was ‘successfully pursued with the Unfair Commercial Practices Directive’.¹⁹ Though the Unfair Commercial Practices Directive posed some challenges for Irish legislation in the field of consumer information, advertising and related commercial practices, those challenges were managed relatively easily. There were few if any provisions in our domestic legislation that were not covered adequately or more comprehensively by the Directive, and indeed a number of positive provisions in the Directive that had not featured previously in our legislation. This is manifestly not the case with the provisions of Chapter IV of the proposed Directive on consumer rights specific to sales contracts. The provisions of the Sale of Goods Acts 1893 & 1980 in areas such as risk and delivery are clearer and more detailed than the somewhat summary provisions of the Directive. In these areas at least, the proposed Directive might with some justification be said to be pursuing maximum harmonisation on a basis of relatively minimal content. If this situation is to be rectified, the proposed Directive will either have to incorporate additional rules in these areas or accord minimum harmonisation status to the provisions on consumer sales contracts.

¹⁸ Meglena Kuneva, European Consumer Commissioner, ‘Consumer Rights Directive’, Address to European Parliament IMCO Committee 2 March 2009, pp.2-3.

¹⁹ European Commission. **Proposal for a Directive on Consumer Rights**, COM (2008) 614, p.7.

17. Though there are aspects of these proposals that give cause for concern, the full harmonisation status of Chapter III on distance and off-premises contracts and Chapter V on unfair contract terms is less problematical from an Irish perspective. Prior to the adoption of the existing EU Directives, there was no domestic consumer legislation in any of these areas. Though all of the existing Directives in these areas are minimum harmonisation instruments, in general their transposition into Irish law made little or no use of their minimum harmonisation status to supplement the provisions of the Directives. Other member states, however, who made more extensive use of the minimum harmonisation status of these instruments are known to have significant problems with the full harmonisation character of the proposed Directive in these fields.

4. BALANCE BETWEEN CONSUMER AND TRADER INTERESTS

18. Article 1 of the proposed Directive expresses its aims as contributing to the proper functioning of the internal market and achieving a high level of consumer protection. Recital 4 states that the proposal strikes ‘the right balance between a high level of consumer protection and the competitiveness of enterprises’. In her remarks on the launch of the proposal, Commissioner Kuneva claimed that the ‘new rules will significantly strengthen consumer protection across the EU’ and ‘at the same time ... will significantly reduce the burden on Europe’s hard pressed business community.’²⁰

19. It is fair to say however that, while specific aspects of the proposed Directive such as the extension of the withdrawal period for distance and off-premises contracts are generally seen as enhancing consumer rights, the overall assessment of the proposal by consumer groups and independent commentators is that it tends to favour business interests and needs over those of consumers. In its response to the Directive, BusinessEurope, the Confederation of European Business, expressed support for the proposal and its aims subject to reservations about a number of its specific provisions.²¹ BEUC, the European Consumer’s Organisation, has indicated however that, though it welcomes some of the specific provisions of the proposed Directive, it

²⁰ Meglena Kuneva, European Consumer Commissioner, ‘**Contract Rights Directive**’, **Press Conference Speaking Points**, 8 October 2008.

²¹ Business Europe. Position Paper, 13 March 2009. **Proposal for a Directive of the European Parliament and of the Council on Consumer Rights.**

is unable to support the proposal in its present form principally because it would result in the removal or reduction of important consumer protection rights in many member states.²² This assessment receives some support from an analysis of the provisions of the proposed Directive in the light of the responses from stakeholders to the Green Paper on the Review of the Consumer Acquis. A Working Paper prepared by the Commission on the outcome of the public consultation on the Green Paper outlined the response of different groups to the main questions posed by the Green Paper.²³ An assessment of these responses reveals some nineteen issues on which business and consumer groups generally had different viewpoints. The position taken by the proposed Directive on the various matters at issue is closer to the stance advocated by business groups in fifteen of these cases. While this does not of itself establish that the Directive takes a pro-business approach, it helps explain the perception that it has failed to strike a reasonable balance between the two interests. As noted above, Commissioner Kuneva is aware of the criticisms levelled at the Directive in this respect and has signalled a willingness to address them. It is important that this is done in order that the proposal can be adopted with the support of both consumer and business interests.

²² BEUC. 24 March 2009. **The Future of European Consumers' Rights: BEUC's Reaction to the Fundamental Issues Raised by the Proposal for a Directive of the European Parliament and of the Council on Consumer Rights.**

²³ Commission Staff Working Paper 2007. **Report on the Outcome of the Public Consultation on the Green Paper on the Review of the Consumer Acquis.**

II CHAPTER I OF THE PROPOSAL: SUBJECT MATTER, DEFINITIONS AND SCOPE

ARTICLE 2: DEFINITIONS

Issues Arising and Proposed Solutions

20. Article 2 of the proposed Directive contains a list of twenty definitions which relate to the substantive provisions of Chapters II to V. Most of these definitions are taken verbatim from previous Directives. An advantage of this approach is that the (limited) case law concerning these definitions can be used to inform our understanding of the proposed Directive. However, a number of the pre-existing definitions reproduced in the proposed Directive were not particularly clear in the first instance. As with other aspects of the proposal, Article 2 can be criticised for simply reproducing existing rules and missing an opportunity for considered reflection, or indeed for failing to use parallel texts such as the Draft Common Frame of Reference to provide greater clarity.

21. The analysis that follows attempts to highlight the most critical issues raised by the definitions set out in Article 2. All twenty definitions are not reviewed, nor is every semantic shortcoming with Article 2 discussed. Allowances have been made for the differences in the approach taken to the drafting of EU and Irish legislation. Nor does this section seek to examine issues (such as whether the definition of ‘consumer’ should be extended to SME’s) that are unlikely to be re-opened at this juncture.

Definition of Sales Contract

22. Under Article 2(3) of the proposed Directive ‘sales contract’ means any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services. Both executed and executory contracts for the sale of goods are included within this definition. However, in the Group’s view, there are a number of issues which require clarification.

23. First, it is unclear whether the definition captures contracts where no money changes hands, such as where goods are supplied in exchange or part exchange for goods (as often happens with car sales), or where goods are exchanged for vouchers or tokens. In the Group’s view, there is no reason in principle why a consumer who

purchases goods from a trader by this method should not have the same level of protection as a consumer who pays with money. The argument in favour of a uniform regime is clear.

PROPOSED SOLUTION (1):

- The definition of sales contract should be extended so as expressly to include contracts for barter and part exchange.

24. Second, the meaning of ‘sale’ is also unclear. On a narrow interpretation it seems to only include an outright sale, thus not including transactions in which a consumer is supplied goods by way of awards by chance, lease, licence, mortgage (or other security) or assignment. If this is the case, a superior definition of ‘contract for sale’ is found in the Draft Common Frame of Reference (“DCFR”), namely “a contract under which one party, the seller undertakes to another party, the buyer to transfer the ownership of goods to the buyer, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price”. Ownership is defined as “the most absolute right a person, the owner, can have over property, including the exclusive right...to use, enjoy, modify, destroy, dispose of and recover the property.”

PROPOSED SOLUTION (2):

- The definition of ‘sales contract’ should be clarified and elaborated upon.
- Further clarity could be brought to the definition of ‘sales contract’ by providing that Chapter IV applies to all mixed purposes contracts even where the goods element is marginal, (for example, where a car is serviced and new oil provided). In this situation, the oil provided should be classified as ‘goods’ (or ‘materials’ if the requirements for service contracts are expanded).

25. As with existing Irish sales legislation, the definition of ‘sales contract’ in the proposed Directive does not include contracts for hire or hire purchase. In current hire contracts, the contract can be terminated if the goods develop a fault, a stronger remedy than those contained in the proposed Directive. Hire purchase contracts involving consumers are covered by the Consumer Credit Act 1995, which implies terms into the contract in a similar way to that effected by the Sale of Goods Acts

1893 & 1980. While the transposition of the proposed Directive will give rise to a degree of dissonance between the rights and remedies available to consumers who have purchased goods under a sales contract and those who have a hire purchase contract, the Group believes that hire purchase contracts should not be brought within the scope of the proposed Directive.

PROPOSED SOLUTION (3):

- The scope of the proposed Directive should not be extended to hire or hire purchase contracts.

The Definition of Goods

26. ‘Goods’ are defined under the proposed Directive in the same way as in Directive 1999/44/EC on the Sale of Goods and Associated Guarantees, namely as “any tangible movable item, with the exception of:

- (a) goods sold by way of execution or otherwise by authority of law,
- (b) water and gas where they are not put up for sale in a limited volume or set quantity,
- (c) electricity;

27. It is unclear what the first of these exceptions means; it may cover situations where goods are transferred pursuant to an award/court order, or are compulsorily acquired or are repossessed pursuant to a security, or are supplied under a public duty. The reference to “movable item” in the definition means that real property is excluded (as with section 62 of the Sale of Goods Act 1893). The rationale for the exclusion of water, gas and electricity from the definition is open to question. It is unclear whether the intention is to remove water, gas and electricity entirely from the scope of the proposed Directive or whether their supply is to be treated as akin to the supply of a service under the proposed Directive (so that Chapter IV will not apply). Neither possibility is desirable. The market for electricity is no longer controlled by a single (State-controlled) supplier and there are also moves to liberalise the gas market. In a competitive electricity and gas market, it is unclear why a consumer should not be able to, for example, withdraw from a contract and switch to an alternative supplier, when the service provided to that consumer has failed to accord with the standard that could be reasonably expected. Notably, gas, electricity and water are classified as

goods under the Consumer Protection Act 2007 and their exclusion from the proposed Directive could create some anomalies if the definition in the proposed Directive has to be transposed in its present form.

PROPOSED SOLUTION (4):

- Article 2(4) should be amended so that gas, electricity and water are included within the definition of goods.

28. Overall, in the Group’s view, the definition of ‘goods’ in the proposed Directive is oblique, particularly when compared with the more comprehensive definition of goods contained in section 2 of the Consumer Protection Act 2007.²⁴ That definition is aimed at addressing certain unclear issues (such as whether computer software, tickets, animals, ships and aircraft etc. constitute goods). Section 62 of the Sale of Goods Act 1893 also has a more comprehensive definition of goods, which makes clear that ‘goods’ includes, for example, emblements and things attached to land.

PROPOSED SOLUTION (5):

- Article 2(4) should be replaced by a more comprehensive definition of goods.

Services Contracts and the Directive

29. While most of the proposed Directive applies to services, there is no equivalent to section 39 of the Sales of Goods and Supply of Services Act 1980 regulating the standards to which traders must conform when supplying services to consumers. In particular, Chapter IV only applies in relation to contracts for the sale of goods and, in

²⁴ Under this definition “goods” are defined as *real or personal property of any nature or description, and includes—*

- (a) *ships, aircraft or other vehicles,*
- (b) *animals,*
- (c) *minerals, trees or crops, whether on, under or attached to land or not,*
- (d) *gas, electricity or water,*
- (e) *computer software,*
- (f) *tickets or like evidence of a right to be in attendance at a particular place at a particular time or times or a right of transportation,*
- (g) *any voucher, coupon or other document or thing intended to be used as a substitute for money in the payment, in whole or in part, for a product or otherwise exchanged for a product, and*
- (h) *any description of interest (present or future, vested or contingent) or obligation arising out of or incidental to goods;*

spite of the definition of goods as including ‘mixed purpose contracts’, where ‘the contract is a mixed purpose contract having its object both goods and services’, the protections afforded by the Chapter relate only to the goods element.

30. It has been argued that the scope of Chapter IV should be extended to include service contracts. On this view, the increase in the size and importance of the services sector means that its omission from the scope of Chapter IV leaves a gap in the proposed Directive that will lead to the fragmentation of consumer protection and restrict the further development of the Internal Market.

PROPOSED SOLUTION (6)

- The Group supports the proposal to bring services within the scope of Chapter IV. Standards along the lines of those set out in section 39 of the Sale of Goods Act and Supply of Services Act 1980 merit consideration in this context. As well as providing that the service be supplied with due skill, care and diligence, and that any goods supplied are of merchantable quality, section 39 also requires:
 - (i) that the supplier has the necessary skill to render the service; and
 - (ii) that where materials are used, they will be sound and reasonably fit for the required purpose.

Definition of ‘Service Contract’

31. In the Group’s view, the definition of ‘service contract’ in the proposed Directive is lacking in content and needs elaboration. Pursuant to Article 2(5) of the proposal, ‘service contract means any contract other than a sales contract whereby a service is provided by the trader to the consumer’. A fuller definition of services is contained in section 2(1) of the Consumer Protection Act 2007.²⁵

²⁵ According to this definition:

“ services ” means any service or facility provided for gain or reward or otherwise than free of charge, including, without limitation

(a) services or facilities for—

(i) banking, insurance, grants, loans, credit or financing,

(ii) amusement, cultural activities, entertainment, instruction, recreation or refreshment,

(iii) accommodation, transport, travel, parking or storage, or

(iv) the care of persons, animals or things,

(b) membership in a club or organisation or any service or facility provided by the club or organisation, and

PROPOSED SOLUTION (7):

- The definition of ‘service contract’ at Article 2(5) of the proposal should be elaborated upon either in the definition itself or in a recital.

Digital Services and the Proposed Directive

32. Article 2(4) of the proposed Directive defines goods as ‘tangible movable items’. Intangible items, such as digitally supplied goods/services, are not covered therefore by Chapter IV of the proposed Directive relating to sales contracts. The position seems to be similar to that under existing Irish case law. Based on English case law, where software and hardware are supplied together (for example, a personal computer with pre-loaded software, or software on a disk) this may be interpreted as a sale of goods but where software is supplied alone (for example, as a download from the internet under licence) this may not qualify as a sale of goods because of the absence of a tangible item.

33. The case for change in this area is compelling. Over the last few years, the purchase of digital services by consumers has dramatically increased. These services can be easily provided on a cross border basis (iTunes) and the argument for harmonisation is strong. As pointed out in Chapter 1, it is anomalous that the proposed Directive will provide consumers with remedies for lack of conformity if they purchase CDs or DVDs, but will not provide remedies if the same content is purchased as a downloadable data file.

PROPOSED SOLUTION (8):

- The provision of digital services from a trader to a consumer should be brought within the scope of Chapter IV of the Directive. The question then becomes whether the supply of ‘digital products’ should be treated as a sale of goods subject to strict liability, a supply of services subject to a fault standard, or a product sufficiently different from goods and services to require a different form of regulation. Ireland should encourage and support the

(c) any rights, benefits, privileges, obligations or facilities that are, or are to be provided, granted or conferred in the course of services, but does not include services provided under a contract of employment”

exploration of appropriate ways to achieve the same levels of consumer protection in the digital environment as in the conventional sales environment.

The Meaning of Delivery in the Proposed Directive

34. There is no definition of delivery in the proposed Directive. The Group notes that delivery seems to correspond with ‘the transfer of material possession of goods to a party’. However, it is not clear what constitutes ‘material possession’ in this context.

PROPOSED SOLUTION (9):

- Article 2 should include a definition of ‘delivery’.
- ‘Material possession’ should be clearly defined.

ARTICLE 3: SCOPE

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35. Article 3(1) sets out the scope of the proposal and states that the ‘Directive shall apply, under the conditions and to the extent set out in its provisions, to sales and services contracts concluded between the trader and the consumer’. Besides being rather clumsily constructed, the provision may unduly narrow the scope of the proposed Directive. In this connection, the Group restates its concerns that the definition of ‘sales contract’ in the proposed Directive is too narrow. Moreover, in addition to regulating sales and service contracts, parts of the proposed Directive (in particular Part V) also purport to regulate the supply of ‘products’, the definition of which includes “immovable property, rights and obligations”. Article 3 (1) needs to be amended to clarify this point.

PROPOSED SOLUTION (10):

- Article 3(1) should be amended to clarify that the proposed Directive does not cover only sales and service contracts.

ARTICLE 4: FULL HARMONISATION

Issues Arising and Proposed Solutions

36. Issues relating to the full harmonisation status of the proposed Directive have been discussed in chapter 1 and are further examined in the consideration of the provisions of Chapters II-V of the proposal on consumer information, information and withdrawal rights for distance and off-premises contracts, other consumer rights specific to sales contracts, and consumer rights concerning contract terms.

III CHAPTER II OF THE PROPOSAL: CONSUMER INFORMATION

Articles 5-7

Issues Arising and Proposed Solutions

Article 5 and Information Disclosure

37. In a competitive market, consumers need to have adequate information about the products of rival traders in order to make optimal purchasing decisions. Traders typically have superior information about the reliability, quality and durability of the products which they sell. This type of information is important in order for consumers to make rational purchasing decisions that make the best use of scarce resources. *Caveat emptor* remains a central tenet of the common law and parties are under no obligation to disclose material information to each other unless the contract is *uberrimae fidei* (as with insurance contracts, for example). The position under the law of torts is similar - a duty of disclosure is imposed on parties in a number of discrete circumstances, such as when a doctor performs a procedure on a patient. Liability can also arise for omissions in certain discrete situations such as the Hedley Byrne principle where the relationship between the parties is one of extreme proximity.²⁶ Yet, the basic position remains that parties cannot be held liable for pure omissions.

38. Over the years the rule relating to non-disclosure has had stark implications for the purchasers of products. In *Ward v Hobbs*²⁷, the buyer of pigs, whom the seller knew were diseased, was held to have no remedy as there was no general duty to disclose known latent defects and any representation that the seller had made by bringing the pigs to the market had been negated by the fact that the seller had sold the pigs “with all faults”. In *Keats v. Corrigan*²⁸ it was held that no remedy lay against a landlord who failed to tell the tenant that the house was in a ruinous condition before letting it to him. In *Surinya & Douglas v. Midland Bank*²⁹ it was held to have followed from the absence of a duty of disclosure that the defendant was not under a duty to inform the plaintiffs that their money could be more profitably invested in a different account.

²⁶ *White v Jones* [1995] 2 A.C. 207; *Banque Financiere se la Cite SA v Wesgate Insurance Co. Ltd* [1989] 2 All ER 952.

²⁷ (1878) 4 AC 13.

²⁸ (1851) 10 C.B. 591.

²⁹ [1999] 1 All ER (Comm.) 612

39. The duties on traders to disclose material information to consumers, however, have been materially altered by section 46 of the Consumer Protection Act 2007 which transposes Article 7 of Directive 2005/29/EC on Unfair Commercial Practices [UCPD] regulating misleading omissions; disclosure requirements may also apply to particular sectors such as those governing package holiday providers under sections 12 & 13 of the Package Holidays and Travel Trade Act 1995. The effect of Article 7 UCPD is to impose general disclosure obligations on traders. As a result of section 74 of the Consumer Protection Act 2007, failure to provide such information could give rise to a right of action in damages. Article 5 of the proposed Directive sets out general information requirements that must be provided by the trader to the consumer prior to the conclusion of any sales or service contract. The provision is clearly modelled on Article 7 UCPD and is meant to provide for a private law analogue to the regulatory requirements of Article 7 UCPD. Roughly paraphrased, Article 5.1. requires the consumer to be told of:

- (a) the main characteristics of the product, as appropriate to the medium and product;
- (b) the geographical address and identity of the trader (trading name) and any trader on behalf of whom that trader is acting;
- (c) the price, inclusive of taxes, or the formula for calculating the price, and where appropriate, all additional freight, delivery or postage charges reasonably calculable in advance, or where not so calculable, the fact that additional charges may be payable;
- (d) the arrangements for payment, delivery, performance, and the complaint handling policy, if they depart from the requirements of professional diligence;
- (e) the existence of any applicable right of withdrawal;
- (f) the existence and conditions of any applicable after-sales service and commercial guarantees;
- (g) the duration of the contract where applicable or, if the contract is open-ended, the conditions for terminating it;
- (h) the minimum duration of the consumer's obligations under the contract;
- (i) the existence and conditions of any deposits or other financial guarantees to be paid or provided by the consumer.

40. In the Group's view, Article 5 of the proposed Directive is an unsatisfactory provision. Article 5 constitutes a *per se* rule, requiring the disclosure of the above-mentioned information prior to the conclusion of a contract regardless of whether such information is material. If adopted in its present form, its effect in some cases would be to place onerous obligations on traders with little obvious corresponding consumer gain. The Group does not dispute that consumers may often require *some* of the information contained in Article 5 – the provision of appropriate price information in line with Article 5(c), for example, will almost always be necessary. It seems questionable, however, whether consumers require much of the information specified in Article 5. The problem is not merely that Article 5 may have the effect of overloading consumers with unnecessary information. In addition, the provision has insufficient regard to the costs to traders of providing information to consumers.

Article 5 and Legal Certainty

41. The Group notes that the requirements of Article 5 only arise if the information is 'not already apparent from the context'. In practice, this caveat is likely to be heavily relied upon by traders if Article 5 is adopted in its current form. The presence of this caveat dilutes the burdensome obligations contained in Article 5. However, its presence also gives rise to a high degree of legal uncertainty as it will not always be clear to traders, consumers and lawyers what information is 'already apparent from the context'. Recital 17 states that, in the case of an on-premises sales contract, 'the main characteristics of a product, the identity of the trader and the arrangements for delivery may be apparent from the context'. However, even this example shows how uncertain the provision is: the word 'may' leaves it open for it to be concluded that in any given situation the trader might be found not to have provided this information. In short, notwithstanding the caveat contained in Article 5(1), it will be difficult for traders to know when they will have to provide the information outlined in Article 5(1) of the proposed Directive and when they will not.

42. Moreover, the type of information which must be provided to consumers also gives rise to problems. Article 5(1)(b), for example, refers to a trader having to 'disclose the geographical address and identity of the trader on behalf of whom he is acting.' For web traders and virtual companies it may be impossible to comply with this provision since many of these traders have no geographical address. Moreover,

how will this provision work in the common case of retail outlets stocking branded products supplied to them by third parties? Are they expected to inform the consumer of the geographical address of the trader whose product they stock? Equally, the requirement under Article 5(1)(e) in respect of disclosing the legal rights of a consumer to withdraw from or cancel a contract is also unclear. In theory, a possibility of a right of withdrawal or cancellation occurs in every transaction, since a contract can be rescinded or terminated for various reasons; but a *per se* right of withdrawal occurs in a limited number of circumstances, such as agreements made under a distance or doorstep selling contract.

The Pre-Emptive Effect of Article 5

43. Moreover, in the Group's view, the problem with Article 5 is not only that it imposes ambiguous obligations on traders to disclose information that might often be of questionable importance to consumers. Given that it is contained in a full harmonisation instrument, the provision is also meant to have a pre-emptive effect. The provisions in Chapter II represent a 'closed list'. Member States cannot legislate for more information to be disclosed (for example, instructions for use, safety information). On its face, this will remove the ability of Member States to enact tailored information disclosure legislation targeted at specific problems that arise in particular markets. Information obligations not specified in Article 5 (1) include health and safety; installation; use; maintenance; legal requirements; financial risks; conflicts of interest; information obligations on professionals in particular contexts, as well as the requirements for distance and off-premises contracts at Articles 9(d)-(f) regarding codes of conduct, ADR mechanisms, and the fact that the contract is a business-to-consumer contract covered by the Directive.

44. In the Group's view, it seems clear in examining the provisions of Article 5 of the proposed Directive that consumers' specific needs for information cannot appropriately be addressed through the general requirements of this provision alone. General provisions relating to misleading omissions cannot deal effectively with consumers' informational needs in every situation. In addition to the general provisions contained in Article 5 of the Proposed Directive, there may be a need for specific rules adapted to specific products or business sectors. Though there was

agreement in the Group about the problems posed by Article 5, there was a range of views as to how these might be addressed.

PROPOSED SOLUTION (11):

- The issues raised by Article 5 could be tackled in a number of different ways. The provision could be adopted on a minimum harmonisation basis or there could be specific derogations from full harmonisation that would permit member states to impose information requirements for certain types of transaction or consumer. Alternatively, the provision could be deleted from the proposed Directive on the ground that it is extremely difficult for a provision of this kind to deal adequately with the information requirements of the enormous range and variety of transactions between traders and consumers. The pre-contractual information to be provided to consumers would be more effectively regulated by a balanced mix of Community and national legislation, both horizontal and sectoral.

The Unclear Effect of Breaching Article 5

45. Article 5(3) of the proposed Directive states that the information requirements of Article 5(1) 'shall form an integral part of the sales or service contract'. The Group is concerned that this gives rise to the implication that these obligations are conditions in the sense applicable under the Sale of Goods Acts 1893 and 1980, that is terms that give the consumer the right to rescind the contract. This is important because the proposed Directive provides at Article 6(2) that 'the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5'. It may be that national laws may view some of the Article 5(1) obligations as producing more serious consequences for a consumer than others and, as the proposed Directive does not target contract remedies, there is no certainty that national laws may not differ on the question of the applicable remedy. In the Group's view, giving consumers a right to rescind a contract because of the failure of a trader to provide information in accordance with Article 5(1) would be disproportionate in many cases. It would also result in a lack of symmetry with other aspects of the proposed Directive, particularly if consumers lose their automatic right to reject in respect of faulty goods.

PROPOSED SOLUTION (12):

- It should be clarified in transposing the proposed Directive into Irish law that the consequences of breach of Article 5(1) are not to be akin to breach of a condition in Irish contract law, but should be treated as breach of an innominate or intermediate term. This would allow the remedy to be determined by reference to the nature of the breach. If the effects of the breach are serious, the term may be treated as a condition; if they are minor, it may be regarded as a warranty.

Article 7: Specific Information Requirements for Intermediaries

46. Under Article 7, non-compliance with the obligation to inform a consumer that the contract is being negotiated by an intermediary acting on behalf of a consumer (i.e. that it is a consumer-to-consumer contract) means that the intermediary is deemed to have concluded the contract in his own name (Article 7). In the Group's view, this provision raises the question of what it is to happen where the intermediary is not in a position to provide the goods or services in his own right. What may be meant by Article 7 is that a consumer can sue a non-disclosing intermediary for damages where, for example, defective goods are supplied by the consumer counterparty.

47. The Group is concerned also at the possible implications of Article 7 for the contract between the consumer buyer and the consumer seller. One interpretation of Article 7 is that the failure of an intermediary to disclose that he is acting for a consumer means there is no contract, or option of a contract, between consumer buyer and the consumer seller. In the Group's view, a breach of Article 7 by an intermediary should have no effect on the validity of the contract concluded between the the consumer buyer and the consumer seller.

PROPOSED SOLUTION (13):

- The meaning of Article 7 should be clarified.
- The failure of an intermediary to disclose that he is acting for a consumer when concluding a contract should have no effect on the validity of the consumer-to-consumer contract.

IV CHAPTER III OF THE PROPOSAL: CONSUMER INFORMATION AND WITHDRAWAL RIGHTS FOR DISTANCE AND OFF-PREMISES CONTRACTS

Issues Arising and Proposed Solutions

ARTICLE 8 SCOPE

48. Chapter III of the proposal contains information requirements which relate specifically to distance and off-premises contracts. These information requirements exist alongside the general information requirements for all sales and service contracts between a consumer and a trader in Chapter II. Chapter III also deals with formal requirements and withdrawal rights for distance and off-premises contracts respectively. Chapter III does not attempt to integrate the Directives on Distance and Doorstep Sales, but instead largely reproduces the provisions of the respective Directives. As a result, the structure of Chapter III is complex and it is arguable that it does not reflect the aim of the proposal as stated in the Explanatory Memorandum to simplify the legislation and to ‘regulate in a systematic fashion the commonalities and eliminate overlaps and inconsistencies’.

PROPOSED SOLUTION (14):

- The information and formal requirements for distance and off-premises contracts at Articles 9-11 of Chapter III should be included with the general information requirements in Chapter II, reserving Chapter III for the right of withdrawal in relation to distance and doorstep sales contracts.

ARTICLE 9 – INFORMATION REQUIREMENTS FOR DISTANCE AND OFF-PREMISES CONTRACTS

49. As a result of the full harmonisation character of the proposed Directive, member states would not be able to introduce, or uphold, any information requirements beyond those set out in Article 9 with regard to a distance or off-premises contract concluded with a consumer. The information duties in Article 9 include the general information required by Articles 5 and 7. This may result in a level of protection for consumers that is lower than that offered to the purchaser or recipient of a service in a business-to-business contract. There are a range of information duties recognised in the legal

systems of member states which are not included in Articles 5, 7 or 9. These would include, for example, duties to provide information on health and safety, installation, maintenance, dangers associated with the goods sold, legal requirements, information in relation to professional responsibilities of providers of goods and services, etc.

PROPOSED SOLUTION (15):

- There should be some derogation from full harmonisation to permit Member States to impose additional information requirements for certain types of transaction or consumer – for example, professional services (such as auctioneer or architect) where there may be existing duties to provide information on matters specific to those professions .

50. Chapter III provides for a substantial number of exemptions from the right of withdrawal in distance and off-premises contracts (Articles 19 and 20). In view of the importance of the right of withdrawal to consumer protection in these types of transactions and the number and complexity of the proposed exemptions, Article 9 should require traders to inform consumers where the right of withdrawal does not apply.

PROPOSED SOLUTION (16):

- Article 9 should be amended to include a requirement on traders to inform consumers where the right of withdrawal does not apply.

51. The information requirements at subparagraphs (d) to (f) are excessive especially given that all the information requirements under Article 9 would form ‘an integral part of the contract’, and in view of the associated potential extension of repudiation rights.

PROPOSED SOLUTION (17):

- Article 9 should be amended either by the deletion of subparagraphs (d) to (f) or the amendment of the chapeau to Article 9 to provide that the information requirements of these subparagraphs do not form an integral part of the contract between the consumer and the trader.

52. Article 3(4) states that Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in the Services Directive and the E-Commerce Directive. Article 10 of the E-Commerce Directive requires internet service providers to provide certain information prior to the order being placed. Though many of the provisions overlap with those in the proposed Directive, they differ in several respects, thus creating a degree of difficulty for traders subject to both sets of requirements. To give a specific example, Article 10(2) of the E-Commerce Directive provides that Member States shall ensure that (except where otherwise agreed by parties who are not consumers), the service provider indicates any relevant codes of conduct to which he subscribes and information on how those codes can be consulted electronically. Under Article 10(4), this requirement is excluded in the case of contracts concluded exclusively by exchange of electronic mail or by equivalent individual communications. Under the proposed Directive, however, the requirement to provide information on codes of conduct would apply to all distance contracts including contracts concluded by e-mail and equivalent individual communications.

PROPOSED SOLUTION (18):

- A specific provision should be included in the proposal that, in the event of a conflict between the information requirements of the proposed Directive and the E-Commerce Directive, the latter (being the more specific provision) would prevail. Alternatively, this could be achieved through a general *lex specialis* clause.

53. Article 9 contains no requirement for the trader to inform consumers of the nature of their payment security provisions. Surveys have shown that over two-thirds of EU consumer think that they are at greater risk from scams or fraud when making purchases on a cross-border basis³⁰.

PROPOSED SOLUTION (19):

- In view of the importance of payment security for consumers engaged in distance transactions, Article 9 should include such a requirement.

³⁰ Eurobarometer 2006. **Consumer Protection in the Internal Market**. Special Report 253, section 3.2.

54. Article 4(1)(g) of the Distance Sales Directive requires traders to provide information on ‘the cost of using the means of distance communication where it is calculated other than at the basic rate.’ This provision is not retained in Article 9 of the proposal.

PROPOSED SOLUTION (20):

- The requirement at Article 4(1)(g) of the Distance Sales Directive should be retained. Although it is understood that the issue will be addressed in a forthcoming Directive on the Information Society, it is important that distance traders should be required to provide this information under the Consumer Rights Directive.

55. Article 4(1)(h) of the Distance Sales Directive requires traders to provide information on ‘the period for which the offer or the price remains valid.’ This provision is not retained in Article 9.

PROPOSED SOLUTION (21):

- It is understood that the provision at Article 4(1)(h) of the Distance Sales Directive has not been retained because the provision of misleading price information by commission or omission is now regulated by Directive 2005/29/EC on Unfair Commercial Practices [UCPD]. However, many of the information requirements at Articles 5 and 9 are contract law counterparts to the marketing law rules in the UCPD. Therefore, the existing requirement regarding the offer/price duration should be retained. It should arguably be placed under Article 5 as it would then apply to all consumer contracts.

ARTICLE 10 – FORMAL REQUIREMENTS FOR OFF-PREMISES CONTRACTS

56. Article 10(1) provides that the information requirements of Article 9 must be given in an order form legibly and in plain and intelligible language. Article 10(2) provides that an off-premises contract shall only be valid if the consumer signs an order form and, in cases where the order form is not on paper, receives a copy of it on another durable medium. It is unclear in this context whether an order form sent by e-

mail or SMS text message would satisfy the durable medium requirement. Article 10(3) states that member states shall not impose any additional formal requirements on off-premises contracts.

57. The Group is concerned that the requirement to provide information about off-premises contracts on an order form would not be practical in many situations. For example, it is difficult to see how it would apply to street sellers, or casual service providers such as window cleaners, gardeners and others. Where the requirement is not fulfilled, there is no provision to allow the consumer to choose whether to proceed with or rescind the contract. Failure to comply results in automatic invalidity of the contract. The wording of Article 10(2) may give the impression, moreover, that an off-premises contract is valid where the consumer signs a written order form or receives a copy of the order form on another durable medium. An order form signed by a consumer may be no more than an offer, while an order form received by a consumer may not even be an offer.

PROPOSED SOLUTION (22):

- The order form requirement of Articles 10(1) and 10(2) is excessively bureaucratic, particularly for low-value transactions. If it is not modified or deleted, consideration should be given to reinstating the monetary threshold at Article 3(1) of the Doorstep Selling Directive or to broadening the exemptions at Article 20(1)(d) to exempt traders engaged in low-value off-premises transactions from the scope of Chapter III.

PROPOSED SOLUTION (23):

- Article 10(2) should be amended to provide that, where the formal requirements for off-premises contracts are not met, the contract will be binding on the trader but not on the consumer or, alternatively, should give the consumer the choice as to whether to proceed with or rescind the contract.

PROPOSED SOLUTION (24):

- The definition of ‘durable medium’ and/or the Recital to the Directive should clarify whether an order form sent by e-mail would satisfy the requirement of

Article 10(2). In addition, the question of whether SMS messages would satisfy the requirement should be clarified. Consideration should be given to the inclusion in Article 10 of an equivalent provision to Article 11(3) which permits the initial provision of more limited information in distance contracts concluded through media subject to space or time limitations.

PROPOSED SOLUTION (25):

- Article 10(2) would benefit from drafting changes to clarify that the signature or receipt of an order form does not entail the conclusion of a contract.

58. There is no requirement in Article 10 that the withdrawal information be prominent in the contract.

PROPOSED SOLUTION (26):

- In view of the importance of the right of withdrawal, the Directive should require that information on withdrawal rights should have as much prominence as any other information in the contract.

ARTICLE 11 – FORMAL REQUIREMENTS FOR DISTANCE CONTRACTS

59. Under Article 11(3), the information requirements of Articles 5 & 7 are adapted to take into account the technical constraints of certain media, such as mobile phones. In this case, the trader is required to comply with a minimum set of information requirements on that medium prior to the conclusion of the contract.

PROPOSED SOLUTION (27):

- In view of the importance of the right of withdrawal, the mandatory information required by Article 11(3) should include information on the right of withdrawal.

ARTICLE 12 – LENGTH AND STARTING POINT OF THE WITHDRAWAL PERIOD.

60. Article 12 does not establish a uniform point for the commencement of the withdrawal period for distance contracts and off-premises contracts. In effect, it

largely maintains the status quo by reproducing the relevant provisions from the Distance and Doorstep Selling Directives. This represents a missed opportunity to simplify and clarify this complex issue so as to achieve a more co-ordinated approach. In the case of distance selling of goods, the withdrawal period only commences when the consumer acquires material possession of the goods. This allows the consumer to ascertain the nature and functioning of the goods before deciding on whether he wishes to exercise the right to withdraw. However, in the case of off-premises contracts for the sale of goods, Article 12(2) provides that the withdrawal period begins on the day the consumer signs the order form or receives a copy of it in another durable medium. This is the case regardless of whether the consumer has material possession of the goods or not. This could mean that the withdrawal period might have expired before the good has been delivered to the consumer. It could also mean in some cases that the withdrawal period may have expired before the contract is concluded, i.e. in a situation where the consumer signs the order form before the trader is legally bound to the contract.

61. Article 12 also maintains the distinction between distance contracts for the sale of goods and distance contracts for the supply of services. In the case of distance contracts for the supply of services, the withdrawal period begins from the day of conclusion of the contract. So, in that case, the consumer does not have the opportunity to assess the quality of the service. The distinction may however, be justified on the basis that a withdrawal period which started only after the provision of the service, would in many instances impose a burden on the providers of those services and may leave them open to abuse of withdrawal rights by consumers. It would be difficult if not impossible to return a service once it has been rendered. It could be argued that such a right would ultimately have a negative effect on the internal market on trade in services.

PROPOSED SOLUTION (28):

- Article 12 would benefit from amendment to establish uniform commencement periods for distance and off-premises contracts for the sale of goods and to clarify other ambiguities referred to below.

62. A possible option is an approach similar to that taken in the Draft Common Frame of Reference which provides as follows:

II 5: 103(2) The withdrawal period ends fourteen-days after the latest of the following times;

- a. the time of conclusion of the contract;
- b. the time when the entitled party receives from the other party adequate information on the right to withdraw; or
- c. if the subject matter of the contract is the delivery of goods, the time when the goods are received.

103(3) The withdrawal period ends no later than one year after the time of conclusion of the contract.

103(4) A notice of withdrawal is timely if dispatched before the end of the withdrawal period.

This option essentially provides that the withdrawal period for sales involving goods (for both distance and off-premises contracts) begins when the consumer receives the goods and in the case of services, when the contract is concluded. It also allows for a situation where a trader delays informing the consumer of the right to withdraw. In this situation, the withdrawal period does not begin until after this notification. The withdrawal period can be extended to a maximum of one year. This ensures that the trader is not left open to a perpetual right of withdrawal. This approach has the merit of simplicity. The withdrawal periods for sales of goods in distance and off-premises contracts are integrated and the consequences of omission of information on the right of withdrawal are built into the provision.

63. Article 12(1) does not specify whether working or calendar days should be used. Though Recital 24 clarifies that all time periods in the Directive are to be understood as being expressed in calendar days, it would be preferable if this were indicated in the text of the Directive itself.

PROPOSED SOLUTION (29):

- Article 12 should expressly state that ‘days’ means calendar days.

64. Under Article 12(2), in the case of distance contracts for the sale of goods, the withdrawal period commences when the consumer acquires material possession of the goods. In the case of distance contracts for the provision of services, the withdrawal period begins at the conclusion of the contract.

PROPOSED SOLUTION (30):

- Article 12 would benefit from a drafting change to clarify that although the withdrawal period commences when the consumer receives the goods, the consumer does not have to wait for the goods to be delivered to exercise the right of withdrawal. This clarification would be beneficial for both consumer and trader.

65. There is no provision for the case of mixed-purpose contracts. For example, when does the withdrawal period commence in the case of the sale of a pre-paid mobile phone where the consumer purchases both a good and a service?

PROPOSED SOLUTION (31):

- If the distinction between contracts for sale of goods and contracts for the supply of services is to be maintained, the Directive should clarify the appropriate starting point for the commencement of the withdrawal period for mixed-purpose contracts.

66. The general provisions of the Draft Common Frame of Reference on mixed contracts (II. – 1:108) may provide a solution to this issue:

Where a contract is a mixed contract then, unless this is contrary to the nature and purpose of the contract, the rules applicable to each relevant category apply, with any appropriate adaptations, to the corresponding part of the contract and the rights and obligations arising from it. This does not apply where:

A mixed contract can be regarded as falling primarily within one category; or one part of a mixed contract is in fact so predominant that it would be unreasonable not to regard the contract as falling primarily within one category, then the rules applicable to the category into which the contract primarily falls (the primary category) apply to the contract and the rights and obligations arising from it.

ARTICLE 13 – OMISSION OF INFORMATION ON THE RIGHT OF WITHDRAWAL

67. The Doorstep Selling Directive dates the commencement of the withdrawal period from the receipt of written notice of the right of withdrawal by the consumer and hence permits an indefinite extension of the withdrawal period where this notice is not supplied. Consumers will be less protected under the proposed Directive as it limits

the extension of the withdrawal period to three months after the trader has performed his other contractual obligations. The existing Distance Selling Directive provides that any breach of the information requirements leads to an extension of the withdrawal period. Under the proposed Directive, however, the withdrawal period is extended only if the trader has not informed the consumer of his right of *withdrawal*. A breach of any other information obligation does not lead to extension of the withdrawal period or other sanction under Article 13. So, the proposal will be less favourable to consumers entering into distance contracts than under the present distance selling rules. Article 13 does not provide for any sanction for breach of the general information obligations despite the fact that it is possible that a consumer may not have exercised the right of withdrawal because he had not been given certain information until after his right to withdraw had elapsed. Instead, the sanction for breach of other information obligations is left to Member States under Article 6(2).

PROPOSED SOLUTION (32):

- **Option 1:** The approach taken should be the same as that in the recently adopted Directive 2008/122/EC on timeshare contracts. Under this Directive, in the case of breach of general information requirements, the withdrawal period ends three months and fourteen calendar days after the conclusion of the contract. In the case of failure to provide information on the right of withdrawal, the withdrawal period ends one year and fourteen calendar days after the conclusion of the contract. This would provide a more harmonised solution to the question of the expiry of the withdrawal period.
- **Option 2:** The approach could mirror that of the Draft Common Frame of Reference. In the case of failure to provide information on the right of withdrawal, the withdrawal period is extended to a maximum of one year after conclusion of the contract. This option does not provide for cases of breach of general information requirements – in this case, the only sanction would be under Article 6(2) of the proposed Directive.

ARTICLE 14 – EXERCISE OF THE RIGHT OF WITHDRAWAL

68. Article 14 imposes form requirements on the consumer which do not appear in the Distance Sales Directive. It will not be possible for the consumer simply to return

goods as a means of exercising his right to withdraw. Article 14(1) was prompted by the need to provide for a documentary trail in cases where consumers withdrew from contracts. The recital refers to differences in the ways in which the right of withdrawal is exercised in the Member States that have resulted in additional costs for businesses selling cross-border. The introduction of a harmonised standard withdrawal form to be used by the consumer is intended to simplify the withdrawal process and provide greater legal certainty.

PROPOSED SOLUTION (33):

- **Option 1:** The provision is reasonable but clarification of certain matters is required (see paragraphs 69 and 70 below).
- **Option 2:** The consumer should not be required to inform the trader of his decision to withdraw on a durable medium but should be able to give notice verbally or to withdraw from the contract by simply returning the goods. The notice should only serve to inform the trader of the withdrawal. The form of notice should not matter. A notice by text message sent to the trader's mobile phone number should suffice for a valid withdrawal as would simply returning the subject matter of the contract.

69. While Article 14(1) imposes an obligation on the consumer to give notice of withdrawal on a durable medium, there is no corresponding requirement on the trader to acknowledge receipt of this notice.

PROPOSED SOLUTION (34):

- If the requirement on the consumer to inform the trader of his exercise of the right of withdrawal is maintained, the trader should be required to acknowledge receipt of the standard withdrawal form or statement of withdrawal from the consumer. This would provide certainty to the consumer and proof that the withdrawal notice had been received. It would also provide clarity in relation to the running of the thirty-day period within which the trader must reimburse the consumer under Article 16. The standard

withdrawal form at Annex I(B) of the proposal should include a detachable acknowledgement slip.

70. Article 14(2) provides that for distance contracts concluded online, the trader may give the consumer the option to fill in and submit an electronic version of the standard form on the trader's website.

PROPOSED SOLUTION (35):

- It should be mandatory for distance traders operating via the internet to provide an online withdrawal facility on their website.

ARTICLE 16 – OBLIGATIONS OF THE TRADER IN CASE OF WITHDRAWAL

71. Article 16 provides that the trader shall reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of withdrawal. In the case of sales contracts, the trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest. Thirty days is probably a reasonable period for reimbursement of payments to consumers. (It has been clarified that, as consumers have fourteen days to withdraw from the contract and a further fourteen days within which to return the goods, the return process could be relatively lengthy. Goods might also take some days to arrive at trader's premises following their dispatch. Over thirty days might elapse from the time the trader handed over or dispatched the goods to the time he received them on their return.) As the trader has to reimburse payment within thirty days of the communication of withdrawal, he might have little more than seven days in some cases to arrange reimbursement when account is taken of the time required to effect reimbursement through credit transfers.

PROPOSED SOLUTION (36):

- Article 16(1) should be amended to provide that reimbursement should be made as soon as possible and not later than thirty days from the receipt of

notice of withdrawal. This would reduce the risk that traders would view the thirty-day period as the norm.

PROPOSED SOLUTION (37):

- Article 16(1) should state that all payments received from the consumer should be reimbursed, including charges for delivery where applicable, rather than leaving this clarification to Recital 30.

ARTICLE 17 – OBLIGATIONS ON THE CONSUMER IN THE CASE OF WITHDRAWAL

72. Article 17(1) provides that, for sales contracts for which material possession of the goods has been transferred to the consumer or, at his request, to a third party before the expiration of the withdrawal period, the consumer shall send back the goods or hand them over to the trader, or to a person authorised by the trader to receive them, within fourteen-days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to collect the goods himself. The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost. Though it is acceptable in principle that the consumer should bear the cost of returning the goods in respect of which he has chosen to exercise the right of withdrawal, further clarification and amendment of the provision is desirable.

PROPOSED SOLUTION (38):

- There should be an obligation on traders to inform consumers of their responsibility for the cost of returning goods. This could be part of the mandatory information on conditions and procedures for exercising the right of withdrawal under Article 9(b).

PROPOSED SOLUTION (39):

- Article 17 should be amended to provide that the responsibility for collecting, or arranging for the collection of large or bulky goods, should rest with the trader. In such cases, where a charge is imposed on the consumer, there should be a provision to the effect that it should not exceed the charge for

delivering the goods to him or, where no charge was imposed, that it should be a fair and reasonable one.

73. Article 17(2) provides for consumer liability for diminished value from use or excessive handling of goods during the withdrawal period. The phrase ‘handling other than what is necessary to ascertain the nature and functioning of the goods’ is ambiguous and could lead to uncertainty for consumers.

PROPOSED SOLUTION (40):

- Article 17(2) should be amended to clarify the circumstances in which the consumer would be liable for diminished value of the goods during the withdrawal period. The wording of the Draft Common Frame of Reference merits consideration in this context. It distinguishes between inspection/testing and normal use. It provides that the consumer need not pay for any diminution in the value to the good delivered under the contract caused by inspection and testing and for any damage, destruction or loss to that good, provided that the consumer used reasonable care to prevent such damage. The consumer is required to pay for diminution in value caused by normal use, unless the consumer was not informed of his right of withdrawal.

74. Article 17(2) further provides that, for services subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period. This provision could make traders not exempt from the right of withdrawal reluctant to provide services during this period. The consumer should be able to agree to receive goods or services before the end of the withdrawal period if that is what he or she wants.

PROPOSED SOLUTION (41):

- If the concern about the effect on trader willingness to provide services is considered valid, Article 17(2) should be deleted and Articles 19(1) and 19(2) amended to provide that, if the consumer gives express written consent to the immediate performance of a services contract, the consumer retains a right of withdrawal but would be liable to pay the costs of goods used or services

provided during the withdrawal period if they subsequently withdraw. Where there is no consent, the consumer would not be liable for any services performed before expiry of the withdrawal period.

ARTICLE 19 – EXCEPTIONS FROM THE RIGHT OF WITHDRAWAL

75. Article 19(1) refers to the supply of goods at subparagraphs (c), (d), (e) and (f) and to the supply of goods and services at paragraph (b).

PROPOSED SOLUTION (42):

- These paragraphs should more accurately refer to the sale of goods and provision of services.

76. Article 19(1)(a) exempts from the right of withdrawal distance contracts for services begun with the consumer's express prior consent before the end of the withdrawal period.

PROPOSED SOLUTION (43):

- **Option 1:** This provision should be amended to provide that consumers retain the right to withdraw from contracts where the performance begins before the end of the withdrawal period (with their express written agreement), but are liable in this event for the cost of services provided during that period if they subsequently exercise the right to withdraw. The consequences of agreeing to performance before the end of the withdrawal period should be made clear to the consumer in writing. An amendment along these lines would provide greater protection for consumer subscribers to contracts with a continuing service aspect (such as telephone, broadband or cable television services) where quality can only be assessed after performance has commenced.
- **Option 2:** If the exemption at Article 19(1)(a) is to be retained, it should be amended to include an express obligation on traders to inform consumers of the loss of withdrawal rights where they consent to immediate performance of the contract under Article 19(1)(a). This would give some protection to consumers under pressure to conclude contracts from 'cold callers'.

77. Article 19(1)(f) provides for an exemption from right of withdrawal for distance contracts for the sale of newspapers, periodicals and magazines.

PROPOSED SOLUTION (44):

- Article 19(1)(f) should exempt annual or other long term subscriptions to these products.

78. Article 19(2)(b) provides for an exemption from the right of withdrawal for off-premises contracts for which the consumer has requested immediate performance in an emergency situation.

PROPOSED SOLUTION (45):

- This provision should be replaced by a provision that would permit the consumer to exercise the right of withdrawal in such situations but leave him liable for the cost of goods provided or services performed during the withdrawal period. It is important to retain the right of withdrawal in such circumstances as the consumer may still be pressured into entering a contract. The question of what exactly constitutes ‘an immediate emergency’ is likely to give rise to uncertainty. Guidance should be provided in Article 19(2)(b) or in the relevant Recital.

79. Article 19(2)(c) provides for an exemption from the right of withdrawal for contracts for which the consumer has requested the trader by means of distance communication to visit his home for repair or maintenance upon his property. Consumers may come under pressure to enter a contract in an off-premises contract regardless of whether they had solicited the trader’s visit. Recital 14 states that ‘in an off-premises context, consumers are under psychological pressure no matter whether they have solicited the trader’s visit or not’. Recital 35 refers to ‘key consumer problems in the home improvement sector where consumers are under pressure to order expensive renovation works’.

PROPOSED SOLUTION (46):

- Article 19(2)(c) should be deleted.

ARTICLE 20 - EXCLUDED DISTANCE AND OFF-PREMISES CONTRACTS

80. The effect of Article 20(1)(a) is to provide a withdrawal right for distance and off-premises contracts for 'works' on immovable property. However, Article 19(2)(c) excludes from the right of withdrawal off-premises contracts relating to 'repair and maintenance' of property.

PROPOSED SOLUTION (47):

- This distinction between, and differential treatment of, contracts for 'works' and 'repair and maintenance' is confusing and requires clarification

81. Article 20(1)(d) excluding food and beverage supplied by traders on frequent and regular rounds of a neighbourhood from the scope of Chapter III does not retain the existing exemption under the Doorstep Selling Directive for traders selling 'other goods' on neighbourhood rounds.

PROPOSED SOLUTION (48):

- This exemption should be reinstated.

82. Article 20 does not contain an exemption for off-premises contracts below a certain monetary threshold. The Doorstep Selling Directive gives Member States the option of excluding contracts below the value of €60 from its scope. This option was exercised by the majority of Member States. There is little evidence of consumer detriment from low-value off-premises contracts and the information and withdrawal requirements for such contracts place an undue burden on traders.

PROPOSED SOLUTION (49):

- Article 20 should be amended to exempt off-premises contracts below the value of €60 or, alternatively, member states should be given the discretion to exclude contracts below this value.

83. Article 20(3) provides that Chapter III shall not apply to distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services as regards contracts providing for a specific date or period of performance. While the

case for excluding the right of withdrawal in these cases appears reasonable, it is not clear why such contracts should also be exempt from the information requirements of Chapter III.

PROPOSED SOLUTION (50):

- These types of contracts should be subject to exemption from the right of withdrawal under Article 19. They should not be exempt from the information requirements of Chapter III.

V CHAPTER IV OF THE PROPOSAL: OTHER CONSUMER RIGHTS SPECIFIC TO SALES CONTRACTS

Issues Arising and Proposed Solutions

84. Chapter IV of the proposed Directive seeks to harmonise, to a maximum level, various aspects of consumer sales and associated guarantees. However, higher levels of consumer protection already exist in Irish law under the Sale of Goods Acts 1893 and 1980 (for example, in relation to particular features of the quality of goods supplied; the primacy of the right to reject; an unrestricted six year limitation period and guarantees) which would be lost if the Directive was adopted in its current form. We are not convinced that any benefits which maximum harmonisation would bring to the internal market are sufficient to outweigh this reduction in consumer protection in Ireland.

PROPOSED SOLUTION (51):

There are a number of options in regard to the implications of the proposal's full harmonisation status for Irish consumer rights in the area of the sale of goods and guarantees:

- Seek exemption for Chapter IV, or parts thereof, from the maximum harmonisation status of the Directive; *or*
- Propose amendments to Chapter IV that would have to effect of raising the level of consumer protection under the Directive to at least the level which pertains in Ireland.

The Group notes that, while the Directive is described as a 'full harmonisation' measure, it contains a number of regulations which are left to the discretion of member states (e.g. second hand goods at public auction under Article 21; damages for loss under Article 27), thereby recognising the need for a differentiated approach in certain areas already. Depending on the above outcomes, consideration will need to be given to the other means through which goods are supplied to consumers (hire; hire-purchase; contracts of exchange, etc.) where legal regulation, modelled on the sale of goods legislation, may exist.

ARTICLE 21 – SCOPE

85. The main issues arising under Article 21 have been dealt with in the discussion of Article 2. The exclusion of replacement parts from the scope of the Chapter is considered under Article 28.

ARTICLE 22 - DELIVERY

86. The draft Directive introduces a new default rule that goods will be delivered within a maximum of thirty days from the day of the conclusion of the contract. Delivery is not defined expressly but by reference to the transfer of the material possession of the goods to the consumer or a third party, other than the carrier, and indicated by the consumer. Where the trader fails to fulfil his obligations to deliver, the consumer is entitled to a refund of any sums paid within seven days from the date of delivery.

87. A number of issues arise in regard to Article 22. First, the default time limit of thirty days reflects duties to delivery under the distance selling regulations where issues of non-delivery are real. It is questionable whether non-delivery is a significant problem outside the distance sales environment. Secondly, it is unclear whether the remedy for failure to deliver under Article 22(2) involves merely a right to reimbursement of any advance payments made by the consumer or whether it would permit the consumer to terminate the contract. If the latter is the case, it is relevant to note that failure to supply goods in conformity with the contract would give rise only to a right to repair or replace in the first instance and appropriate to ask if this asymmetry between types of breach is reasonable.

PROPOSED SOLUTION (52):

- As the thirty day rule is a default rule and the need for such a rule is questionable outside the distance selling environment, this provision should be deleted from the proposed Directive and regulated at national level.
- If the thirty day delivery rule is retained, the remedy for non-compliance should be clarified. A remedy that would allow a right to terminate the contract and seek a refund of the price would seem disproportionate given the remedies regime proposed for goods not in conformity with the contract. If

the intention is to leave other remedies for non-delivery and late delivery to national legal systems, this should be expressly stated.

- If the thirty day delivery rule is retained, Article 22(1) should be amended to provided that delivery shall take place at a reasonable hour as provided at section 29(4) of the Sale of Goods Act 1893.
- Matters of ownership and the passing of property/title should continue to be governed at a national level and the Directive should acknowledge the fact in a Recital.

ARTICLE 23 – PASSING OF RISK

88. Article 23 provides that risk of loss or damage to the goods passes from trader to consumer when the consumer has acquired material possession of the goods. However, where the consumer fails to take reasonable steps to acquire material possession of the goods, risk shall pass at the agreed time of delivery. Linking risk to actual delivery of possession from trader to consumer in this way would probably meet parties' expectations and would leave any risk to goods in transit with the trader (unlike some examples under domestic rules). Two aspects of the provision, however, require further elucidation. First, as noted above at paragraph 35 and proposed solution (9), the precise meaning of 'material possession' needs to be clarified. Secondly, the provision as currently drafted does not cater for the situation where no delivery time has been agreed by the parties.

PROPOSED SOLUTION (53):

- In general, the introduction of a rule on risk which ensures that risk of loss or damage to goods in transit would remain with the trader is welcome and would strengthen the rights of Irish consumers; this is the position relating to consumer sales in the UK under section 20(4) of the Sale of Goods Act 1979.
- Article 23(2) needs to be amended to take account of the situation where no delivery time has been agreed by the parties; this could be done, for example, by the insertion of 'or within a reasonable time, where no delivery time is agreed' after 'at the time of delivery'.

ARTICLE 24 - CONFORMITY WITH THE CONTRACT

89. This provision is largely unchanged from Directive 1999/44/EC; the main difference arises from the full harmonisation status of the proposed Directive. Accordingly, the trader must deliver goods in conformity with the contract; conformity is to be judged for this purpose by reference to specified factors including the description given by the trader; the fitness of the good for a particular purpose; its fitness for normal use; and its quality and performance, taking into account public statements (subject to Article 24(4)). There is no lack of conformity if, at the time the contract was concluded, the consumer was aware, or should reasonably have been aware of the lack of conformity, or if the lack of conformity originated in materials supplied by the consumer. Article 24(5) contains the same so-called IKEA clause as Directive 1999/44/EC .

90. Article 24 raises a number of issues requiring clarification or correction. First, if maximum harmonisation is maintained, various aspect of the rules regulating quality under Irish law (the implied terms) will be lost and the levels of consumer protection reduced unless these aspects are included in the proposed exclusive European standard; these include durability, safety in general, minor defects, cosmetic defects (all in relation to merchantable quality); and freedom from dangerous defects regarding motor vehicles. Secondly, Article 24(3) provides for an exemption from the conformity requirements where the consumer was aware, or should reasonably have been aware, of the lack of conformity. The equivalent Irish exemptions from merchantable quality under section 14(2) of the Sale of Goods Act 1893 are applicable only to defects specifically drawn to the buyer's attention or, in cases where the buyer examined the goods prior to the conclusion of the contract, to defects that this examination should have revealed. Thirdly, though our domestic provisions on spare parts and after-sale service are arguably unaffected as they fall outside the scope of the proposed Directive, this needs to be confirmed. Fourthly, unlike the provision at section 34 of the Sale of Goods Act 1893, the proposed Directive gives consumers no express right to examine goods for the purpose of assessing conformity with the contract. Fifthly, it is not clear whether quantity of delivery (shortfall or excess) comes within the scope of the Directive by virtue of the requirement at Article 24(2)(a) that goods supplied must correspond with the description given by the trader. It is relevant to note in this connection that the Draft Common Frame of Reference

measures conformity by reference, among other things, to ‘quantity, quality and description required by the contract’. It should be clarified whether issues as to quantity come within the scope of Chapter IV of the proposed Directive. If so, consideration will have to be given to the implications for section 30 of the Sale of Goods Act 1893 and its remedies regime regarding delivery of the wrong quantity, including a right to reject the goods delivered.

PROPOSED SOLUTION (54):

- An exemption could be sought from the full harmonisation character of Article 24, thereby permitting other criteria to be taken into account in assessing conformity; **or**
- Article 24 could be amended to encompass other relevant factors to be taken into account in assessing quality, especially durability, safety, cosmetic and minor defects. The provisions of the Draft Common Frame of Reference on other factors such as accessories and instructions also merit consideration in this context.
- Clarification should be sought in relation to exemptions from the conformity requirements of Article 24 using the provisions of Irish and UK Sale of Goods Acts as a template.
- It is necessary also to clarify whether the current provisions of domestic legislation regarding spare parts and after-sale service come within the scope of the proposal.
- The inclusion of a right of examination along the lines of section 34 of the Sale of Goods Act 1893 should be considered. This would give consumers an opportunity to assess the conformity of goods on delivery.
- The position regarding quantity of delivery and the associated remedies regime requires clarification.

ARTICLE 25 LEGAL RIGHTS– LIABILITY FOR LACK OF CONFORMITY

91. Article 25 proposes that the trader shall be liable to the consumer for any lack of conformity which exists at the time risk passes to the consumer. This provision raises two main issues. First, the provision at Article 4 of Directive 1999/44/EC regarding rights of redress for the final seller of goods is not reproduced in the proposed

Directive. Though the final seller will continue to have rights against his supplier, under contract and otherwise, these are not normally a mirror image of the rights and remedies available to consumers against sellers. Secondly, the proposed Directive does not address the issue of direct producer liability, although there are arguments in favour of such an approach, particularly as it would provide consumers with another avenue of redress.

PROPOSED SOLUTION (55):

- The question of direct producer liability should be pursued in the context of the proposed Directive or, if this is not a feasible option, at a later stage. If direct liability is not regulated at EU level now or in the future, however, it will be possible for national authorities to legislate in the matter.

ARTICLE 26 - REMEDIES FOR LACK OF CONFORMITY

92. Article 26 redrafts the remedial scheme which exists under Directive 1999/44/EC. Article 26(1) outlines the remedies that will apply where goods do not conform to the contract namely, repair or replacement, price reduction, or rescission of the contract. Article 26(2) states that the trader shall remedy the lack of conformity by either repair or replacement, according to his choice. Article 26(3) elaborates on the hierarchy of remedies outlined in Article 26(1). Accordingly, where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause him a disproportionate effort, the consumer may then choose to have the price reduced or the contract rescinded (including the rejection of the goods and the refund of the price). It further provides that a trader's effort is disproportionate if it imposes costs on him, which, in comparison with price reduction or rescission of the contract, are excessive in the circumstances of the case. Article 26(3) further provides that the consumer may only rescind the contract if the lack of conformity is not minor. Lastly, Article 26(4) sets out the circumstances in which the consumer may have recourse to any of the four remedies for non-conformity:

- refusal by the trader (implicit or explicit) to remedy the lack of conformity;
- failure by the trader to remedy the lack of conformity within a reasonable time;
- an attempted remedy by the trader causing significant inconvenience to the consumer; and

- the reappearance of the same defect more than once, within a short period of time.

93. Article 26 is a critical provision and, because of the proposed Directive's full harmonisation status, has major implications for the long-established remedies regime under domestic legislation. First, Article 26(1) signifies a change from Directive 1999/44/EC which left the choice of repair or replacement with the consumer. The proposed amendment clearly favours the trader and weakens the position of consumers. The Review Group does not consider this change to be warranted. Secondly, the primary right for buyers of defective goods in Irish law is the right to terminate the contract, reject the goods and seek a refund of the price. Under Article 26(3) of the proposed Directive, however, the right to rescind the contract would operate only as a second-tier remedy. If the proposed Directive is adopted in its current form, Irish consumers will lose this primary right to reject the goods. The available evidence suggests that the right to reject is a valued and widely used form of consumer protection in Ireland. In the Group's view, any diminution of this right to reject would result in a significant reduction in the levels of consumer protection in this country. Thirdly, Article 26(3) provides that a consumer cannot rescind the contract if the lack of conformity is minor. A similar provision in Directive 1999/44/EC was transposed in Ireland, though not the UK, under the Regulations that gave effect to the Directive. The remedies regime under the Sale of Goods Acts, however, does not include a restriction of this kind. If the full harmonisation basis of Chapter IV is retained, this too would result in a lowering of the level of protection for Irish consumers.

94. Though these are the principal concerns raised by Article 26, its provisions raise other issues. Article 26(3) states that a trader's effort is disproportionate if it imposes costs on him which, in comparison with price reduction or rescission of the contract, are excessive in the circumstances of the case. Though it is not entirely clear, the corresponding provision in Directive 1999/44/EC appears to suggest that the relevant comparison for the purpose of determining whether the costs of repair or replacement are disproportionate is the relative cost of each of these two options. By stipulating that the test for lack of proportionality should be between the cost of repair or replacement and that of price reduction or rescission, it has been suggested that this

change might dispose traders to opt for price reduction as the least costly remedy in some cases. Article 26(4) similarly gives rise to a number of questions. This is a new provision which, per recital 42, would apply where the trader has ‘more than once failed’ to remedy the lack of conformity. The wording of the provision is restrictive and appears to mean that the consumer would be entitled to invoke the choice of remedy provision only on the third occurrence of the defect. It is submitted that one failed repair should be sufficient to allow the consumer his choice of remedy. It is not clear, moreover, what would constitute ‘a short period of time’ for the purposes of the provision.

95. The exclusion from the scope of Chapter IV of spare parts replaced by the trader in the course of the repair of a defective good might seem to suggest that lower standards of quality are permitted in relation to spare parts supplied in the context of a repair under Article 26 than in respect of the good itself. It has been clarified that the good as a whole (including the new spare parts) would remain subject to the conformity requirement in such a situation, and that the exclusion of the replacement parts is intended to ensure that the two-year liability period will not be extended by virtue of their insertion. But this provision would clearly seem to favour the supplier. Where goods are supplied which do not conform with the contract and are hence in need of repair, the two-year limitation period should, at the very least, be paused while the repair is being effected. It is relevant to note in this context that, in the case of the replacement of defective goods, the two-year time period begins afresh under Article 28(2).

PROPOSED SOLUTION (56):

- The proposed hierarchy of remedies at Article 26(1) and the provision at Article 26(2) that the choice of remedy should rest with the trader would be detrimental to consumer interests and should be opposed. Serious consideration should be given to the alternative proposal put forward by the UK Law Commission.³¹ This provides that the trader shall remedy the lack of

³¹ The Law Commission. 2008. Consultation Paper No. 188. **Consumer Remedies for Faulty Goods**, pp. 113-115.

conformity according to the choice of the consumer by 1) repair or replacement, 2) reduction of the price, or 3) rescission of the contract within thirty days of delivery of the goods to the consumer, though depending on the circumstances of the case, this period could be longer or shorter, if deemed reasonable. This appears to be a workable proposal that Ireland could support.

- In view of the importance to consumers of the appearance and finish of goods, Article 26 should be amended to provide that so-called minor defects are included among the criteria relevant to consumer entitlement to remedies for lack of conformity. It is noted in this connection that the proposals of the UK Law Commission would permit rescission for minor defects.
- There is a need to broaden the circumstances in which the consumer can have recourse to any remedy to include situations where a product has proved dangerous or where the trader has behaved so unreasonably as to undermine trust between the parties. The UK Law Commission has provisionally proposed that consumers should enjoy a choice of remedy in such circumstances. The Sales Report of the Study Group on a European Civil Code also proposes that a buyer should not be required to give a seller the opportunity to remedy a lack of conformity where the nature of that lack of conformity gives the buyer reason to believe that he cannot rely on the seller's future performance. It cites the example of a consumer who orders food for a party and finds a dead mouse in a pie supplied by the trader. Even if the trader were willing and able to rectify the defect in such a case, the consumer should be entitled to terminate the contract on the ground of justifiable loss of confidence in the seller.
- Further consideration needs to be given to the issue and implications of the test to be used to determine whether the costs of repair or replacement are disproportionate under Article 26(3). The proposal at Article 26(3) that the comparison should be between the cost of repair or replacement and that of price reduction or rescission should be assessed alongside the alternative option that the comparison should be between the relative cost of repair and replacement.

ARTICLE 27 - COSTS AND DAMAGES

96. Article 27(1) states that the consumer shall be entitled to have the lack of conformity remedied free of any cost. Though this restates the rule under Directive 1999/44/EC, Recital 15 of that Directive permits member states to provide that any reimbursement to the consumer may be reduced to take account of any use the consumer has had of the goods since delivery. This regulatory option was not exercised by Ireland, though it was implemented in the UK. Recital 41 of the proposed Directive states, however, that the consumer shall not compensate the trader for the use of the defective goods. Article 27(2) is a new provision and states that the consumer may claim damages for any loss not remedied in accordance with Article 26.

PROPOSED SOLUTION (57):

- It is reasonable to prohibit deductions for prior use of goods in the event of rescission for lack of conformity. The deletion of the regulatory option at Recital 15 of Directive 1999/44/EC should be supported.
- In relation to Article 27(2), the ECJ judgment in the *Leitner* case [C- 168/00] suggests that the proposed Directive should provide guidance on the type of loss in respect of which damages may be claimed.

ARTICLE 28 - TIME LIMITS AND BURDEN OF PROOF

97. Article 28(1) provides that the trader is liable for a lack of conformity that becomes apparent within two years of delivery. Article 28(2) provides that, where a good is replaced in order to remedy a lack of conformity, the two-year time limit for liability for lack of conformity begins again with delivery of the replacement good. Where a remedy for lack of conformity is effected by repair, however, the two-year time limit does not restart from the time of the repair. Article 28(3) states that, in the case of second-hand goods, the trader and consumer may agree on a shorter liability period of not less than one year. Article 28(4) provides that, in order to benefit from his rights for lack of conformity under the Directive, the consumer shall inform the trader of the lack of conformity within two months of the date of detecting it. Article 28(5) states that, unless proven otherwise, any lack of conformity which becomes apparent within six months of the time when risk passed to the consumer, shall be presumed to have existed at that time unless this presumption is incompatible with the

nature of the goods and the nature of the lack of conformity. The provision is silent, however, on the question of whether this six-month period restarts after goods have been repaired or replaced.

98. Article 28 has significant implications for consumer rights, in particular its provisions on the time limit for liability and the notification of defects. Irish sale of goods legislation contains no time limit for liability for lack of conformity; the matter is instead governed by the general six year limitation period for contractual claims. If the maximum harmonisation status of Chapter IV is retained and Article 28 remains in its present form, the proposed two-year time limit for liability would reduce levels of consumer protection in Ireland, particularly in relation to certain high value goods such as motor vehicles (where the guarantee period may exceed a 2 year period), certain domestic appliances, and goods used in the construction of homes and extensions. The proposal would also seem to imply that two years is the standard duration of the life cycle of products. It is questionable similarly if the two month notification requirement at Article 28(4) is either reasonable or workable. It would be difficult in many cases for the trader to know when the consumer first became aware of the defect and therefore whether they had complied with the two-month limit. Usually a consumer will inform a trader straight away of a fault as it would be in his interests to have it remedied as quickly as possible. There may be circumstances, however, where a consumer does not give immediate notification of a defect. The consumer may have bought the good somewhere other than his normal place of residence and may face language or distance barriers to notification. The consumer may also delay notification in order to see if the defect corrects itself in time. Article 28(2) further raises the issue of whether it is reasonable to have a different rule for a lack of conformity remedied by repair and replacement respectively. In the Group's view, there is no clear rationale for recommencing the two-year liability period where a good is replaced but retaining the original two-year time limit where a good is repaired. It is not clear finally whether the six-month presumption of fault in Article 28(5) recommences after goods are redelivered following repair and/or replacement and this point requires clarification.

PROPOSED SOLUTION (58):

- The proposed mandatory two-year limitation period would significantly reduce the level of consumer protection in Ireland, particularly for high value goods. The provision should either be exempt from full harmonisation or the liability period should be substantially extended.
- There is no good reason why different rules should apply to lack of conformity remedied by repair and replacement respectively. Article 28(2) should be amended to treat repairs on the same basis as replacements.
- The proposed two-month notification requirement for defects should be deleted.
- It should be clarified whether the six-month period in Article 28(4) recommences after goods are redelivered following repair or replacement

ARTICLE 29 - COMMERCIAL GUARANTEES

99. Article 29(1) provides that a commercial guarantee shall be binding on the guarantor under the conditions laid down in the guarantee statement. In the absence of the guarantee statement, the commercial guarantee shall be binding under the conditions laid down in the advertising on the commercial guarantee. Article 29(2) states that the guarantee statement shall be drafted in plain intelligible language and be legible and that it shall include the following:

- a) legal rights of the consumer, as provided for in Article 26,
- b) the contents of the commercial guarantee and the conditions for making claims,
- c) where applicable, the fact that the commercial guarantee cannot be transferred to a subsequent buyer.

Article 29(3) provides, that if the consumer requests; the trader shall make the guarantee statement available in a durable medium.

100. Though Article 29 largely mirrors the guarantee provisions of Directive 1999/44/EC, several of its provisions require clarification or correction. First, Article 29(2)(c) contains a new provision that, where a guarantee cannot be passed on to a subsequent buyer, this must be indicated in the guarantee statement. The guarantor can only prevent buyers from transferring the guarantee where this would not be an unfair contract term under Chapter V of the proposed Directive. However, section 19

of the Sale of Goods and Supply of Services Act 1980 provides that, for the purpose of the right of action under a guarantee, ‘buyer’ includes all persons who acquire title to the goods within the duration of the guarantee. If the full harmonisation status of Chapter IV is retained, therefore, the resultant limitation on the transferability of guarantees would reduce levels of consumer protection in Ireland. Secondly, under the Sale of Goods and Supply of Services Act 1980, guarantees, as defined, are enforceable against manufacturers (section 19) and suppliers (section 17). This raises the question of whether it will be possible to retain this extended liability regime given the full harmonisation character of the proposed Directive. Thirdly, the full harmonisation status of the proposal raises the further question of whether there are gaps in Article 29 that need to be addressed if it is to provide an effective framework for the regulation of guarantees. Among possible gaps in the provision are the indication of a minimum guarantee period where the guarantee statement does not specify a duration; a rule that no costs can be imposed on a consumer for invoking a guarantee; and provisions for the prolongation of the guarantee period where goods are repaired or replaced.

PROPOSED SOLUTION (59):

- Though qualified by the inclusion of restrictions on the transferability of guarantees in the grey list of unfair contract terms under Chapter V, the proposed limitation on the transfer of guarantees would impair nevertheless the protections provided to consumers and should be deleted. It should also be clarified whether supplier liability for observance of the guarantee is compatible with the full harmonisation character of the proposal.
- There is merit in a proposal, on the lines of that in the Draft Common Frame of Reference, that any requirement in a guarantee that makes it conditional on the completion of formal requirements by the purchaser (such as registration or notification of purchase) should not be binding on the consumer.
- If Article 29 remains subject to full harmonisation, it should be supplemented by requirements designed to ensure a more comprehensive regulatory framework for guarantees.

VI CHAPTER V OF THE PROPOSAL: CONSUMER RIGHTS CONCERNING CONTRACT TERMS

Issues Arising and Proposed Solutions

101. Part 5 of the preamble to the proposal contains the following summary relating to Chapter V of the proposed Directive (Consumer Rights Concerning Contract Terms).

Chapter V broadly reflects the provision of Directive 93/13/EEC. It applies to unfair contract terms which have not been individually negotiated, such as standard contract terms. Unfair terms are those creating significant imbalances in the rights and obligations of consumers and of traders and are not binding on consumers. In order to ensure legal certainty, the Directive contains two lists of unfair terms. Annex II contains a list of terms which in all circumstances are considered unfair. Annex III contains a list of terms which are deemed unfair unless the trader proves otherwise. These same lists apply in all Member States and may only be amended by the comitology procedure provided for by the Directive.

102. This summary of the effect of Chapter V is accurate in relation to the strong link with Directive 93/13/EEC, but it significantly underplays the fact that Chapter V, most succinctly, highlights the shift from the minimum harmonisation standard found in Directive 93/13/EEC to the “full targeted harmonisation” rationale set by the proposed Directive. Directive 93/13/EEC provides a consumer with the means to attack or invalidate clauses (non-core) in a contract which the consumer had presented to him or her, without an opportunity to negotiate terms, particularly a pre-formulated standard contract. Member states are free to allow additional protection against unfair terms that were individually negotiated. Furthermore, the indicative list set out in the annex to the Directive, according to ECJ case law, did not even have to be specifically transposed into national law.

103. The annex to Directive 93/13/EEC has been replaced by two new lists, one being a ‘black list’ of five terms that are to be considered unfair in all circumstances, while there is also a ‘grey list’ of terms (twelve in all) which are presumed to be unfair, the onus resting on the trader to show that, in context, the clause is not unfair. While the proposed Directive and Directive 93/13/EEC generally repeat the substantive provisions vis-à-vis the impugned contractual terms (with some degree of

consolidation and clarification), both the 'black list' and the 'grey list' in the Proposed Directive are closed in a number of senses.

104. The 'black list' admits no exception in the sense that a clause limiting the trader's liability for an agent's statement (Annex II, para (b)), for example, will always be invalid. Conversely, a clause within the 'grey list' (e.g. a clause closing off the liability of a supplier (Annex III, para (a)) will be potentially invalid. Why should very similar clauses, as in the examples above, be treated differently if the impact on the consumer is broadly the same? The answer given by the drafters of the proposed Directive is legal certainly, even if the result is rather mechanistic. The most significant sense in which the 'black list' and 'grey list' are closed also reflects the "full targeted harmonisation" standard: member states cannot add to either list. Some member states will be required to delete from national laws further consumer protection measures in the form of additional provisions that prescribed clauses that vulnerable consumers (e.g. elderly or disabled persons) were being presented with. This degree of inflexibility has been attacked by critics of the revised provisions in the proposed Directive.

105. The European Commission has rejected these charges by arguing that changes to the lists may be effected relatively easily via the comitology procedure in the proposed Directive. The Commission is also probably correct in arguing that clauses that have found their way onto the "black list" reflect the jurisprudence of the European Court of Justice insofar as clauses that fall within the "black list" are *per se* void (Mostaza Claro Case C-168/05) in most instances, without having to consider all the circumstances in which the contract was negotiated. The interrelationship between the lists, the general clause and the good faith obligation however have not been exhaustively considered, and several commentators have indicated that in such a climate there will be ample room for national courts to produce inconsistent decisions.

106. Having said all this, the impact of Chapter V on Irish law may prove to be not very profound. It should be noted that Directive 93/13/EEC did not create significant problems for the Parliamentary Counsel, the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (S.I. No. 27 of 1995) having transposed the Directive in a fairly literal manner (even to the extent of including the good faith

requirement). The only significant case law that these Regulations have produced relate to the power of the relevant statutory body (now the National Consumer Agency) to apply under Regulation 8 for a High Court Order prohibiting terms which are adjudged to be unfair terms. (see Application of Director for Consumer Affairs, discussed by Dorgan at (2002) (Dec.) **Law Society Gazette 10.**)

107. It is our understanding that the proposed Directive will not have any impact upon existing statutory rules relating to misrepresentation (Sale of Goods and Supply of Services Act 1980, s. 43-46). Nor will the proposed Directive have any effect on common law interpretative devices that limit the effect of entire agreement clauses, while the freedom of an Irish court to use concepts such as duress, improvident or unconscionable bargain to counteract certain business practices are not curtailed in any way. We note that in the United Kingdom both the Law Commissions for England and Wales, and Scotland, have proposed a process of integration vis-à-vis the existing statutory rules and Directive 93/13/EEC, and while this has been overtaken by events, some aspects of the integration process raise issues for consideration here in Ireland. For example, the implied terms in sections 12, 13 and 15 of the 1893 Act, as well as section 13 of the 1980 Act direct that certain exclusion clauses are void. Does this mean that such provisions (insofar as they have 'black list' or 'grey list' status) will have to be re-assessed?

108. In conclusion, while many of the provisions in Chapter V are familiar, there are adjustments to Directive 93/13/EEC that are to be welcomed. We draw attention in particular to the enhanced transparency provisions and the improvements made to Article 31 (contrast Regulation 5 of S.I. 27 of 1995). Though Ireland did not depart from the text of Directive 93/13/EEC when creating S.I. 27 of 1995 (subject to clarification of points raised above in relation to the 1893 Act and the 1980 act), the full harmonisation status of the proposal may, as discussed in the next section, give rise to difficulties in reconciling the maximum harmonisation philosophy with related areas of Irish law.

Maximum Harmonisation and Unfair Contract Terms

109. Chapter V of the Proposed Directive deals with consumer rights concerning contract terms. The major difference between Chapter V and Directive 93/13/EEC is

that certain terms are now explicitly ‘blacklisted’. Unlike many other Member States (who added to the grey list contained in Directive 93/13/EEC), a ‘copy out’ approach was taken to the transposition of Directive 93/13. Since Ireland never (explicitly) availed of the minimum harmonisation clause contained in Directive 93/13/EEC to provide consumers with additional protections in respect of unfair terms in standard form contracts, we would seem to be in a relatively poor position to object to unfair contract terms being regulated on a maximum harmonisation basis.

110. In the Group’s view, however, the proposed maximum harmonisation status of Chapter V gives rise nevertheless to some issues for Ireland. Chapter V, in effect, applies to all contract terms drafted in advance by traders, save those reflecting ‘mandatory statutory or regulatory provisions.’ Chapter V is therefore potentially applicable in a large number of contexts (e.g. solicitor-consumer, accountant-consumer, car-dealer-consumer, possibly landlord-tenant, jeweller-consumer). In the Group’s view, before subscribing to maximum harmonisation in respect of Chapter V, consideration needs to be given to whether it would lead to a diminution of standards of consumer protection in specific instances.

111. Section 62 of the Consumer Credit Act 1995, for example, renders void any provision in a hire-purchase contract whereby:

- a) an owner or a person acting on the owner’s behalf is authorised to enter upon any premises for the purpose of taking possession of the goods which have been let under a hire-purchase agreement,
- b) the right conferred on a hirer by this Part to determine a hire-purchase agreement is excluded or restricted,
- c) any liability in addition to the liability imposed by this Part is imposed on a hirer by reason of the termination of the hire-purchase agreement by the hirer under this Part,
- d) a hirer, after the determination of the hire-purchase agreement or the bailment in any manner whatsoever, is subject to a liability which exceeds the liability to which he would have been subject if the agreement had been determined by him under this Part,
- e) any person acting on behalf of an owner or seller in connection with the formation or conclusion of a hire purchase agreement is treated as or deemed to be the agent or the hirer,
- f) an owner or seller is relieved from liability for the acts or defaults of any person acting on his behalf in connection with the formation or conclusion of a hire-purchase agreement.

In effect, this provision regulates unfair contract terms in hire purchase agreements. In the Group's view, it would seem to fall within the scope of Chapter V of the proposal and it would be open to doubt therefore whether this provision could survive if Chapter V is adopted in its present form.

112. Section 68(2) of the Solicitors (Amendment) Act 1994 is another example of a rule that might be affected if Chapter V is adopted in its present form. This provision, among other things, prohibits solicitors from calculating fees on a percentage basis in percentage matters and contractual arrangements that would permit the calculation of fees on such a basis are unenforceable. The question arises therefore whether this provision is one that would come within the scope of Chapter V of the proposal and would therefore be subject to the full harmonisation status of the Chapter.³² The provision certainly deals (or can deal) with a 'contract term drafted in advance by the trader' and a consumer will often have little or no possibility of influencing such a term. While it is possible that this type of provision is exempted by Article 30(3) of the proposal relating to 'mandatory statutory or regulatory provisions', it is at least arguable that the provision would have to be amended. This provision and that at section 62 of the Consumer Credit Act are cited only as examples; there may be other rules that regulate contract terms in specific contexts (particularly perhaps in the case of regulated professions) that would be affected by Chapter V if it is adopted in its present form.

PROPOSED SOLUTION (60):

- Consideration should be given to whether exemptions from maximum harmonisation are needed in respect of certain types of consumer contract.

113. A related question is whether it is appropriate to regulate the full spectrum of business-to-consumer contracts by means of a 'one size fits all' rule. A notable

³² Article 32(3) of the proposed Directive excludes the main subject matter of the contract or the adequacy of the remuneration for the trader's main contractual obligation from the application of the unfairness test in Article 32(1) and (2) provided that the trader fully complies the transparency requirements of Article 31. On this basis, it could be argued that the regulation of 'core terms does not come within the scope of Chapter V and can continue to be regulated at national level and that section 68(2) of the Solicitors (Amendment) Act regulates a 'core term', namely the remuneration received by a solicitor in consideration of the provision of legal services.

feature of Chapter V in this context is that it takes a ‘principles based’ approach to the regulation of business-to-consumer contracts. This is exemplified by Article 32 of the proposal. This ‘principles based’ approach contrasts with the ‘rules-based’ approach to regulation customarily followed in this country under which a greater emphasis is placed on legal certainty than in many civil law jurisdictions. Experience suggests that, for general principles to be effective in an Irish context, they need to be combined with specific rules. For example, Annex III 1 (d) of the Proposed Directive presumes as unfair a contractual term ‘requiring any consumer who fails to fulfil his obligation to pay damages which significantly exceed the harm suffered by the trader’. In the context of an airline contract, this provision might reasonably be held to preclude an airline failing to reimburse taxes and charges when a consumer cancels his or her flight. However, one corollary of maximum harmonisation is that it would be impossible to introduce national legislation which spelt this out in clearer terms. Accordingly, enforcement authorities/consumers would have to rely on the more uncertain provisions of Annex III 1(d). The inability to flesh out the provisions of Chapter V with more detailed rules may prove a barrier to enforcement and/or be exploited by unscrupulous traders.

114. The provisions of the Consumer Credit Act 1995 on hire-purchase agreements provide another example. By applying Article 32 of the proposed Directive (in conjunction with Annex III 1(c))³³, a court would be able to challenge the validity of a clause in a hire-purchase agreement that imposed a disproportionate penalty on a hirer seeking to determine an agreement of this kind. The existence of such a general power, however, does not obviate the case for a specific provision regulating this particular practice. In short, the inability to flesh out the provisions of Chapter V with more detailed rules may prove a barrier to enforcement and/or be exploited by unscrupulous traders. At all events, the role of statutory agencies to provide guidance on practices that infringe Chapter V is likely to prove ever more critical, as will the ability of such agencies to consult and co-operate across national boundaries.

³³ This states that contract terms which have the following object or effect are presumed to be unfair:
(c) requiring any consumer who fails to fulfil his obligation to pay damages which significantly exceed the harm suffered by the trader.

115. The Group further notes that sui generis problems with consumer contracts arise from time to time that may require prompt national solutions. One recent example in Ireland concerns the terms and conditions governing gift vouchers, where there is arguably a need for a legislative solution. The movement to maximum harmonisation will not make it impossible to combat such problems since the Annexes of the proposed Directive can be amended through a Comitology procedure. However, it will almost certainly make it more difficult to counter-act emerging problems effectively and expeditiously.

ANNEX I SUMMARY OF PROPOSALS OF REVIEW GROUP

Chapter I: Subject Matter, Definition and Scope

- 1) The definition of sales contract should be extended so as expressly to include contracts for barter and part exchange.
- 2) The definition of 'sales contract' should be clarified and elaborated upon. Further clarity could be brought to the definition by providing that Chapter IV applies to all mixed-purpose contracts even where the goods element of the contract is marginal (for example, where a car is serviced and new oil provided.) In this situation, the oil provided should be classified as 'goods' (or 'materials' if the requirements for service contracts are expanded).
- 3) The scope of the proposed Directive should not be extended to hire or hire purchase contracts.
- 4) Article 2(4) of the proposal should be amended so that gas, electricity and water are included in the definition of goods.
- 5) Article 2(4) of the proposal should be replaced by a more comprehensive definition of goods.
- 6) The scope of Chapter IV should be extended to include service contracts. The provisions of section 39 of the Sale of Goods Act 1980 on implied undertakings as to quality of service merit consideration in this context. As well as requiring that the service be supplied with due skill, care and diligence and that any goods supplied are of merchantable quality, section 39 also requires:
 - (i) that the supplier has the necessary skill to render the service; and
 - (ii) that where materials are used, they will be sound and reasonably fit for the required purpose.
- 7) The definition of services at Article 2(5) of the proposal should be elaborated upon either in the definition itself or in a recital.
- 8) The provision of digital services from a trader to a consumer should be brought within the scope of Chapter IV of the Directive. The question then becomes whether the supply of 'digital products' should be treated as a sale of goods subject to strict liability, a supply of services subject to a fault standard, or a product sufficiently different from goods and services to require a different form of regulation. Ireland should encourage and support the exploration of appropriate

ways to achieve the same levels of consumer protection in the digital environment as in the conventional sales environment.

9) Article 2 should include a definition of 'delivery'. 'Material possession' should also be clearly defined.

10) Article 3(1) should be amended to clarify that the proposed Directive does not cover only sales and service contracts. In addition to regulating these types of contract, parts of the proposal (in particular Chapter V) purport to regulate immovable property, rights and obligations.

Chapter II: Consumer Information

11) The issues raised by Article 5 could be tackled in a number of different ways. The provision could be adopted on a minimum harmonisation basis or there could be specific derogations from full harmonisation that would permit member states to apply additional information requirements to contracts involving certain types of transaction or consumer. Alternatively, the provision could be deleted from the proposed Directive on the ground that it is extremely difficult for a provision of this kind to deal adequately with the information requirements of the enormous range and variety of transactions between traders and consumers. The pre-contractual information to be provided to consumers would be more effectively regulated by a balanced mix of Community and national legislation, both horizontal and sectoral.

12) It should be clarified in transposing the proposed Directive into Irish law that the consequences of breach of Article 5(1) are not to be akin to breach of a condition in Irish contract law but should be treated as breach of an innominate or intermediate term. This would allow the remedy to be determined by reference to the nature of the breach. If the effects of the breach are serious, the term may be treated as a condition; if they are minor, it may be regarded as a warranty.

13) The meaning and purpose of Article 7 should be clarified. The failure of an intermediary to disclose that he is acting for a consumer when concluding a contract should have no effect on the validity of the consumer-to-consumer contract.

Chapter III: Consumer Information and Withdrawal Rights for Distance and Off-Premises Contracts

14) The information and formal requirements for distance and off-premises contracts at Article 9 to 11 of Chapter III should be included with the general information requirements in Chapter II, reserving Chapter III for the right of withdrawal from distance and doorstep sales contracts.

15) There should be some derogation from full harmonisation to permit Member States to impose additional information requirements for certain types of transaction or consumer, for example professional services (such as auctioneer or architect) where there may be existing duties to provide information on matters specific to those professions.

16) Article 9 should be amended to include a requirement on traders to inform consumers where the right of withdrawal does not apply.

17) Article 9 should be amended either by the deletion of subparagraphs (d) to (f) or the amendment of the chapeau to Article 9 to provide that the information requirements of these subparagraphs do not form an integral part of the contract between the consumer and the trader.

18) A specific provision should be included in the proposal that, in the event of a conflict between the information requirements of the proposed Directive and the E-Commerce Directive, the latter (being the more specific provision) would prevail. Alternatively, this could be achieved through a general *lex specialis* clause.

19) In view of the importance of payment security for consumers engaged in distance transactions, Article 9 should include a requirement on traders to inform consumers of the nature of the payment security provisions applicable to the transaction.

20) The provision at Article 4(1)(g) of the Distance Sales Directive requiring traders to provide information on ‘the cost of the means of distance communication where it is calculated other than at the basic rate’ should be retained in the proposal.

21) The provision at Article 4(1)(h) of the Distance Sales Directive requiring traders to provide information on the ‘period for which the offer or the price remains valid’ should be retained in the proposal, possibly under Article 5 where it would apply to all consumer contracts.

- 22)** The order form requirement at Articles 10(1) and 10(2) of the proposal is excessively bureaucratic, particularly for low-value transactions. If it is not modified or deleted, consideration should be given to reinstating the monetary threshold at Article 3(1) of the Doorstep Selling Directive, or to broadening the exemptions at Article 20(1)(d) in order to exempt traders engaged in low-value off-premises transactions from the scope of Chapter III.
- 23)** Article 10(2) of the proposal should be amended to provide that, where the formal requirements for off-premises contracts are not met, the contract will be binding on the trader but not on the consumer. Alternatively, the consumer could be given as to whether to proceed with or rescind the contract.
- 24)** The definition of ‘durable medium’ and/or the Recital to the Directive should clarify whether an order form sent by e-mail would meet the requirement of Article 10(2). In addition, the question of whether SMS messages would satisfy the requirement should be clarified. Consideration should be given to the inclusion in Article 10 of a provision equivalent to Article 11(3) permitting the initial provision of more limited information in distance contracts concluded through media subject to space or time limitations.
- 25)** Article 10(2) would benefit from drafting changes to clarify that the signature or receipt of an order form does not entail the conclusion of a contract.
- 26)** In view of the importance of the right of withdrawal, the Directive should require that information on withdrawal rights should have as much prominence as any other information in the contract.
- 27)** In view of the importance of the right of withdrawal, the mandatory information required by Article 11(3) should include information on the right of withdrawal.
- 28)** Article 12 would benefit from amendment to establish uniform commencement periods for distance and off-premises contracts for the sale of goods and to clarify other ambiguities.
- 29)** Article 12 should expressly state that, for the purpose of determining the length of the withdrawal period for distance and off-premises contracts, ‘days’ means calendar days.
- 30)** Article 12 would benefit from a drafting change to clarify that, although the withdrawal period commences when the consumer receives the goods, the consumer does not have to wait for the goods to be delivered to exercise the right

of withdrawal. This clarification would be beneficial for both consumer and trader.

31) If the distinction between contracts for sale of goods and contracts for the supply of services is to be maintained, the Directive should clarify the appropriate starting point for the commencement of the withdrawal period for mixed-purpose contracts.

32) Article 13 provides that, if the trader has not provided the consumer with information on the right of withdrawal, the withdrawal period shall expire three months after the trader has fully performed his other contractual obligations. In the Group's view, the withdrawal period should be subject to a more substantial extension in such cases. This could be done by amending the Article along the lines of the equivalent provision in Directive 2008/122/EC on timeshare contracts which provides that, in the case of failure to provide information on the right of withdrawal, the withdrawal period ends one year and fourteen calendar days after the conclusion of the contract. Alternatively, the provision could adopt the approach contained in the Draft Common Frame of Reference which states that, in the case of failure to provide information on the right of withdrawal, the withdrawal period is extended to a maximum of one year after conclusion of the contract.

33) Article 14 requires the consumer exercising the right of withdrawal to inform the trader of his decision to withdraw on a durable medium either in a statement addressed to the trader or by means of the standard withdrawal form set out in Annex I(B) of the proposal. In the Group's view, two approaches can be taken to the provision. First, it can be regarded as reasonable subject to clarification of the corresponding obligations of the trader. Second, the view can be taken that the consumer should not be required to inform the trader of his decision to withdraw on a durable medium, but should be able to give notice verbally or withdraw simply by returning the goods. The notice should only serve to inform the trader of the withdrawal. The form of notice should not matter. A notice by text message sent to the trader's mobile phone number should suffice for a valid withdrawal as would simply returning the subject matter of the contract.

34) If the requirement on the consumer to inform the trader of his exercise of the right of withdrawal is maintained, the trader should be required to acknowledge receipt of the standard withdrawal form or statement of withdrawal from the

consumer. This would provide certainty to the consumer and proof that their withdrawal notice had been received. It would also provide clarity in relation to the running of the thirty-day period within which the trader must reimburse the consumer under Article 16 of the proposal. The standard withdrawal form at Annex I(B) of the proposal should include a detachable acknowledgement slip.

35) It should be mandatory for distance traders operating via the internet to provide an online withdrawal facility on their website.

36) Article 16(1) of the proposal should be amended to provide that, where the consumer exercises the right of withdrawal, reimbursement should be made as soon as possible and not later than thirty-days from the receipt of notice of withdrawal. This would reduce the risk that traders would view the thirty-day period within which reimbursement must be made as the norm.

37) Article 16(1) of the proposal should state that, where the consumer exercises the right to withdraw, all payments received should be reimbursed, including charges for delivery where applicable, rather than leaving this clarification to Recital 30.

38) There should be an obligation on traders to inform consumers of their responsibility for the cost of returning goods in respect of which they have exercised the right to withdraw. This could be part of the mandatory information on conditions and procedures for exercising the right of withdrawal under Article 9(b).

39) Article 17 of the proposal should be amended to provide that the responsibility for collecting, or arranging for the collection of, large or bulky goods should rest with the trader. In such a case, where a charge is imposed on the consumer, there should be a provision to the effect that it should not exceed the charge for delivering the good to him or, where no such charge applied, that the charge should be a fair and reasonable one.

40) Article 17(2) should be amended to clarify the circumstances in which the consumer would be liable for diminished value of the goods during the withdrawal period. The wording of the relevant provision in the Draft Common Frame of Reference merits consideration in this context. It distinguishes between inspection/testing and normal use. It provides that the consumer need not pay for any diminution in the value to the good delivered under the contract caused by inspection and testing and for any damage, destruction or loss to that good,

provided that the consumer used reasonable care to prevent such damage. The consumer is required to pay for diminution in value caused by normal use, unless the consumer was not informed of his right of withdrawal.

41) Article 17(2) further provides that, for service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period. Concern has been expressed that this provision could, to the detriment of consumers, make traders unwilling to perform services during the withdrawal period. If this concern is considered valid, Article 17(2) should be deleted and Articles 19(1) and 19(2) amended to provide that, if the consumer gives express written consent to the immediate performance of a services contract, the consumer retains the right of withdrawal, but would be liable to pay the costs of goods used or services provided during the withdrawal period if they subsequently withdraw. Where no such consent is given, the consumer would not be liable for any services performed before expiry of the withdrawal period.

42) Article 19(1)(a) should refer at subparagraphs (b) to (f) to the sale of goods and provision of services and not to the supply of goods or services.

43) Article 19(1)(a) exempts from the right of withdrawal distance contracts for services begun with the consumer's express prior consent before the end of the withdrawal period. As discussed at 41) above, this provision should be amended to provide that consumers retain the right to withdraw from contracts where the performance begins before the end of the withdrawal period (with their express written agreement), but are liable in this event for the cost of services provided during that period if they subsequently exercise the right to withdraw. The consequences of agreeing to performance before the end of the withdrawal period should be made clear to the consumer in writing. An amendment along these lines would provide greater protection for consumer subscribers to contracts with a continuing service aspect (such as telephone, broadband or cable television services) where quality can only be assessed after performance has commenced. If the exemption at Article 19(1)(a) is retained, it should be amended to include an express obligation on traders to inform consumers of the loss of withdrawal rights where they consented to immediate performance of the contract under Article 19(1)(a). This would give some protection to consumers under pressure to conclude contracts from 'cold callers'.

44) Article 19(1)(f) should exempt annual or other long-term subscriptions to newspapers, magazines and periodical from the non-application of the right of withdrawal.

45) Article 19(2)(b) provides for an exemption from the right of withdrawal for off-premises contracts for which the consumer has requested immediate performance in an emergency situation. This provision should be replaced by a provision which would permit the consumer to exercise the right of withdrawal in such situations, but leave him liable for the cost of goods provided or services performed during the withdrawal period. It is important to retain the right of withdrawal in such cases as consumers may still be pressured into concluding a contract in these circumstances. The question of what exactly constitutes ‘an immediate emergency’ is likely to give rise to uncertainty. Guidance should be provided in Article 19(2)(b) or in the relevant Recital.

46) Article 19(2)(c) provides for an exemption from the right of withdrawal for contracts for which the consumer has, by means of distance communication, requested the trader to visit his home for repair or maintenance upon his property. This provision should be deleted. As Recital 14 acknowledges, consumers may come under pressure to conclude a contract in such cases regardless of whether or not they had solicited the trader’s visit.

47) Article 19(2)(c) exempts from the right of withdrawal off-premises contracts relating to the repair and maintenance of property. The effect of Article 20(1)(a), however, is to give a right of withdrawal for off-premises and distance contracts involving ‘works relating to immovable property’. The distinction between, and differential treatment of, contracts for ‘works’ and ‘repair and maintenance’ is confusing and requires clarification

48) Article 20(1)(d) which excludes food and beverages supplied by traders on regular rounds from the scope of Chapter III does not retain the existing exemption under the Doorstep Selling Directive for traders selling ‘other goods’ on such rounds. This exemption should be reinstated.

49) Article 20 should be amended to exempt off-premises contracts below the value of €60 from the scope of Chapter III of the proposal or, alternatively, member states should be given the discretion to exclude contracts below this value.

50) Article 20(3) exempts distance contracts for accommodation, transport, car rental services, and catering and leisure services for a specific date or period of performance from the scope of Chapter III of the proposal. While there is a reasonable for exempting such contracts from the right of withdrawal, they should not be exempt from the information requirements of the Chapter.

Chapter IV: Other Consumer Rights Specific to Sales Contracts

51) There are a number of options in regard to the implications of the proposal's full harmonisation status for Irish consumer rights in the area of the sale of goods and guarantees:

- Seek exemption for Chapter IV, or parts thereof, from the maximum harmonisation status of the Directive; *or*
- Propose amendments to Chapter IV which would have to effect of raising the level of consumer protection under the Directive to at least the level which pertains in Ireland.

52) Article 22(1) proposes that, unless the parties have agreed otherwise, the trader shall deliver the goods to the consumer (or to a third party indicated by the consumer) within a maximum of thirty days from the day of the conclusion of the contract.

- As the thirty day rule is a default rule and the need for such a rule is questionable outside the distance selling environment, this provision should be deleted from the proposed Directive and regulated at national level.
- If the thirty day delivery rule is retained, the remedy for non-compliance should be clarified. A remedy that would allow a right to terminate the contract and seek a refund of the price would seem disproportionate in the light of the remedies regime proposed for goods not in conformity with the contract. If the intention is to leave other remedies for non-delivery and late delivery to national legal systems, this should be expressly stated.
- If the thirty day delivery rule is retained, Article 22(1) should be amended to provided that delivery shall take place at a reasonable hour as provided at section 29(4) of the Sale of Goods Act 1893.

- Matters of ownership and the passing of property/title should continue to be governed at a national level and the Directive should acknowledge the fact in a Recital.

53) Article 23 of the proposal provides that risk of loss or damage to the goods passes from trader to consumer when the consumer has acquired ‘material possession’ of the goods. In general, the introduction of a rule on risk which ensures that risk of loss or damage to goods in transit would remain with the trader is welcome and would strengthen the rights of Irish consumers. Article 23(2) needs to be amended however to take account of the situation where no delivery time has been agreed by the parties; this could be done, for example, by the insertion of ‘or within a reasonable time, where no delivery time is agreed’ after ‘at the time of delivery’.

54) Article 24 sets out the conditions which goods must satisfy for the purposes of the presumption of conformity with the contract. There are a number of options regarding the provision and its implications as a fully harmonised measure for the current conformity requirements under Irish legislation.

- An exemption could be sought from the full harmonisation character of Article 24, thereby permitting other criteria to be taken into account in assessing conformity; **or**
- Article 24 could be amended to encompass other relevant factors to be taken into account in assessing quality, especially durability, safety, cosmetic and minor defects. The provisions of the Draft Common Frame of Reference on other factors such as accessories and instructions also merit consideration in this context.
- Clarification should be sought in relation to exemptions from the conformity requirements of Article 24 using the provisions of Irish and UK Sale of Goods legislation as a template.
- It is necessary also to clarify whether the current provisions of domestic legislation regarding spare parts and after-sale service come within the scope of the proposal.
- The inclusion in the provision of a right of examination along the lines of section 34 of the Sale of Goods Act 1893 should be considered. This would give consumers an opportunity to assess the conformity of goods on

delivery.

- The position regarding quantity of delivery and the associated remedies regime requires clarification.

55) Article 25 of the proposal does not reproduce the provision at Article 4 of Directive 1999/44/EC regarding rights of redress for the final seller of goods, or otherwise address the question of direct producer liability. This question should be pursued in the context of the proposed Directive or, if this is not a feasible option, at a later stage. If direct liability is not regulated at EU level now or in the future, however, it will be possible for national authorities to legislate in the matter.

56) The proposed hierarchy of remedies at Article 26(1) and the provision at Article 26(2) that the choice of remedy should rest with the trader would be detrimental to consumer interests and should be opposed.

- Serious consideration should be given to the alternative proposal put forward by the UK Law Commission. This provides that the trader shall remedy the lack of conformity according to the choice of the consumer by 1) repair or replacement, 2) reduction of the price, or 3) rescission of the contract within 30 days of delivery of the goods to the consumer, though depending on the circumstances of the case, this period could be longer or shorter, if deemed reasonable. This appears to be a workable proposal that Ireland could support.
- In view of the importance to consumers of the appearance and finish of goods, Article 26 should be amended to provide that so-called minor defects are included among the criteria relevant to consumer entitlement to remedies for lack of conformity. It is noted in this connection that the UK Law Commission proposals would permit rescission for minor defects.
- There is a need to broaden the circumstances in which the consumer can have recourse to any remedy to include situations where a product has proved dangerous or where the trader has behaved so unreasonably as to undermine trust between the parties. The UK Law Commission has provisionally proposed that consumers should enjoy a choice of remedy in such circumstances. The Sales Report of the Study Group on a European Civil Code also proposes that a buyer should not be required to give a seller the opportunity to remedy a lack of conformity where the nature of that lack of

conformity gives the buyer reason to believe that he cannot rely on the seller's future performance. It cites the example of a consumer who orders food for a party and finds a dead mouse in a pie supplied by the trader. Even if the trader were willing and able to rectify the defect in such a case, the consumer should be entitled to terminate the contract on the ground of justifiable loss of confidence in the seller.

- Further consideration needs to be given to the issue and implications of the test to be used to determine whether the costs of repair or replacement are disproportionate under Article 26(3). The proposal at Article 26(3) that the comparison should be between the cost of repair or replacement and that of price reduction or rescission should be assessed alongside the alternative option that the comparison should be between the relative cost of repair and replacement.
- 57)** It is reasonable, as Article 27 proposes, to prohibit deductions for prior use of goods in the event of rescission for lack of conformity. The deletion of the regulatory option at Recital 15 of Directive 1999/44/EC permitting such deductions should be supported. In relation to Article 27(2) of the proposal, the ECJ judgment in the *Leitner* case suggests that the proposed Directive should provide guidance on the type of loss in respect of which damages may be claimed.
- 58)** The proposed mandatory two-year limitation period at Article 28 for claims relating to the concerning the of lack of conformity would significantly reduce the level of consumer protection in Ireland, particularly for high value goods.
- The provision should either be exempt from full harmonisation or the liability period should be substantially extended.
 - There is no good reason why different rules should apply to lack of conformity remedied by repair and replacement respectively. Article 28(2) should be amended to treat repairs on the same basis as replacements.
 - The proposed two-month notification requirement for defects should be deleted.
 - It should be clarified whether the six-month period in Article 28(4) recommences after goods are redelivered following repair or replacement

59) Though qualified by the inclusion of restrictions on the transferability of guarantees in the grey list of unfair contract terms under Chapter V, the limitation on the transfer of guarantees proposed at Article 29(2)(c) would impair nevertheless the protections provided to consumers.

- The provision at Article 29(2)(c) should be deleted. It should also be clarified whether supplier liability for observance of the guarantee is compatible with the full harmonisation character of the proposal.
- There is merit in a proposal, on the lines of that in the Draft Common Frame of Reference, that any requirement in a guarantee that makes it conditional on the completion of formal requirements by the purchaser (such as registration or notification of purchase) should not be binding on the consumer.
- If Article 29 remains subject to full harmonisation, it should be supplemented by requirements designed to ensure a more comprehensive regulatory framework for guarantees.

Chapter V: Consumer Rights Concerning Contract Terms

60) Consideration should be given to whether exemptions from maximum harmonisation are needed in respect of certain types of consumer contract.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 08.10.2008
COM(2008) 614/3

2008/xxxx (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on consumer rights

{SEC(2008) 2544}
{SEC(2008) 2545}
{SEC(2008) 2547}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Grounds for and objectives of the proposal**

The proposal is a result of the review of the Consumer Acquis which covers a number of Directives on consumer protection.

The Review was launched in 2004 with the objective to simplify and complete the existing regulatory framework. The overarching aim of the Review is to achieve a real business-to-consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect of the principle of subsidiarity.

The Directives under review contain minimum harmonisation clauses meaning that Member States may maintain or adopt stricter consumer protection rules. Member States have made extensive use of this possibility. The outcome is a fragmented regulatory framework across the Community which causes significant compliance costs for businesses wishing to trade cross-border.

The conflict-of-law rules like those included in the Regulation on the law applicable to contractual obligations ("Rome I") do not address this problem. Under Rome I, consumers contracting with a foreign trader cannot be deprived of the protection stemming from the non-derogable rules of their home country.

The internal market effects of the fragmentation are a reluctance by businesses to sell cross-border to consumers which in turn reduces consumer welfare. If consumers are precluded access to competitive cross-border offers they do not fully reap up the benefits of the internal market in terms of more choice and better prices.

The level of consumer confidence in cross-border shopping is low. One of the causes of this phenomenon is the fragmentation of the Consumer Acquis. The fragmentation and the related uneven level of consumer protection make it difficult to conduct pan-European education campaigns on consumer rights and to carry out alternative dispute resolution mechanisms.

The objective of the proposal is to contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence in the internal market and reducing business reluctance to trade cross-border. This overall objective should be attained by decreasing the fragmentation, tightening up the regulatory framework and providing consumers with a high common level of consumer protection and adequate information about their rights and how to exercise them. To this end, the European Commission will put in place a process in order to look for the most appropriate way to inform consumers on their basic rights at the point of sale.

- **General context**

The costs incurred by business to comply with the fragmented Consumer Acquis are significant. Surveys have shown that for the majority of traders, such compliance costs constitute an important barrier to cross-border trade which reduces their incentive to sell cross-border, particularly to consumers in small Member States. If no legislative action is taken at Community level, such costs will continue to be passed on to consumers in the form of higher prices or, worse, businesses will continue to refuse to

sell cross-border or create geographical discriminations between consumers depending on their country of residence.

The European Parliament, in its Resolution of 16 July 2007 recommended that legislative action is taken and expressed its preference for the adoption of an instrument taking the form of a horizontal Directive based on full targeted harmonisation.

In its Communication 'A single market for 21st century Europe' of 20 November 2007, the Commission stated that the single market needs to deliver better results and tangible benefits for consumers and SMEs.

- **Existing provisions in the area of the proposal**

The proposal aims at revising Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts, Directive 1999/44/EC on consumer sales and guarantees. These four Directives provide for consumer contractual rights.

The proposal merges these four Directives into a single horizontal instrument regulating the common aspects in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps.

The proposal moves away from the minimum harmonisation approach followed in the four existing Directives (i.e. Member States may maintain or adopt stricter national rules than those laid down in the Directive) to embrace a full harmonisation approach (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive).

- **Consistency with the other policies and objectives of the Union**

Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market contains some basic information requirements which have to be fulfilled by traders before contract conclusion. Directives 85/577/EEC, 97/7/EC and 99/44/EEC also contain some information requirements. In line with the Better Regulation objective, the proposal ensures consistency between these various Directives and regulates the legal consequences of a failure to comply with such requirements.

The proposal achieves a high level of consumer protection in consumer contracts. Therefore, the proposal complies with fundamental rights, in particular Article 38 of the Charter of Fundamental Rights of the European Union.

The proposal also complies with the fundamental principles of the EC Treaty, such as the principles of the free movement of goods and the freedom to provide services which will not be restricted by stricter national rules in the field harmonised by the Directive, except for the necessary and proportionate measures which Member States may take on grounds of public policy, public security, public health or the protection of the environment, in accordance with Community law.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **Consultation of interested parties**

Consultation methods, main sectors targeted and general profile of respondents

On 8 February 2007, the Commission adopted the Green Paper on the Review of the Consumer Acquis, summarising the Commission's initial findings and initiating a public consultation focusing on the cross-cutting issues (i.e. the horizontal issues) of the Directives under review.

The Green Paper attracted responses from a wide range of stakeholders, i.e. business, consumer, European Parliament, Member States, academics and legal practitioners.

The Commission also published two consultation documents on Directive 97/7/EC and on Directive 85/577/EEC focusing on the specific issues (i.e. the vertical issues) pertaining to these Directives. All interested parties were invited to submit replies to the Commission, respectively by 21 November 2006 and 4 December 2007. The Commission received respectively 84 and 62 replies from all relevant stakeholders. The outcome of these two specific consultations is available at the website: http://ec.europa.eu/consumers/rights/gen_rights_en.htm

The Commission held a full-day stakeholder conference on 14 November 2007.

On 20 December 2007, two questionnaires (the first one targeted at businesses, the second one targeted at consumers) were sent out by the Commission's contractor to stakeholders.

The current problems and the envisaged legislative changes with different options have been discussed with business and consumer stakeholders who were invited to answer questions on the likely impacts of each option in the context of workshops held in February 2008.

Summary of responses and how they have been taken into account

The majority of respondents to the Green Paper called for the adoption of a horizontal legislative instrument applicable to domestic and cross-border transactions, based on full targeted harmonisation; i.e. targeted at the issues raising substantial barriers to trade for business and/or deterring consumers from buying cross-border. The horizontal legislative instrument should in the view of most respondents be combined with vertical revisions of the existing sector-specific directives (for example revision of the Timeshare and Package Travel Directives). There was a strong support for tightening-up and systematising the Consumer Acquis, e.g. introducing common definitions of consumers/traders and delivery, harmonised rules on information and withdrawal rights and the insertion at Community level of a "black" list of unfair contract terms (i.e. terms banned upfront) and a "grey" list of such terms (i.e. terms presumed to be unfair) instead of the current purely indicative list.

This Green Paper consultation was conducted over the internet from 08/02/2007 to 15/05/2007. The Commission received 307 responses. The results are available on http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

- **Collection and use of expertise**

There was no need for external expertise.

- **Impact assessment**

Six options have been subject to an impact assessment. All policy options take into account, as a baseline, the recently-adopted Rome I.

Policy Option 1 is the status quo option, meaning that the minimum harmonisation of the Consumer Acquis is maintained. The economic impact of this option is negative. The key problem of the fragmentation of the regulatory framework would persist.

Policy Option 2 is a non-legislative option consisting of Community funding for awareness raising campaigns and self-regulation. As a standalone package, it would not bring any positive impact since the key problem of legal fragmentation would remain, unless the codes of conduct were based on the highest common standards and covered the whole Community.

Policy Option 3 includes a total of 4 legislative proposals, based on full harmonisation and which could fit in a horizontal instrument. It focuses on a limited number of inconsistencies in Community legislation. Clearer and up to date definitions simplify the legislation but have very limited impact on the contribution to the better functioning of the internal market, minimising the burden on business and enhancing consumer confidence.

Policy Option 4 includes 16 legislative changes based on full harmonisation and combined with the four legislative changes proposed under Policy Option 3. It addresses all the relevant consumer protection issues which traders have to take into account when designing their marketing materials, drafting their standard contract terms and operating their business with consumers. The full harmonisation of those issues would considerably reduce the administrative costs for distant and direct traders selling cross-border and would have a positive impact on the functioning of the internal market. Such legislative changes are relevant for consumer confidence in cross-border shopping. Furthermore, this Policy Option includes an update of the legislation to new market developments. This Policy Option has positive economic impacts, enhance consumer confidence and improve the quality of legislation.

Policy Option 5 includes 3 legislative proposals based on full harmonisation and granting new consumer rights in addition to the 20 legislative changes proposed under Policy Options 3 and 4. The negative impact on the costs borne by business and on the contribution to the better functioning of the internal market do not appear to be outweighed by the benefits it would bring to consumers.

Policy Option 6 includes the legislative proposals covered by Policy Option 3 or 4 and an internal market clause applying to the non-fully harmonised aspects. The internal market clause would allow the contracting parties, for those aspects covered by the clause, to choose the law of any Member State even where that law provides for a lower level of consumer protection than the law of the country where the consumer resides. Given its conflict with Article 6 of Rome I, such a clause would cause a legislative amendment and involve a major policy change a few months after the adoption of Rome I which contains a review clause (review to be completed by 2013). Furthermore, this policy option, while supported by business, has been opposed by the great majority of Member States and all consumer organisations in their response to the

Green Paper. While this option would remove regulatory barriers in the internal market and result in a reduction of the burden for business, it would transfer the problem of legal uncertainty to consumers resulting in negative impacts on consumer confidence; it would also create problems for national courts and enforcement bodies who would have to apply a foreign law.

The Commission carried out an impact assessment listed in the Work Programme, whose report is accessible on:

http://ec.europa.eu/consumers/rights/cons_acquis_en.htm.

3. LEGAL ELEMENTS OF THE PROPOSAL

- **Summary of the proposed action**

The purpose of the proposal is to contribute to the proper functioning of the business-to-consumer internal market and achieve a high common level of consumer protection by fully harmonising the key aspects of consumer contract law which are relevant for the internal market.

- **Legal basis**

Article 95 of the Treaty.

- **Subsidiarity principle**

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community.

The objectives of the proposal cannot be sufficiently achieved by the Member States for the following reasons.

The legal fragmentation problem cannot be solved by the Member States individually since it is the different implementation by the Member States of the minimum harmonisation clauses contained in the existing Directives that is at the root of the problem. Likewise, addressing new market developments, regulatory gaps and inconsistencies in Community consumer laws in an uncoordinated manner generates more fragmentation and exacerbates the problem. Only a coordinated Community intervention can contribute to the completion of the internal market by solving this problem.

Action by Member States alone in an uncoordinated manner would not allow the internal market to deliver results both for business, in particular SMEs and consumers. Indeed such an uncoordinated action would not use the potential of the business-to-consumer internal market, particularly the high potential of growth of cross-border distance selling which SMEs could directly benefit from. It would also deprive consumers from reaping up the benefits of the internal market with more choice and better prices from cross-border offers. Finally, it would restrict the development of competitive enterprises, especially SMEs who would like to expand their business across the Community.

Community action will better achieve the objectives of the proposal for the following

reasons.

The proposal is based on full harmonisation of Community consumer contract law. Its positive impact on the retail market would be considerable. As shown by the Impact Assessment Report, the savings in terms of administrative burden on business wishing to sell cross-border would be high.

The proposal would create a single set of rules ensuring a high common level of consumer protection across the Community and allowing traders to sell to consumers in 27 Member States as they would do at home with for example the same standard contract terms and the same information materials. The proposal would therefore significantly reduce traders' compliance costs while granting consumers a high level of protection.

The discrepancy between the growth in domestic and cross-border sales is particularly significant for Internet sales for which the potential of further growth is high. This proposal could therefore be one of the main tangible results of the business-to-consumer internal market.

The legal fragmentation resulting from the implementation by Member States of the minimum harmonisation clauses in the Directives under review has been shown by a comparative law analysis of the implementation of the Consumer Acquis in all 27 Member States. This analysis has been published on the website: http://ec.europa.eu/consumers/rights/cons_acquis_en.htm#comp

The 2008 Eurobarometer survey indicates that this legal fragmentation constitutes an important barrier to cross-border trade.

The scope of the proposal is limited to consumer protection rules in contracts concluded between traders and consumers. It fully harmonises all the consumer protection aspects which are relevant for cross-border trade, i.e. the aspects which are key for traders when they draft their standard contract terms and design the information materials as well as for the operation of their business (e.g. the management of returns in distance or direct selling).

The proposal therefore complies with the subsidiarity principle.

The Commission recognises that the full harmonisation approach successfully pursued with the Unfair Commercial Practices Directive in the field of consumer protection marks a new departure in the area of consumer contractual rights. This causes for an appropriate communication strategy to explain the impact and benefits of the proposal. In addition to the interinstitutional dialogue with Parliament and Council, the Commission intends to engage actively with all stakeholders in the months ahead in the various Member States.

- **Proportionality principle**

The proposal complies with the proportionality principle for the following reasons.

The proposal regulates only the key aspects of consumer contract law and does not interfere with more general contract law concepts such as the capacity to contract or the award of damages.

The proposal applies both to domestic and cross-border contracts, in line with the

outcome of the Green Paper. The inclusion of domestic transactions within the scope is proportionate to the objective of simplification of the Community regulatory framework, since it avoids a dual regime which would have created further fragmentation and distortions of competition between businesses trading only domestically and those trading both domestically and cross-border.

The administrative burden on public authorities would be negligible since it would merely consist in notifying to the Commission the national case law on unfair contract terms in the context of a comitology procedure.

The Community traders who wish to expand their business cross-border would significantly reduce their administrative costs due to full harmonisation. Some of the companies trading only domestically with no interest to take advantage of the internal market would marginally lose out due to their small one-off costs of adaptation to the regulatory changes. For face-to-face retailers, a minor additional burden can be expected for specific types of face-to-face businesses, such as second-hand shops acting as intermediaries of consumers.

If the proposal fosters consumer protection and increases competition in the retail market through more cross-border offers, then consumers will win through having more choice, better quality and lower prices.

- **Choice of instruments**

Proposed instruments: directive.

Other means would not be adequate for the following reasons.

The problem of fragmentation of the Community regulatory framework can only be overcome at Community level by a legislative initiative. Self-regulation or co-regulation would not solve this legal fragmentation problem.

A Directive is preferred to a Regulation since its transposition would allow a smoother implementation of the Community law into the existing national contract laws or consumer codes. It would give the Member States the necessary margin of appreciation to maintain national legal concepts and basic principles of national contract law which comply with the objectives of the Community legislative proposal. Unlike a Regulation, the implementation of a Directive may give rise to a single and coherent set of law at national level which would be simpler to apply and interpret by traders, easier to enforce by public authorities and more in line with the subsidiarity principle.

4. BUDGETARY IMPLICATION

The cost of the future Committee on unfair terms includes the salary of one official valued at €117,000 to support the comitology process. It also includes the cost of the plenary session with one participant from the 27 Member States and three meetings scheduled per year, valued at €20,000 each.

5. ADDITIONAL INFORMATION

- **Simplification**

The proposal provides for simplification of legislation.

The proposal considerably simplifies the Consumer Acquis. By merging together four Directives, it regulates in a systematic fashion the commonalities and eliminates the overlaps and inconsistencies. For example, the proposal consistently regulates common features such as common definitions, a core of pre-contractual information and rules on the contractual aspects of sales which are currently scattered across several Directives.

The proposal is included in the Commission's rolling programme for up-date and simplification of the acquis communautaire and its Work and Legislative Programme under the reference 2008/SANCO/001.

- **Repeal of existing legislation**

The adoption of the proposal will lead to the repeal of existing legislation.

- **Review/revision/sunset clause**

The proposal includes a review clause.

- **Correlation table**

The Member States are required to communicate to the Commission the text of national provisions transposing the Directive as well as a correlation table between those provisions and this Directive.

- **European Economic Area**

The proposed act concerns an EEA matter and should therefore extend to the European Economic Area.

- **Detailed explanation of the proposal**

Chapter I contains the common definitions such as 'consumer' and 'trader' and lays down the principle of full harmonisation.

Chapter II contains a core of information to be provided by traders prior to the conclusion of all consumer contracts as well as an information obligation on intermediaries concluding contracts on behalf of consumers. Chapter III which only applies to distance and off-premises contracts, provides for specific information requirements and regulates the right of withdrawal (length, exercise and effects) in a consistent manner. It also refers to a standard withdrawal form reproduced in Annex I(B).

Chapter IV clarifies the provisions of Directive 99/44/EC. It maintains the principle that the trader is liable to the consumer for a period of two years if the goods are not in conformity with the contract. It introduces a new rule whereby the risk of loss or damage of the goods is transferred to the consumer only when he or a third person indicated by him other than the carrier acquires the material possession of the goods.

Chapter V broadly reflects the provision of Directive 93/13/EEC. It applies to unfair contract terms which have not been individually negotiated, such as standard contract terms. Unfair terms are those creating significant imbalances in the rights and obligations of consumers and of traders and are not binding on consumers. In order to

ensure legal certainty, the Directive contains two lists of unfair terms. Annex II contains a list of terms which in all circumstances are considered unfair. Annex III contains a list of terms which are deemed unfair unless the trader proves otherwise. These same lists apply in all Member States and may only be amended by the comitology procedure provided for by the Directive.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on consumer rights

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the procedure laid down in Article 251 of the Treaty³,

Whereas:

- (1) Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises⁴, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts⁵, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts⁶, Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees⁷, lay down a number of contractual rights for consumers.
- (2) Those Directives have been reviewed in the light of experience with a view to simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules. That review has shown that it is appropriate to replace those four Directives by this single Directive. This Directive should accordingly lay down standard rules for the common aspects and move away from the minimum harmonisation approach in the former Directives under which Member States could maintain or adopt stricter national rules.
- (3) Article 153(1) and (3)(a) of the Treaty provides that the Community is to contribute to the attainment of a high level of consumer protection by the measures it adopts pursuant to Article 95 thereof.

¹ OJ C , , p. .

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ L 372, 31.12.1985, p. 31.

⁵ OJ L 95, 21.4.1993, p. 29.

⁶ OJ L 144, 4.6.1997, p. 19. Directive, as last amended by Directive 2007/64/EC (OJ L 319, 5.12.2007, p. 1).

⁷ OJ L 171, 7.7.1999, p. 12.

- (4) In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The harmonisation of certain aspects of consumer contract law is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring the respect of the principle of subsidiarity.
- (5) The cross-border potential of distance selling which should be one of the main tangible results of the internal market is not fully exploited by consumers. Compared with the significant growth of domestic distance sales over the last few years, the growth in cross-border distance sales has been limited. This discrepancy is particularly significant for Internet sales for which the potential of further growth is high. The cross-border potential of contracts negotiated away from business premises (direct selling) is constrained by a number of factors including the different national consumer protection rules imposed upon the industry. Compared with the growth of domestic direct selling over the last few years, in particular in the services sector (e.g. utilities), the number of consumers using this channel for cross-border purchases has remained flat. Responding to increased business opportunities in many Member States, small and medium size enterprises (including individual entrepreneurs) or agents of direct selling companies should be more inclined to seek business opportunities in other Member States, in particular in border regions. Therefore the full harmonisation of consumer information and the right of withdrawal in distance and off-premises contracts will contribute to the better functioning of the business to consumer internal market.
- (6) The laws of the Member States on consumer contracts show marked differences which can generate appreciable distortions of competition and obstacles to the smooth functioning of the internal market. The existing Community legislation in the field of consumer contracts concluded at a distance or away from business premises' consumer goods and guarantees as well as unfair contract terms establishes minimum standards for harmonising legislation allowing the Member States the possibility to maintain or introduce more stringent measures which ensure a higher level of consumer protection in their territories. Furthermore, many issues are regulated inconsistently between directives or have been left open. These issues have been addressed differently by the Member States. As a result, the national provisions implementing directives on consumer contract law diverge significantly.
- (7) These disparities create significant internal market barriers affecting business and consumers. They increase compliance costs to business wishing to engage in cross border sale of goods or provision of services. Fragmentation also undermines consumer confidence in the internal market. The negative effect on consumer confidence is strengthened by an uneven level of consumer protection across the Community. This problem is particularly acute in the light of new market developments.
- (8) Full harmonisation of some key regulatory aspects will considerably increase legal certainty for both consumers and business. Both consumers and business will be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Community. The effect will be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. These barriers can only be

eliminated by establishing uniform rules at Community level. Furthermore consumers will enjoy a high common level of protection across the Community.

- (9) The field harmonised by this Directive should cover certain aspects of business to consumer contracts. These are rules on information to be provided before conclusion and during performance of the contract, the right of withdrawal for distance and off-premises contracts, consumer rights specific to contracts of sale and unfair contract terms in consumer contracts.
- (10) The provisions of this Directive should be without prejudice to Regulation (EC) No 593/2008 of the European Parliament and of the Council applicable to contractual obligations (Rome I)⁸.
- (11) The existing Community legislation on consumer financial services contains numerous rules on consumer protection. For this reason the provisions of this Directive cover contracts relating to financial services only insofar as this is necessary to fill the regulatory gaps.
- (12) The new definition of distance contract should cover all cases where sales and service contracts are concluded using exclusively one or more means of distance communication (such as mail order, Internet, telephone or fax). This should create a level playing field for all distance traders. It should also improve legal certainty as compared to the current definition requiring the presence of an organised distance selling scheme run by the trader up to the conclusion of the contract.
- (13) The particular circumstances under which an offer was made or the contract was negotiated should not be relevant in the definition of a distance contract. The fact that the trader is an occasional distance seller or that he uses an organised scheme run by a third party such as an online platform, should not deprive consumers of their protection. Similarly, a transaction negotiated face to face between the trader and the consumer away from business premises should be a distance contract, if the contract has then been concluded through the exclusive use of means of distance communication, such as the Internet or telephone. For traders, a simpler definition of a distance contract should improve legal certainty and protect them from unfair competition.
- (14) An off-premises contract should be defined as a contract concluded with the simultaneous physical presence of the trader and the consumer, away from business premises, for example at the consumer's home or workplace. In an off-premises context, consumers are under psychological pressure no matter whether they have solicited the trader's visit or not. Furthermore, in order to prevent circumventions of rules when consumers are approached away from business premises, a contract negotiated, for example at the consumer's home but concluded in a shop should be regarded as an off-premises contract.
- (15) Business premises should include premises in whatever form (such as shops or lorries) which serve as a permanent place of business for the trader. Market stalls and fair stands should be treated as business premises even though they may be used by the trader on a temporary basis. Other premises which are rented for a short time only and where the trader is not established (such as hotels, restaurants, conference centres, cinemas rented by traders who are not established there) should not be regarded as

⁸ OJ L 177, 4.7.2008, p. 6.

business premises. Similarly, all public spaces including public transport or facilities as well as private homes or workplaces should not be regarded as business premises.

- (16) The definition of durable medium should include in particular documents on paper, USB sticks, CD-ROMs, DVDs, memory cards and the hard drive of the computer on which the electronic mail or a pdf file is stored.
- (17) Consumers should be entitled to receive information before the conclusion of the contract. However traders should not have to provide the information when already apparent from the context. For example in an on-premises transaction, the main characteristics of a product, the identity of the trader and the arrangements for delivery may be apparent from the context. In distance and off-premises transactions, the trader should always provide the information on arrangements for payment, delivery, performance and the complaint handling policy, since these might not be apparent from the context.
- (18) Traders should be obliged to inform consumers in advance of any arrangement resulting in the consumers paying a deposit to the trader, including an arrangement whereby an amount is blocked on the consumers' credit or debit card.
- (19) In the case of public auctions, due to the nature and tradition of that sales method, the auctioneer may instead of communicating the geographical address and the identity of the seller for whom he is selling the goods replace that with his own contact details.
- (20) The consumer should know whether he is contracting with the trader or with an intermediary acting on behalf of another consumer, since in the latter case the consumer may not enjoy the protection under this Directive. Therefore the intermediary should inform of this fact and the consequences thereof. The notion of intermediary should not include online trading platforms which do not conclude the contract in the name of or on behalf of any other party.
- (21) In the case of distance contracts, the information requirements should be adapted to take into account the technical constraints of certain media, such as the restrictions of the number of characters on certain mobile telephone screens or the time constraint on television sales spots. In this case the trader should comply with a minimum set of information requirements and refer the consumer to another source of information, for instance by providing a toll free telephone number or a hypertext link to a webpage of the trader where the relevant information is directly available and easily accessible.
- (22) Since in the case of distance sales, the consumer is not able to see the good before concluding the contract he should have a right of withdrawal, which allows him to ascertain the nature and functioning of the goods.
- (23) The current varying lengths of the withdrawal periods both between the Member States and for distance and off-premises contracts cause legal uncertainty and compliance costs. The same withdrawal period should apply to all distance and off-premises contracts.
- (24) To ensure legal certainty, it is appropriate that Council Regulation (EEC, Euratom) No 1182/71 of 3 June 1971 determining the rules applicable to periods, dates and time limits⁹ should apply to the calculation of the periods contained in this Directive. Therefore, all periods contained in this Directive should be understood to be expressed in calendar days.

⁹ OJ L 124, 8.6.1971, p. 1.

- (25) The rules on distance contracts should be without prejudice to the provisions on the conclusion of e-contracts and the placing of e-orders as set out by Articles 9 and 11 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).
- (26) When the consumer orders more than one good from the same trader, he should be entitled to exercise the right of withdrawal in respect of each of these goods. If the goods are delivered separately, the withdrawal period should start when the consumer acquires the material possession of each individual good. Where a good is delivered in different lots or pieces, the withdrawal period should start when the consumer or a third party indicated by the consumer acquires the material possession of the last lot or piece.
- (27) If the trader has not informed the consumer on the right of withdrawal prior to the conclusion of a distance or off-premises contract, the withdrawal period should be extended. However, in order to ensure legal certainty over time, a three-month limitation period should be introduced, provided that the trader has fully performed his contractual obligations. The trader should be regarded as having fully performed his obligations when he has delivered the goods or has fully provided the services ordered by the consumer.
- (28) Differences in the ways in which the right of withdrawal is exercised in the Member States have caused costs for businesses selling cross-border. The introduction of a harmonised standard withdrawal form to be used by the consumer should simplify the withdrawal process and bring legal certainty. For these reasons, Member States should refrain from adding any presentational requirements to the Community-wide standard form relating for example to the font size.
- (29) As experience shows that many consumers and traders prefer to communicate via the trader's website, there should be a possibility for the trader to give the consumer the option of filling in a web-based withdrawal form. In this case the trader should provide an acknowledgement of receipt by email without delay.
- (30) In case of withdrawal the trader should reimburse all payments received from the consumer, including those covering the expenses born by the trader to deliver goods to the consumer.
- (31) Some consumers exercise their right of withdrawal after having used the goods to an extent more than necessary to ascertain the nature and functioning of the good. In this case the consumer should be liable for any diminished value of the goods. In order to ascertain the nature and functioning of a good, the consumer should only handle or try it in the same manner as he would be allowed to do in a shop. For example, the consumer should only try on a garment and should not be allowed to wear it. In order to ensure the effectiveness of the withdrawal right in service contracts, in particular for non-urgent renovation works for which consumers may be subject to high pressure selling at their homes followed by the immediate performance of the service before the expiration of the withdrawal period, consumers should bear no cost for such a service.
- (32) In order to avoid the trader reimbursing a consumer who has not returned the goods, the consumer should be required to send back the goods no later than fourteen days after having informed the trader about his decision to withdraw.
- (33) Certain exemptions should exist from the right of withdrawal, such as in cases where a right of withdrawal would be inappropriate given the nature of the product. That is

applicable for example to wine supplied a long time after the conclusion of the contract of a speculative nature where the value is dependent on fluctuations in the market (vin en primeur).

- (34) Furthermore, in case of distance contracts for the provision of services, for which the performance begins during the withdrawal period (e.g. data files downloaded by the consumer during that period), it would be unfair to allow the consumer to withdraw after the service has been enjoyed by the consumer in full or in part. Therefore the consumer should lose his right of withdrawal when performance begins with his prior express agreement.
- (35) The Commission has found some key consumer problems in the home improvement sector where consumers are under high pressure to order expensive renovation works. The scope of the information and withdrawal rules should be clarified and extended in order to cover this kind of contract. Only contracts for the conveyance of interests in real property should be excluded from the scope of the rules on information and withdrawal rights applicable to distance and off-premises contracts.
- (36) The application of a right of withdrawal may be inappropriate for certain services relating to accommodation, transport and leisure. The conclusion of the corresponding contracts implies the setting aside of capacity which, if a right of withdrawal was introduced, the trader may find difficult to fill. Therefore these distance contracts should not be covered by the provisions on consumer information and the right of withdrawal.
- (37) For the purpose of simplification and legal certainty, the right of withdrawal should apply to all types of off-premises contracts, except under strictly defined circumstances which can easily be proved. Therefore, no right of withdrawal should apply for urgent repairs at the consumer's home for which such a right of withdrawal would be incompatible with the emergency situation as well as for supermarket home-delivery schemes which allow consumers to select food, drinks and other goods intended for current consumption in the household through the supermarket's website and have them delivered at their home. These are goods, which are inexpensive and bought regularly by consumers for their every day's consumption or everyday use in the household and should therefore not be subject to a right of withdrawal. The main difficulties encountered by consumers and the main source of disputes with traders are about delivery of goods, including goods getting lost or damaged during transport and late and partial delivery. Therefore it is appropriate to clarify and harmonise the national rules on delivery and passing of risk.
- (38) In the context of consumer sales, the delivery of goods can take place in various ways. Only a rule which may be freely derogated from will allow the necessary flexibility to take into account those variations. The consumer should be protected against any risk of loss or damage of the goods occurring during the transport arranged or carried out by the trader. The rule introduced on the passing of risk should not apply where the consumer unduly delays taking possession of the goods (for example, when the goods are not collected by the consumer from the post-office within the deadline fixed by the latter). In those circumstances, the consumer should bear the risk of loss or deterioration after the time of delivery as agreed with the trader.
- (39) The trader should be liable to the consumer if the goods are not in conformity with the contract. The goods should be presumed to be in conformity with the contract if they satisfy a number of conditions concerning mainly the qualities of the goods. The quality and performance which consumers can reasonably expect will depend *inter*

alia on whether the goods are new or second-hand as well as on the expected life-span of the goods.

- (40) If the good is not in conformity with the contract, firstly, the consumer should have the possibility to require the trader to repair the goods or to replace them at the trader's choice unless the trader proves that those remedies are unlawful, impossible or causes the trader disproportionate effort. The trader's effort should be determined objectively considering costs incurred by the trader when remedying the lack of conformity, the value of the goods and the significance of the lack of conformity. The lack of spare parts should not be a valid ground to justify the trader's failure to remedy the lack of conformity within a reasonable time or without a disproportionate effort.
- (41) The consumer should not bear any costs for remedying the lack of conformity, particularly the cost of postage, labour and materials. Furthermore, the consumer should not compensate the trader for the use of the defective goods.
- (42) When the trader has either refused or has more than once failed to remedy the lack of conformity the consumer should be entitled to choose freely any of the available remedies. The trader's refusal can be either explicit or implicit, meaning in the latter case that the trader does not respond or ignores the consumer's request to remedy the lack of conformity.
- (43) Directive 1999/44/EC allowed the Member States to set a period of at least two months during which the consumer was to inform the trader of any lack of conformity. The diverging transposition laws have created barriers to trade. Therefore, it is necessary to remove this regulatory option and improve legal certainty by obliging consumers to inform the trader of the lack of conformity within two months from the date of detection.
- (44) Some traders or producers offer consumers commercial guarantees. In order to ensure that consumers are not misled, the commercial guarantees should include certain information, including their duration, territorial scope and a statement that the commercial guarantee does not affect the consumer's legal rights.
- (45) There is a need to protect consumers against unfair contract terms which have not been individually negotiated, such as standard contract terms. The rules on unfair terms should not apply to terms which the consumer agreed upon following a negotiation. Being afforded the possibility to choose between different contract terms which have been drafted by the trader or a third party on behalf of the trader should not be regarded as a negotiation.
- (46) Provisions on unfair contract terms should not apply to contract terms, which directly or indirectly reflect mandatory statutory or regulatory provisions of the Member States which comply with Community law. Similarly terms which reflect the principles or provisions of international conventions to which the Community or the Member States are party, particularly in the transport area, should not be subject to the unfairness test.
- (47) Consumer contracts should be drafted in plain, intelligible language and be legible. Traders should be free to choose the font type or size in which the contract terms are drafted. The consumer should be given an opportunity to read the terms before concluding the contract. This opportunity could be given to the consumer by providing him with the terms on request (for on-premises contracts) or making those terms otherwise available (e.g. on the trader's website in respect of distance contracts) or attaching standard terms to the order form (in respect of off-premises contracts). The trader should seek the consumer's express consent to any payment in addition to the

remuneration for the trader's main contractual obligation. Inferring consent by using opt-out systems, such as pre-ticked boxes online should be prohibited.

- (48) When making an assessment of good faith, particular regard should be made to the strength of the bargaining positions of the parties, whether the consumer was induced to accept the term and whether the goods or services were sold or supplied on the special order of the consumer. The requirement of good faith may be satisfied by the trader where he deals fairly and equitably with the other party whose legitimate interests he should take into account.
- (49) For the purposes of this Directive, neither the fairness of terms which describe the main subject matter of the contract, nor the quality/price ratio of the goods or services supplied should be assessed unless these terms did not meet transparency requirements. The main subject matter of the contract and the price/quality ratio should nevertheless be taken into account in assessing the fairness of other terms. For example, in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability should not be subject to such an assessment since these restrictions are taken into account in calculating the premium paid by the consumer.
- (50) In order to ensure legal certainty and improve the functioning of the internal market, the Directive should contain two lists of unfair terms. Annex II contains a list of terms which should in all circumstances be considered unfair. Annex III contains a list of terms which should be deemed unfair unless the trader proves otherwise. These same lists should apply in all Member States.
- (51) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹⁰.
- (52) In particular, the Commission should be empowered to amend Annexes II and III on contract terms to be considered or presumed unfair. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (53) The Commission's power to amend Annexes II and III should be used to ensure consistent implementation of the rules on unfair terms by supplementing those Annexes with contractual terms, which should be considered unfair in all circumstances or which should be deemed unfair unless the trader has proved otherwise.
- (54) The Member States may use any concept of national contract law which fulfils the required objective that unfair contract terms should not be binding on the consumer.
- (55) The Member States should ensure that their courts or administrative authorities have at their disposal adequate and effective means of preventing the continued application of unfair terms in consumer contracts.
- (56) In accordance with the Treaty, the Directive provides for a high level of consumer protection. Nothing in this Directive prevents traders from offering consumers contractual arrangements which go beyond the protection afforded by this Directive.

¹⁰ OJ L 184, 17.7.1999, p. 23.

- (57) Persons or organisations regarded under national law as having a legitimate interest in protecting consumer contractual rights should be afforded legal remedies for initiating proceedings, either before a court or before an administrative authority which is competent to decide upon complaints or to initiate appropriate legal proceedings.
- (58) It is necessary that Member States lay down penalties for infringements of the provisions of this Directive and they must ensure that these are enforced. The penalties should be effective, proportionate and dissuasive.
- (59) The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) should apply, in order to determine whether the consumer retains the protection granted by this Directive.
- (60) The European Commission will look into the most appropriate way to ensure that all consumers are made aware of their rights at the point of sale.
- (61) Since inertia selling, which consists of unsolicited supplies of goods or services to consumers, is prohibited by Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive')¹¹ but no contractual remedy is provided thereof, it is necessary to introduce in this Directive the contractual remedy of exempting the consumer from the provision of any consideration for such unsolicited supplies.
- (62) Directive 2002/58/EC already regulates unsolicited communications and provides for a high level of consumer protection. The corresponding provisions on the same issue contained in Article 10 of Directive 97/7/EC should be deleted.
- (63) It is appropriate to review this Directive if some barriers to the internal market were identified. The review could lead to a Commission proposal to amend this Directive, which may include amendments to other consumer protection legislation reflecting the Commission's Consumer Policy Strategy commitment to review the *acquis* in order to achieve a high, common level of consumer protection.
- (64) Directives 85/577/EEC, 93/13/EEC and 97/7/EC and Directive 1999/44/EC should be repealed.
- (65) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to eliminate the internal market barriers and achieve a high common level of consumer protection.
- (66) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union,

¹¹ OJ L 149, 11.6.2005, p. 22.

HAVE ADOPTED THIS DIRECTIVE:

Chapter I

Subject matter, definitions and scope

Article 1 *Subject matter*

The purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating certain aspects of the laws, regulations and administrative provisions of the Member States concerning contracts between consumers and traders.

Article 2 *Definitions*

For the purpose of this Directive, the following definitions shall apply:

- (1) 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession;
- (2) 'trader' means any natural or legal person who, in contracts 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;
- (3) 'sales contract' means any contract for the sale of goods by the trader to the consumer including any mixed-purpose contract having as its object both goods and services;
- (4) 'goods' means any tangible movable item, with the exception of:
 - (a) goods sold by way of execution or otherwise by authority of law,
 - (b) water and gas where they are not put up for sale in a limited volume or set quantity,
 - (c) electricity;
- (5) 'service contract' means any contract other than a sales contract whereby a service is provided by the trader to the consumer;
- (6) 'distance contract' means any sales or service contract where the trader, for the conclusion of the contract, makes exclusive use of one or more means of distance communication;
- (7) 'means of distance communication' means any means which, without the simultaneous physical presence of the trader and the consumer, may be used for the conclusion of a contract between those parties;
- (8) 'off-premises contract' means:
 - (a) any sales or service contract concluded away from business premises with the simultaneous physical presence of the trader and the consumer

or any sales or service contract for which an offer was made by the consumer in the same circumstances, or

- (b) any sales or service contract concluded on business premises but negotiated away from business premises, with the simultaneous physical presence of the trader and the consumer.
- (9) 'business premises' means:
- (a) any immovable or movable retail premises, including seasonal retail premises, where the trader carries on his activity on a permanent basis, or
 - (b) market stalls and fair stands where the trader carries on his activity on a regular or temporary basis;
- (10) 'durable medium' means any instrument which enables the consumer or the trader to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored;
- (11) 'order form' means an instrument setting out the contract terms, to be signed by the consumer with a view to concluding an off-premises contract;
- (12) 'product' means any good or service including immoveable property, rights and obligations;
- (13) 'financial service' means any service of a banking, credit, insurance, personal pension, investment or payment nature;
- (14) 'professional diligence' means the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the trader's field of activity;
- (15) 'auction' means a method of sale where goods or services are offered by the trader through a competitive bidding procedure which may include the use of means of distance communication and where the highest bidder is bound to purchase the goods or the services. A transaction concluded on the basis of a fixed-price offer, despite the option given to the consumer to conclude it through a bidding procedure is not an auction;
- (16) 'public auction' means a method of sale where goods are offered by the trader to consumers, who attend or are given the possibility to attend the auction in person, through a competitive bidding procedure run by an auctioneer and where the highest bidder is bound to purchase the goods;
- (17) 'producer' means the manufacturer of goods, the importer of goods into the territory of the Community or any person purporting to be a producer by placing his name, trade mark or other distinctive sign on the goods;
- (18) 'commercial guarantee' means any undertaking by the trader or producer (the 'guarantor') to the consumer to reimburse the price paid or to replace, repair or service goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising available at the time of, or before the conclusion of the contract;

- (19) 'intermediary' means a trader who concludes the contract in the name of or on behalf of the consumer;
- (20) 'ancillary contract' means a contract by which the consumer acquires goods or services related to a distance contract or an off-premises contract and these goods or services are provided by the trader or a third party on the basis of an arrangement between that third party and the trader.

Article 3
Scope

1. This Directive shall apply, under the conditions and to the extent set out in its provisions, to sales and service contracts concluded between the trader and the consumer.
2. This Directive shall only apply to financial services as regards certain off-premises contracts as provided for by Articles 8 to 20, unfair contract terms as provided for by Articles 30 to 39 and general provisions as provided for by Articles 40 to 46, read in conjunction with Article 4 on full harmonisation.
3. Only Articles 30 to 39 on consumer rights concerning unfair contract terms, read in conjunction with Article 4 on full harmonisation, shall apply to contracts which fall within the scope of Directive 94/47/EC of the European Parliament and of the Council¹² and of Council Directive 90/314/EEC¹³.
4. Articles 5, 7, 9 and 11 shall be without prejudice to the provisions concerning information requirements contained in Directive 2006/123/EC of the European Parliament and of the Council¹⁴ and Directive 2000/31/EC of the European Parliament and of the Council¹⁵.

Article 4
Full harmonisation

Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection.

Chapter II

Consumer information

Article 5
General information requirements

1. Prior to the conclusion of any sales or service contract, the trader shall provide the consumer with the following information, if not already apparent from the context:

¹² OJ L 280, 29.10.1994, p. 83.

¹³ OJ L 158, 23.6.1990, p. 59.

¹⁴ OJ L 376, 27.12.2006, p. 36.

¹⁵ OJ L 178, 17.7.2000, p. 1.

- (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
 - (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
 - (c) the price inclusive of taxes, or where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
 - (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence;
 - (e) the existence of a right of withdrawal, where applicable;
 - (f) the existence and the conditions of after-sales services and commercial guarantees, where applicable;
 - (g) the duration of the contract where applicable or if the contract is open-ended, the conditions for terminating the contract;
 - (h) the minimum duration of the consumer's obligations under the contract, where applicable;
 - (i) the existence and the conditions of deposits or other financial guarantees to be paid or provided by the consumer at the request of the trader.
2. In the case of a public auction, the information in paragraph 1(b) may be replaced by the geographical address and the identity of the auctioneer.
 3. The information referred to in paragraph 1 shall form an integral part of the sales or service contract.

Article 6
Failure to provide information

1. If the trader has not complied with the information requirements on additional charges as referred to in Article 5(1)(c), the consumer shall not pay these additional charges.
2. Without prejudice to Articles 7(2), 13 and 42, the consequences of any breach of Article 5, shall be determined in accordance with the applicable national law. Member States shall provide in their national laws for effective contract law remedies for any breach of Article 5.

Article 7
Specific information requirements for intermediaries

1. Prior to the conclusion of the contract, the intermediary shall disclose to the consumer, that he is acting in the name of or on behalf of another consumer and that the contract concluded, shall not be regarded as a contract between the consumer and the trader but rather as a contract between two consumers and as such falling outside the scope of this Directive.

2. The intermediary, who does not fulfil the obligation under paragraph 1, shall be deemed to have concluded the contract in his own name.
3. This Article shall not apply to public auctions.

Chapter III

Consumer information and withdrawal right for distance and off-premises contracts

Article 8 Scope

This Chapter shall apply to distance and off-premises contracts.

Article 9 Information requirements for distance and off-premises contracts

As regards distance or off-premises contracts, the trader shall provide the following information which shall form an integral part of the contract:

- (a) the information referred to in Articles 5 and 7 and, by way of derogation from Article 5(1)(d), the arrangements for payment, delivery and performance in all cases;
- (b) where a right of withdrawal applies, the conditions and procedures for exercising that right in accordance with Annex I;
- (c) if different from his geographical address, the geographical address of the place of business of the trader (and where applicable that of the trader on whose behalf he is acting) where the consumer can address any complaints;
- (d) the existence of codes of conduct and how they can be obtained, where applicable;
- (e) the possibility of having recourse to an amicable dispute settlement, where applicable;
- (f) that the contract will be concluded with a trader and as a result that the consumer will benefit from the protection afforded by this Directive.

Article 10 Formal requirements for off-premises contracts

1. With respect to off-premises contracts, the information provided for in Article 9 shall be given in the order form in plain and intelligible language and be legible. The order form shall include the standard withdrawal form set out in Annex I(B).
2. An off-premises contract shall only be valid if the consumer signs an order form and in cases where the order form is not on paper, receives a copy of the order form on another durable medium.
3. Member States shall not impose any formal requirements other than those provided for in paragraphs 1 and 2.

Article 11
Formal requirements for distance contracts

1. With respect to distance contracts, the information provided for in Article 9(a) shall be given or made available to the consumer prior to the conclusion of the contract, in plain and intelligible language and be legible, in a way appropriate to the means of distance communication used.
2. If the trader makes a telephone call to the consumer with a view to concluding a distance contract, he shall disclose his identity and the commercial purpose of the call at the beginning of the conversation with the consumer.
3. If the contract is concluded through a medium which allows limited space or time to display the information, the trader shall provide at least the information regarding the main characteristics of the product and the total price referred to in Articles 5(1)(a) and (c) on that particular medium prior to the conclusion of such a contract. The other information referred to in Articles 5 and 7 shall be provided by the trader to the consumer in an appropriate way in accordance with paragraph 1.
4. The consumer shall receive confirmation of all the information referred to in Article 9(a) to (f), on a durable medium, in reasonable time after the conclusion of any distance contract, and at the latest at the time of the delivery of the goods or when the performance of the service has begun, unless the information has already been given to the consumer prior to the conclusion of any distance contract on a durable medium.
5. Member States shall not impose any formal requirements other than those provided for in paragraphs 1 to 4.

Article 12
Length and starting point of the withdrawal period

1. The consumer shall have a period of fourteen days to withdraw from a distance or off-premises contract, without giving any reason.
2. In the case of an off-premises contract, the withdrawal period shall begin from the day when the consumer signs the order form or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium.

In the case of a distance contract for the sale of goods, the withdrawal period shall begin from the day on which the consumer or a third party other than the carrier and indicated by the consumer acquires the material possession of each of the goods ordered.

In the case of a distance contract for the provision of services, the withdrawal period shall begin from the day of the conclusion of the contract.
3. The deadline referred to in paragraph 1 is met if the communication concerning the exercise of the right of withdrawal is sent by the consumer before the end of that deadline.
4. The Member States shall not prohibit the parties from performing their obligations under the contract during the withdrawal period.

Article 13
Omission of information on the right of withdrawal

If the trader has not provided the consumer with the information on the right of withdrawal in breach of Articles 9(b), 10(1) and 11(4), the withdrawal period shall expire three months after the trader has fully performed his other contractual obligations.

Article 14
Exercise of the right of withdrawal

1. The consumer shall inform the trader of his decision to withdraw on a durable medium either in a statement addressed to the trader drafted in his own words or using the standard withdrawal form as set out in Annex I(B).
Member States shall not provide for any other formal requirements applicable to this standard withdrawal form.
2. For distance contracts concluded on the Internet, the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

Article 15
Effects of withdrawal

The exercise of the right of withdrawal shall terminate the obligations of the parties:

- (a) to perform the distance or off-premises contract, or
- (b) to conclude an off-premises contract, in cases where an offer was made by the consumer.

Article 16
Obligations of the trader in case of withdrawal

1. The trader shall reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of withdrawal.
2. For sales contracts, the trader may withhold the reimbursement until he has received or collected the goods back, or the consumer has supplied evidence of having sent back the goods, whichever is the earliest.

Article 17
Obligations of the consumer in case of withdrawal

1. For sales contracts for which the material possession of the goods has been transferred to the consumer or at his request, to a third party before the expiration of the withdrawal period, the consumer shall send back the goods or hand them over to the trader or to a person authorised by the trader to receive them, within fourteen days from the day on which he communicates his withdrawal to the trader, unless the trader has offered to collect the goods himself.

The consumer shall only be charged for the direct cost of returning the goods unless the trader has agreed to bear that cost.

2. The consumer shall only be liable for any diminished value of the goods resulting from the handling other than what is necessary to ascertain the nature and functioning of the goods. He shall not be liable for diminished value where the trader has failed to provide notice of the withdrawal right in accordance with Article 9(b). For service contracts subject to a right of withdrawal, the consumer shall bear no cost for services performed, in full or in part, during the withdrawal period.

Article 18

Effects of the exercise of the right of withdrawal on ancillary contracts

1. Without prejudice to Article 15 of Directive 2008/48/EC, if the consumer exercises his right of withdrawal from a distance or an off-premises contract in accordance with Articles 12 to 17, any ancillary contracts shall be automatically terminated, without any costs for the consumer.
2. The Member States shall lay down detailed rules on the termination of such contracts.

Article 19

Exceptions from the right of withdrawal

1. In respect of distance contracts, the right of withdrawal shall not apply as regards the following:
 - (a) services where performance has begun, with the consumer's prior express consent, before the end of the fourteen day period referred to in Article 12;
 - (b) the supply of goods or services for which the price is dependent on fluctuations in the financial market which cannot be controlled by the trader;
 - (c) the supply of goods made to the consumer's specifications or clearly personalized or which are liable to deteriorate or expire rapidly;
 - (d) the supply of wine, the price of which has been agreed upon at the time of the conclusion of the sales contract, the delivery of which can only take place beyond the time-limit referred to in Article 22(1) and the actual value of which is dependent on fluctuations in the market which cannot be controlled by the trader;
 - (e) the supply of sealed audio or video recordings or computer software which were unsealed by the consumer;
 - (f) the supply of newspapers, periodicals and magazines;
 - (g) gaming and lottery services;
 - (h) contracts concluded at an auction.
2. In respect of off-premises contracts, the right of withdrawal shall not apply as regards the following:
 - (a) contracts for the supply of foodstuffs, beverages or other goods intended for current consumption in the household, selected in advance by the consumer by means of distance communication and physically supplied to the consumer's

- home, residence or workplace by the trader who usually sells such goods on his own business premises;
- (b) contracts for which the consumer, in order to respond to an immediate emergency, has requested the immediate performance of the contract by the trader; if, on this occasion, the trader provides or sells additional services or goods other than those which are strictly necessary to meet the immediate emergency of the consumer, the right of withdrawal shall apply to those additional services or goods;
 - (c) contracts for which the consumer has specifically requested the trader, by means of distance communication, to visit his home for the purpose of repairing or performing maintenance upon his property; if on this occasion, the trader provides services in addition to those specifically requested by the consumer or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the right of withdrawal shall apply to those additional services or goods.
3. The parties may agree not to apply paragraphs 1 and 2.

Article 20
Excluded distance and off-premises contracts

1. Articles 8 to 19 shall not apply to distance and off-premises contracts:
- (a) for the sale of immovable property or relating to other immovable property rights, except for rental and works relating to immovable property;
 - (b) concluded by means of automatic vending machines or automated commercial premises;
 - (c) concluded with telecommunications operators through public payphones for their use;
 - (d) for the supply of foodstuffs or beverages by a trader on frequent and regular rounds in the neighbourhood of his business premises.
2. Articles 8 to 19 shall not apply to off-premises contracts relating to:
- (a) insurance,
 - (b) financial services whose price depends on fluctuations in the financial market outside the trader's control, which may occur during the withdrawal period, as defined in Article 6(2)(a) of Directive 2002/65/EC¹⁶ and
 - (c) credit which falls within the scope of Directive 2008/48/EC.
3. Articles 8 to 19 shall not apply to distance contracts for the provision of accommodation, transport, car rental services, catering or leisure services as regards contracts providing for a specific date or period of performance.

¹⁶ OJ L 271, 09.10.2002, p. 16.

Chapter IV

Other consumer rights specific to sales contracts

Article 21

Scope

1. This Chapter shall apply to sales contracts. Without prejudice to Article 24(5), where the contract is a mixed-purpose contract having as its object both goods and services, this Chapter shall only apply to the goods.
2. This Chapter shall also apply to contracts for the supply of goods to be manufactured or produced.
3. This Chapter shall not apply to the spare parts replaced by the trader when he has remedied the lack of conformity of the goods by repair under Article 26.
4. Member States may decide not to apply this Chapter to the sale of second-hand goods at public auctions.

Article 22

Delivery

1. Unless the parties have agreed otherwise, the trader shall deliver the goods by transferring the material possession of the goods to the consumer or to a third party, other than the carrier and indicated by the consumer, within a maximum of thirty days from the day of the conclusion of the contract.
2. Where the trader has failed to fulfil his obligations to deliver, the consumer shall be entitled to a refund of any sums paid within seven days from the date of delivery provided for in paragraph 1.

Article 23

Passing of risk

1. The risk of loss of or damage to the goods shall pass to the consumer when he or a third party, other than the carrier and indicated by the consumer has acquired the material possession of the goods.
2. The risk referred to in paragraph 1 shall pass to the consumer at the time of delivery as agreed by the parties, if the consumer or a third party, other than the carrier and indicated by the consumer has failed to take reasonable steps to acquire the material possession of the goods.

Article 24

Conformity with the contract

1. The trader shall deliver the goods in conformity with the sales contract.
2. Delivered goods shall be presumed to be in conformity with the contract if they satisfy the following conditions:

- (a) they comply with the description given by the trader and possess the qualities of the goods which the trader has presented to the consumer as a sample or model;
 - (b) they are fit for any particular purpose for which the consumer requires them and which he made known to the trader at the time of the conclusion of the contract and which the trader has accepted;
 - (c) they are fit for the purposes for which goods of the same type are normally used or
 - (d) they show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the trader, the producer or his representative, particularly in advertising or on labelling.
3. There shall be no lack of conformity for the purposes of this Article if, at the time the contract was concluded, the consumer was aware, or should reasonably have been aware of, the lack of conformity, or if the lack of conformity has its origin in materials supplied by the consumer.
4. The trader shall not be bound by public statements, as referred to in paragraph 2(d) if he shows that one of the following situations existed:
 - (a) he was not, and could not reasonably have been, aware of the statement in question;
 - (b) by the time of conclusion of the contract the statement had been corrected;
 - (c) the decision to buy the goods could not have been influenced by the statement.
5. Any lack of conformity resulting from the incorrect installation of the goods shall be considered as a lack of conformity of the goods where the installation forms part of the sales contract and the goods were installed by the trader or under his responsibility. The same shall apply equally if the goods, intended to be installed by the consumer, are installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

Article 25

Legal rights – Liability for lack of conformity

The trader shall be liable to the consumer for any lack of conformity which exists at the time the risk passes to the consumer.

Article 26

Remedies for lack of conformity

1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:
 - (a) have the lack of conformity remedied by repair or replacement,
 - (b) have the price reduced,
 - (c) have the contract rescinded.

2. The trader shall remedy the lack of conformity by either repair or replacement according to his choice.
3. Where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.
The consumer may only rescind the contract if the lack of conformity is not minor.
4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:
 - (a) the trader has implicitly or explicitly refused to remedy the lack of conformity;
 - (b) the trader has failed to remedy the lack of conformity within a reasonable time;
 - (c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;
 - (d) the same defect has reappeared more than once within a short period of time.
5. The significant inconvenience for the consumer and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2)(b).

Article 27
Costs and damages

1. The consumer shall be entitled to have the lack of conformity remedied free of any cost.
2. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.

Article 28
Time limits and burden of proof

1. The trader shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the risk passed to the consumer.
2. When the trader has remedied the lack of conformity by replacement, he shall be held liable under Article 25 where the lack of conformity becomes apparent within two years as from the time the consumer or a third party indicated by the consumer has acquired the material possession of the replaced goods.
3. In the case of second-hand goods, the trader and the consumer may agree on a shorter liability period, which may not be less than one year.
4. In order to benefit from his rights under Article 25, the consumer shall inform the trader of the lack of conformity within two months from the date on which he detected the lack of conformity.

5. Unless proved otherwise, any lack of conformity which becomes apparent within six months of the time when the risk passed to the consumer, shall be presumed to have existed at that time unless this presumption is incompatible with the nature of the goods and the nature of the lack of conformity.

Article 29
Commercial guarantees

1. A commercial guarantee shall be binding on the guarantor under the conditions laid down in the guarantee statement. In the absence of the guarantee statement, the commercial guarantee shall be binding under the conditions laid down in the advertising on the commercial guarantee.
2. The guarantee statement shall be drafted in plain intelligible language and be legible. It shall include the following:
 - (a) legal rights of the consumer, as provided for in Article 26 and a clear statement that those rights are not affected by the commercial guarantee,
 - (b) set the contents of the commercial guarantee and the conditions for making claims, notably the duration, territorial scope and the name and address of the guarantor,
 - (c) without prejudice to Articles 32 and 35 and Annex III(1)(j), set out, where applicable, that the commercial guarantee cannot be transferred to a subsequent buyer.
3. If the consumer so requests, the trader shall make the guarantee statement available in a durable medium.
4. Non compliance with paragraph 2 or 3 shall not affect the validity of the guarantee.

Chapter V

Consumer rights concerning contract terms

Article 30
Scope

1. This Chapter shall apply to contract terms drafted in advance by the trader or a third party, which the consumer agreed to without having the possibility of influencing their content, in particular where such contract terms are part of a pre-formulated standard contract.
2. The fact that the consumer had the possibility of influencing the content of certain aspects of a contract term or one specific term, shall not exclude the application of this Chapter to other contract terms which form part of the contract.
3. This Chapter shall not apply to contract terms reflecting mandatory statutory or regulatory provisions, which comply with Community law and the provisions or principles of international conventions to which the Community or the Member States are party.

Article 31
Transparency requirements of contract terms

1. Contract terms shall be expressed in plain, intelligible language and be legible.
2. Contract terms shall be made available to the consumer in a manner which gives him a real opportunity of becoming acquainted with them before the conclusion of the contract, with due regard to the means of communication used.
3. The trader shall seek the express consent of the consumer to any payment in addition to the remuneration foreseen for the trader's main contractual obligation. If the trader has not obtained the consumer's express consent but has inferred it by using default options which the consumer is required to reject in order to avoid the additional payment, the consumer shall be entitled to reimbursement of this payment.
4. Member States shall refrain from imposing any presentational requirements as to the way the contract terms are expressed or made available to the consumer.

Article 32
General principles

1. Where a contract term is not included in Annex II or III, Member States shall ensure that it is 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.
2. Without prejudice to Articles 34 and 38, the unfairness of a contract term shall be assessed, taking into account the nature of the products for which the contract was concluded and by referring, at the time of the conclusion of the contract, to all the circumstances attending the conclusion and to all the other terms of the contract or of another contract on which the former is dependent. When assessing the fairness of a contract term, the competent national authority shall also take into account the manner in which the contract was drafted and communicated to the consumer by the trader in accordance with Article 31.
3. Paragraphs 1 and 2 shall not apply to the assessment of the main subject matter of the contract or to the adequacy of the remuneration foreseen for the trader's main contractual obligation, provided that the trader fully complies with Article 31.

Article 33
Burden of proof

Where the trader claims that a contract term has been individually negotiated, the burden of proof shall be incumbent on him.

Article 34
Terms considered unfair in all circumstances

Member States shall ensure that contract terms, as set out in the list in Annex II, are considered unfair in all circumstances. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.

Article 35
Terms presumed to be unfair

Member States shall ensure that contract terms, as set out in the list in point 1 of Annex III, are considered unfair, unless the trader has proved that such contract terms are fair in accordance with Article 32. That list of contract terms shall apply in all Member States and may only be amended in accordance with Articles 39(2) and 40.

Article 36
Interpretation of terms

1. Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.
2. This Article shall not apply in the context of the procedures laid down in Article 38(2).

Article 37
Effects of unfair contract terms

Contract terms which are unfair shall not be binding on the consumer. The contract shall continue to bind the parties if it can remain in force without the unfair terms.

Article 38
Enforcement in relation to unfair contract terms

1. Member States shall ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by traders.
2. In particular, persons or organisations, having a legitimate interest under national law in protecting consumers, may take action before the courts or administrative authorities for a decision as to whether contract terms drawn up for general use are unfair.
3. Member States shall enable the courts or administrative authorities to apply appropriate and effective means to prevent traders from continuing to use terms which have been found unfair.
4. Member States shall ensure that the legal actions referred to in paragraph 2 and 3 may be directed either separately or jointly depending on national procedural laws against a number of traders from the same economic sector or their associations which use or recommend the use of the same general contract terms or similar terms.

Article 39
Review of the terms in Annexes 2 and 3

1. Member States shall notify to the Commission the terms which have been found unfair by the competent national authorities and which they deem to be relevant for the purpose of amending this Directive as provided for by paragraph 2.
2. In the light of the notifications received under paragraph 1, the Commission shall amend Annex II and III. Those measures designed to amend non essential elements

of this Directive shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 40(2).

Chapter VI

General provisions

Article 40

The Committee

1. The Commission shall be assisted by the Committee on unfair terms in consumer contracts (hereinafter referred to as "the Committee").
2. Where reference is made to this paragraph, Article 5a(1) to (4), and Article 7 of Decision 1999/468/EC¹⁷ shall apply, having regard to the provisions of Article 8 thereof.

Article 41

Enforcement

1. Member States shall ensure that adequate and effective means exist to ensure compliance with this Directive.
2. The means referred to in paragraph 1 shall include provisions whereby one or more of the following bodies, as determined by national law, may take action under national law before the courts or before the competent administrative bodies to ensure that the national provisions for the implementation of this Directive are applied:
 - (a) public bodies or their representatives;
 - (b) consumer organisations having a legitimate interest in protecting consumers;
 - (c) professional organisations having a legitimate interest in acting.

Article 42

Penalties

1. Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.
2. Member States shall notify those provisions to the Commission by the date specified in Article 46 at the latest and shall notify it without delay of any subsequent amendment affecting them.

¹⁷ OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

Article 43
Imperative nature of the Directive

If the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive.

Article 44
Information

Member States shall take appropriate measures to inform consumers of the national provisions transposing this Directive and shall, where appropriate, encourage traders and code owners to inform consumers of their codes of conduct.

Article 45
Inertia selling

The consumer shall be exempted from the provision of any consideration in cases of unsolicited supply of a product as prohibited by Article 5(5) and point 29 of Annex I of Directive 2005/29/EC. The absence of a response from the consumer following such an unsolicited supply shall not constitute consent.

Article 46
Transposition

1. Member States shall adopt and publish, by [eighteen months after its entry into force] at the latest, the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

They shall apply those provisions from [two years after its entry into force].

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Chapter VII
Final provisions

Article 47
Repeals

Directives 85/577/EEC 93/13/EEC and 97/7/EC and Directive 1999/44/EC, as amended by the Directives listed in Annex IV, are repealed.

References to the repealed Directives shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex V.

Article 48
Review

The Commission shall review this Directive and report to the European Parliament and the Council no later than [insert same date as in the second subparagraph of Article 46(1) +five years].

If necessary, it shall make proposals to adapt it to developments in the area. The Commission may request information from the Member States.

Article 49
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 50
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX I
INFORMATION CONCERNING THE EXERCISE OF THE RIGHT OF
WITHDRAWAL

A. Information to be provided with the withdrawal form

1. The name, geographical address and the email address of the trader to whom the withdrawal form must be sent.
2. A statement that the consumer has a right to withdraw from the contract and that this right can be exercised by sending the withdrawal form below on a durable medium to the trader referred to in paragraph 1:
 - (a) for off-premises contracts, within a period of fourteen days following his signature of the order form;
 - (b) for distance sales contracts, within a period of fourteen days following the material possession of the goods by the consumer or a third party, other than the carrier and indicated by the consumer;
 - (c) for distance service contracts:
 - within a period of fourteen days following the conclusion of the contract, where the consumer has not given his prior express consent for the performance of the contract to begin before the end of this fourteen day period;
 - within a period ending when the performance of the contract begins, where the consumer has given his prior express consent for the performance of the contract to begin before the end of the fourteen day period.
3. For all sales contracts, a statement informing the consumer about the time-limits and modalities to send back the goods to the trader and the conditions for the reimbursement in accordance with Articles 16 and 17(2).
4. For distance contracts concluded on the Internet, a statement that the consumer can electronically fill in and submit the standard withdrawal form on the trader's website and that he will receive an acknowledgement of receipt of such a withdrawal from the trader by email without delay.
5. A statement that the consumer can use the withdrawal form set out in Part B.

B. Model withdrawal form

(complete and return this form only if you wish to withdraw from the contract)

- To:
- I/We* hereby give notice that I/We* withdraw from my/our* contract of sale of the following goods*/provision of the following service*
- Ordered on*/received on*
- Name of consumer(s)

- Address of consumer(s)
- Signature of consumer(s) (only if this form is notified in writing)
- Date

*Delete as appropriate.

ANNEX II

CONTRACT TERMS WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

Contract terms, which have the object or effect of the following, shall be unfair in all circumstances:

- (a) excluding or limiting the liability of the trader for death or personal injury caused to the consumer through an act or omission of that trader;
- b) limiting the trader's obligation to respect commitments undertaken by his agents or making his commitments subject to compliance with a particular condition which depends exclusively on the trader;
- (c) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions;
- (d) restricting the evidence available to the consumer or imposing on him a burden of proof which, according to the applicable law, should lie with the trader;
- (e) giving the trader the right to determine whether the goods or services supplied are in conformity with the contract or giving the trader the exclusive right to interpret any term of the contract.

ANNEX III

CONTRACT TERMS WHICH ARE PRESUMED TO BE UNFAIR

1. Contract terms, which have the object or effect of the following, are presumed to be unfair:
 - (a) excluding or limiting the legal rights of the consumer vis-à-vis the trader or another party in the event of total or partial non-performance or inadequate performance by the trader of any of the contractual obligations, including the rights of the consumer of offsetting a debt owed to the trader against a claim which the consumer may have against him;
 - (b) allowing the trader to retain a payment by the consumer where the latter fails to conclude or perform the contract, without giving the consumer the right to be compensated of the same amount if the trader fails to conclude or perform the contract;
 - (c) requiring any consumer who fails to fulfil his obligation to pay damages which significantly exceed the harm suffered by the trader;
 - (d) allowing the trader to terminate the contract at will where the same right is not granted to the consumer;
 - (e) enabling the trader to terminate an open-ended contract without reasonable notice except where the consumer has committed a serious breach of contract;
 - (f) automatically renewing a fixed-term contract where the consumer does not indicate otherwise and has to give a long notice to terminate the contract at the end of each renewal period;
 - (g) allowing the trader to increase the price agreed with the consumer when the contract was concluded without giving the consumer the right to terminate the contract;
 - (h) obliging the consumer to fulfil all his obligations where the trader has failed to fulfil all his obligations;
 - (i) giving the trader the possibility of transferring his obligations under the contract, without the consumer's agreement;
 - (j) restricting the consumer's right to re-sell the goods by limiting the transferability of any commercial guarantee provided by the trader;
 - (k) enabling the trader to unilaterally alter the terms of the contract including the characteristics of the product or service;
 - (l) unilaterally amending contract terms communicated to the consumer in a durable medium through on-line contract terms which have not been agreed by the consumer.
2. Point 1(e) shall not apply to terms by which a supplier of financial service reserves the right to terminate unilaterally an open-ended contract without notice, provided that the supplier is required to inform the other contracting party or parties thereof immediately.

3. Point 1(g) shall not apply to
 - (a) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;
 - (b) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
 - (c) price-indexation clauses, where lawful, provided that the method by which prices vary is explicitly described.

4. Point 1(k) shall not apply to
 - (a) terms under which a supplier of financial services reserves the right to alter the rate of interest payable by the consumer or due to the latter, or the amount of other charges for financial services without notice where there is a valid reason, provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately;
 - (b) transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the trader does not control;
 - (c) contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency;
 - (d) terms under which the trader reserves the right to alter unilaterally the conditions of an open-ended contract, provided that he is required to inform the consumer with reasonable notice and that the consumer is free to terminate the contract.

ANNEX IV
Repealed Directives with the list of its successive amendments
(referred to in Article 47)

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises OJ L 372, 31.12.1985, p. 31.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 95, 21.4.1993, p. 29.

Directive 97/7/EC of the European Parliament and of the Council OJ L 144, 4.6.1997, p. 19.

Directive 2002/65/EC of the European Parliament and of the Council OJ L 271, 9.10.2002, p. 16

Directive 2005/29/EC of the European Parliament and of the Council OJ L 149, 11.6.2005, p. 29

Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 OJ L 319, 5.12.2007, p. 1

Directive 1999/44/EC of the European Parliament and of the Council OJ L 171, 7.7.1999, p. 12.

ANNEX V

CORRELATION TABLE

Old numbering of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.	Old numbering of Directive 1993/13/EC on unfair terms in consumer contracts	Old numbering of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.	Old numbering of Directive 1999/44/EC on the sale of consumer goods and associated guarantees	New numbering in this Directive
Article 1 ¹⁸				
	Article 1, paragraph 1 ¹⁹			
	Article 1, paragraph 2 (replaced)			Article 30, paragraph 3
		Article 1 ²⁰		
			Article 1, paragraph 1 ²¹	
			Article 1, paragraph 2 point a (replaced)	Article 2, point 1
			Article 1, paragraph 2 point b ²²	Article 2, point 4
				Article 21, paragraph 3
			Article 1, paragraph 2 point c	Article 2, point 2

¹⁸ Replaced, in substance, by Article 3 and Article 8 read in conjunction with Article 2, point 8.

¹⁹ Replaced, in substance, by Article 1.

²⁰ Replaced, in substance, by Article 1.

²¹ Replaced, in substance, by Article 1.

²² Amended, in substance, by Article 21 paragraph 4 .

Old numbering of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.	Old numbering of Directive 1993/13/EC on unfair terms in consumer contracts	Old numbering of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.	Old numbering of Directive 1999/44/EC on the sale of consumer goods and associated guarantees	New numbering in this Directive
			Article 1, paragraph 2 point d	Article 2, point 18
			Article 1, paragraph 2 point e (replaced)	Article 2, point 19
			Article 1, paragraph 2 point f	Deleted
			Article 1, paragraph 3 (replaced)	Article 21, paragraph 4
			Article 1, paragraph 4	Article 21, paragraph 2
Article 2 (replaced)				Article 2, point 1
				Article 2, point 2
	Article 2 point a			Deleted
	Article 2 point b (replaced)			Article 2, point 1
	Article 2 point c (replaced)			Article 2, point 2
		Article 2, paragraph 1 (replaced)		Article 2, point 6
		Article 2, paragraph 2 (replaced)		Article 2, point 1

Old numbering of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.	Old numbering of Directive 1993/13/EC on unfair terms in consumer contracts	Old numbering of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.	Old numbering of Directive 1999/44/EC on the sale of consumer goods and associated guarantees	New numbering in this Directive
		Article 2, paragraph 3 (replaced)		Article 2, point 2
		Article 2, paragraph 4, 1 st sentence (replaced)		Article 2, point 7
		Article 2, paragraph 4 , 2 nd sentence		Deleted
		Article 2, paragraph 5		Deleted
			Article 2, paragraph 1	Article 24, paragraph 1
				Article 22
			Article 2, paragraph 2	Article 24, paragraph 2
			Article 2, paragraph 3	Article 24, paragraph 3
			Article 2, paragraph 4	Article 24, paragraph 4
			Article 2, paragraph 5	Article 24, paragraph 5
Article 3, paragraph 1				Deleted

Old numbering of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.	Old numbering of Directive 1993/13/EC on unfair terms in consumer contracts	Old numbering of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.	Old numbering of Directive 1999/44/EC on the sale of consumer goods and associated guarantees	New numbering in this Directive
Article 3, paragraph 2, point a (replaced)				Article 20, paragraph 1, point a
Article 3, paragraph 2, point b (replaced)				Article 20, paragraph 1, point d
Article 3, paragraph 2, point c (replaced)				Article 12, paragraph 2
Article 3, paragraph 2, point d				Article 20, paragraph 2, point a
Article 3, paragraph 2, point e				Article 20, paragraph 2, point b
Article 3, paragraph 3 ²³				
	Article 3, paragraph 1			Article 32, paragraph 1²⁴
	Article 3, paragraph 2, 1st subparagraph (replaced)			Article 30, paragraph 1

²³ Replaced in substance by Article 3 and Article 8 read in conjunction with Article 2, point 8.

²⁴ To be read in conjunction with Article 30, paragraph 1.

Old numbering of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.	Old numbering of Directive 1993/13/EC on unfair terms in consumer contracts	Old numbering of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.	Old numbering of Directive 1999/44/EC on the sale of consumer goods and associated guarantees	New numbering in this Directive
	Article 3, paragraph 2, 2nd subparagraph			Article 30, paragraph 2
	Article 3, paragraph 2, 3rd subparagraph			Article 33
	Article 3, paragraph 3 (replaced)			Article 34
				Article 35
		Article 3, paragraph 1, 1 st indent (replaced)		Article 3, paragraph 2
		Article 3, paragraph 1, 2 nd indent		Article 20, paragraph 1, point b
		Article 3, paragraph 1, 3 rd indent (replaced)		Article 20, paragraph 1, point c
		Article 3, paragraph 1, 4 th indent (replaced)		Article 20, paragraph 1, point a

Old numbering of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.	Old numbering of Directive 1993/13/EC on unfair terms in consumer contracts	Old numbering of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.	Old numbering of Directive 1999/44/EC on the sale of consumer goods and associated guarantees	New numbering in this Directive
		Article 3 ²⁵ , paragraph 1, 5 th indent (replaced)		
		Article 3, paragraph 2, 1 st indent (replaced)		Article 20, paragraph 1, point d
		Article 3, paragraph 2, 2 nd indent (replaced)		Article 20, paragraph 3
			Article 3, paragraph 1(replaced)	Article 25
				Article 23
			Article 3, paragraph 2 (replaced)	Article 26, paragraph 1
Article 4, 1 st sentence (replaced)				Article 9
Article 4, 2 nd sentence (replaced)				Article 10
	Article 4, paragraph 1 (replaced)			Article 32, paragraph 2

²⁵ Partly replaced, by Article 19, paragraph 1, point h.

Old numbering of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.	Old numbering of Directive 1993/13/EC on unfair terms in consumer contracts	Old numbering of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.	Old numbering of Directive 1999/44/EC on the sale of consumer goods and associated guarantees	New numbering in this Directive
	Article 4, paragraph 2 (replaced)			Article 32, paragraph 3
		Article 4, paragraph 1, point a (replaced)		Article 5, paragraph 1, point b
		Article 4, paragraph 1, point b (replaced)		Article 5, paragraph 1, point a
		Article 4, paragraph 1, point c (replaced)		Article 5, paragraph 1, point c
		Article 4, paragraph 1, point d (replaced)		Article 5, paragraph 1, point c
		Article 4, paragraph 1, point e (replaced)		Article 9, paragraph 1, point a
Article 5, paragraph 1 (replaced)				Article 12
				Article 14
Article 5, paragraph 2 (replaced)				Article 15
				Article 16

Old numbering of Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises.	Old numbering of Directive 1993/13/EC on unfair terms in consumer contracts	Old numbering of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts.	Old numbering of Directive 1999/44/EC on the sale of consumer goods and associated guarantees	New numbering in this Directive
				Article 17
	Article 5, 1 st sentence (replaced)			Article 31
	Article 5, 2 nd and 3 rd sentence			Article 36
Article 6 (replaced)				Article 43
	Article 6, paragraph 1			Article 37
	Article 6, paragraph 2			Deleted
Article 7 ²⁶				
	Article 7, paragraph 1			Article 38, paragraph 1
	Article 7, paragraph 2 (replaced)			Article 38, paragraph 2

Old numbering in the Annex of Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws	To be construed as a reference to
Paragraphs 2, 6, 8 and 11	This Directive

²⁶ Replaced, in substance, by Article 16 and Article 17.