

## THE CONTRIBUTION OF EU DIRECTIVES TO THE OBJECTIVE OF CONSUMER PROTECTION

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### 1. Introduction

From relatively slow beginnings,<sup>1</sup> consumer policy within the European Union (hereinafter the 'EU') has today taken hold to such an extent that there is now even a Commissioner and Directorate General within the Commission whose portfolio is solely dedicated to Health and Consumers. Initially, the consumer was scantily referred to in the Treaty establishing the European Economic Community; it was thought that the consumer would simply benefit from the process of European integration.<sup>2</sup> With successive amendments to the EU's constitution, references to the consumer increased and eventually a proper legal basis on consumer protection was included.<sup>3</sup> Legislation harmonising national laws in the field of consumer protection emerged,<sup>4</sup> which in turn spawned consumer protection legislation in Member States.

There is today a preponderance of European measures claiming to protect the consumer, with legislative measures taking the form of both Directives and Regulations. As the title clearly suggests, this paper will only consider the contribution of EU Directives to consumer protection, and not that of other instruments, such as Regulations. In addition, due to space constraints, product safety, product liability, labelling, sectoral advertising and protection through the provisions of the Treaty on the Functioning of the European Unions (hereinafter the 'TFEU')<sup>5</sup> on free movement and competition provisions, which are vast and self-contained topics, will not be considered.

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<sup>1</sup> For a history of EU consumer law, see Stephen Weatherill, *EU Consumer Law and Policy* (2<sup>nd</sup> edn Edward Elgar, Cheltenham 2005) ch1.

<sup>2</sup> In arts 39, 40, 85(3), 86, and 92(2)(a).

<sup>3</sup> The Maastricht Treaty introduced Article 129a to the Treaty on the European Community [1992] OJ C191, which then became art 153 by virtue of the re-numbering effected by the Amsterdam Treaty; now Treaty on the Functioning of the European Union [2008] OJ C 115/47, arts 12 and 169.

<sup>4</sup> See Weatherill (n1) ch 1.

<sup>5</sup> [2008] OJ C 115/47.

In particular, this paper will take account of the following Directives:

**Table 1: List of consumer protection Directives**

<b>Protection of Consumers' Economic Interests</b>	<b>Financial services</b>
Distance Selling Directive (repealed) <sup>6</sup>	Distance Financial Services <sup>7</sup>
Doorstep Selling Directive (repealed) <sup>8</sup>	Credit Agreements Directive <sup>9</sup>
<b>Package Travel Directive<sup>10</sup></b>	<b>Consumer information</b>
Timeshare Directive <sup>11</sup>	Advertising Directive <sup>12</sup>
Guarantees Directive <sup>13</sup>	Unfair Commercial Practices Directive <sup>14</sup>

<sup>6</sup> 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 contracts [1997]OJ L144/19 – repealed in 2011 by the Consumer Rights Directive (n 17).

<sup>7</sup> Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L271/16.

<sup>8</sup> Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L 372/31, repealed in 2011 by the Consumer Rights Directive (n 17).

<sup>9</sup> Directive 2008/48/EC of the European Parliament and Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EC [2008] OJ L133/66.

<sup>10</sup> Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [1990] OJ L158/59.

<sup>11</sup> Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L33/10.

<sup>12</sup> Directive 2006/114/EC of the European Parliament and the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21.

<sup>13</sup> Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

<sup>14</sup> Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive Edition II, 2012.

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Unfair Terms Directive <sup>15</sup>	<b>Legal Redress</b>
Consumer Rights Directive <sup>16</sup>	Injunctions Directive <sup>17</sup>

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As will be revealed in the following analysis, these directives utilise a set number of tried-and-tested techniques in order to try to protect the consumer on the internal market. These techniques apply at one of the three stages of the lifespan of a contract, that is, either pre-contractually, post-contractually or during the life of the contract. These various techniques, which will be examined in this paper in order to try to analyse their efficiency, are listed in Table 2.<sup>18</sup>

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84/450/EEC, Directives 97/7/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 [2005] OJ L 149/22.

<sup>15</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

<sup>16</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/12/EEC and Directive 1999/44/EC of the European parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64.

<sup>17</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L 110/30.

<sup>18</sup> The only other techniques found in the directives listed in Table 1 which will not be considered in this paper is granting the consumer other rights during the performance of the contract, for instance the Distance Financial Services Directive (art 5(2) and (3)) and the Credit Agreements Directive (arts 5(3) and the following, art 11 and the following) both require the provision of information after the conclusion of the contract.

**Table 2: Overview of the techniques examined in this paper**

<b>Pre-contractual stage</b>	
	Information disclosure
	Regulating unfair commercial practices
	Advertising regulation
<b>Contractual stage</b>	
	Regulating the substance of the contract
	Regulating sale and guarantees
<b>Post-contractual stage</b>	
	Cooling-off periods
	Legal redress and representation

## **2. Protection at the Pre-contractual Stage—Information Disclosure, Unfair Commercial Practices, and Advertising**

### **2.1 Information Disclosure**

#### **2.1.1 What is Information Disclosure?**

Information disclosure requires that the consumer 'be provided with specified information about a contemplated transaction'.<sup>19</sup> The idea behind this is that the information gap between the consumer and supplier is bridged, permitting the consumer to make an informed choice. Moreover, if the consumer is well-informed about the product, the quality of negotiation between the supplier and consumer is ameliorated.<sup>20</sup>

The information disclosure technique, while allowing the consumer and trader to agree to any terms, tries to ensure that the environment in which the contract is concluded is rebalanced, by allegedly giving the consumer more economic power. As a result the market is more transparent. Suppliers are enabled to compete with each other more fairly and efficiently,<sup>21</sup> presumably to the benefit of consumers.

<sup>19</sup> Weatherill (n 1) 84.

<sup>20</sup> See Christian Twigg-Flesner and others, 'Law, Information and product Quality. Introductory Remarks by the Editors of the Special Issue' (2002) 25 *Journal of Consumer Policy* 291.

<sup>21</sup> Geraint Howells and Stephen Weatherill, *Consumer Protection Law* (2<sup>nd</sup> edn, Ashgate 2005) 63.

This technique is viewed highly by the EU legislative organs, so much so that it is one of the techniques most used in the consumer protection directives. It is so well-considered that it has now, by virtue of the Consumer Rights Directive, been extended to any consumer contract,<sup>22</sup> although it is arguable that this is unjustified since the consumer is not always in a weaker position when compared to the seller.

There are however obvious flaws with this highly aspirational technique. Firstly, it assumes that the consumer will give due attention to the information provided and understand it fully. It requires that the consumer has an inquiring mind, is able to sift through the information and then make an informed choice. However, not all consumers fit this template. A study carried out in Australia with respect to information disclosure requirements as regards consumer credit agreements found that most low-income consumers do not in fact understand the terms and conditions required to be disclosed by consumer legislation attached to such contracts; and even when they do, they feel they have no choice but to agree to them.<sup>23</sup> Secondly, although the Directives indicate basic issues which have to be communicated to the consumer, most do not indicate how much information should be given. Thus the trader, subject to any more stringent national rules, is free to either give the consumer the bare minimum information, which may not be enough for the consumer to operate in the market; or else to inundate him with information, leaving the consumer overwhelmed and unable to determine which information is relevant. In a similar vein, the Directives do not specify how the information is to be made available to the consumer in order for the information to be best conveyed to him. The Wilson study suggests that the provision of a shorter form contract with only the most essential terms outlined might make disclosure requirements more effective.<sup>24</sup>

Thirdly, if the supplier is economically powerful, information disclosure is not enough to correct the imbalance and the consumer will still be unable to conclude a fair deal.<sup>25</sup> This would particularly be the case where the supplier is a monopolist, or, the consumer views the particular product as essential, as in such cases the consumer has no other option except to conclude the contract on the arbitrary terms specified by the supplier. In short, information disclosure is useless if the consumer has, for whatever reason, no choice but to conclude the transaction.

Finally, it has to be remembered that competition law and consumer law aim to regulate the same market. While information disclosure may be seen as beneficial to the consumer

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<sup>22</sup> Consumer Rights Directive, art 5.

<sup>23</sup> Therese Wilson and others, 'Protecting the Most Vulnerable in Consumer Credit Transactions' (2009) 32 *Journal of Consumer Policy* 117.

<sup>24</sup> *Ibid.*, 124.

<sup>25</sup> Weatherill (n 1) 85.

from a purely consumer law perspective, a fully transparent market is seen as facilitating collusion from the competition law perspective, meaning that in the long-run no benefit accrues to the consumer. There is therefore an issue as to the extent of information disclosure which should be required.<sup>26</sup>

Howells and Weatherill<sup>27</sup> conclude that it is questionable how useful the provision of information is; the extent to which it can replace the necessity for more interventionist rules and how best information can be conveyed to the consumer. That said however, it still remains the most popular technique with the European legislator, and it cannot be doubted that a consumer who is even slightly informed is still in a better position than the consumer who is completely in the dark.

### **2.1.2 When and How is this Technique Used?**

The Timeshare,<sup>28</sup> Package Travel,<sup>29</sup> Consumer Rights,<sup>30</sup> Distance Financial Services<sup>31</sup> and Credit Agreements Directives<sup>32</sup> specifically require the trader or supplier to disclose particular information to the consumer, although each Directive requires disclosure to a different extent.<sup>33</sup> The recently repealed Distance Selling<sup>34</sup> and Doorstep Selling<sup>35</sup> Directives, which form the basis of the Consumer Rights Directive, also contained provisions on information disclosure.

While the Package Travel, Distance Selling and Doorstep Selling Directives are all minimum harmonisation Directives, the other Directives are all pre-emptive Directives, meaning that Member States are prohibited from legislating to a higher degree than that laid down in the respective Directive. This influences the requirements regarding information disclosure

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<sup>26</sup> See James Tunney, 'The Neglected Tension Between Disclosure of Information in Consumer and Competition Law Contexts' (2002) 25 Journal of Consumer Policy 329, 338-341.

<sup>27</sup> Twigg-Flesner and others (n 20) 362.

<sup>28</sup> Art 4 and Annexes.

<sup>29</sup> Art 4.

<sup>30</sup> Arts 5-6 and Annex I.

<sup>31</sup> Arts 3-5.

<sup>32</sup> Arts 5, 6 and Annexes.

<sup>33</sup> Although not strictly a consumer protection directive, the Electronic Commerce Directive also contains, in art 10, certain information disclosure requirements which protect consumers.

<sup>34</sup> Art 4.

<sup>35</sup> Art 4.

obligations in the Directives. While the former three Directives require traders/package travel organisers to provide a bare minimum of information, the latter Directives are highly detailed. This is presumably so as Member States are expected to lay down further requirements should they decide that consumers within their territory require further information in order for the market to be sufficiently transparent. The potential problem with minimum harmonisation Directives is that although they are meant to harmonise the internal market, Member States, by making use of the right to legislate to a higher degree may re-create a situation where different levels of protection are afforded to consumers across the EU.<sup>36</sup> As a result, the current trend is for the EU legislator to legislate by means of pre-emptive Directives. It is arguable that through the use of maximum harmonisation Directives, the consumer is actually less protected than before, because the only protection offered to him is that provided for by the Directive, whereas certain Member States may have in place more stringent information disclosure requirements. This said, certain Directives, such as the Consumer Rights Directive<sup>37</sup> or the Distance Financial Services Directive<sup>38</sup> undermine the maximum harmonisation nature of the Directives by containing provisions which allow Member States to legislate to a higher degree within certain limits. In such cases, there may be overlapping tiers of regulation, yet presumably this is allowed as it provides further protection for the consumer although it may weaken market transparency.

Certain Directives<sup>39</sup> contain Annexes which detail what information has to be provided in each case. Consequently, the Annexes ensure that the consumer is receiving adequate information while making it easier for the trader to comply with the information provision obligations in the Directives.

Additionally, all the Directives provide that the information has to be provided free of charge and on paper or another durable medium.<sup>40</sup> Such a provision serves a dual purpose. First, it prevents the situation where an unscrupulous trader charges money for the provision of information, which would detract from the protectionist value of this technique. Secondly, it eliminates the possibility of information being given orally, since this method is insufficient in order for the consumer to absorb the information, let alone to make comparisons with other products.

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<sup>36</sup> See Peter Rott, 'Minimum Harmonization for the Competition of the Internal Market? The Example of Consumer Sales Law' (2003) 40 *Common Market Law Review* 1107.

<sup>37</sup> Consumer Rights Directive, art 5(4).

<sup>38</sup> Distance Financial Services Directive, art 4.

<sup>39</sup> The Credit Agreements, Timeshare and Consumer Rights Directives.

<sup>40</sup> See (n 28-32) and (n 34-35).

Some Directives such as the Timeshare,<sup>41</sup> Distance Financial Services,<sup>42</sup> or the Package Travel<sup>43</sup> Directives indicate that information has to be provided in 'good time' prior to the conclusion of the contract. However no indication of what this may be is given in any of the Directives. This is an open-ended term which can be subject to different interpretations. Presumably, 'good time' entails sufficient time for the consumer to make an informed choice. However it still requires a subjective interpretation first for the trader and then, should the issue be taken to court, for the judiciary to determine. This is an undesirable state of affairs for all parties concerned. The trader has to make this determination at the risk of legal proceedings. The consumer is at risk of not being granted enough time, and of possibly having to take the issue to court to obtain redress, which requires both time and money. Other Directives, such as the Package Travel<sup>44</sup> or Consumer Rights<sup>45</sup> Directives, are even vaguer in that they simply specify that information has to be provided before the conclusion of the contract, but do not specify *when* such information should be delivered. While the Timeshare, Distance Financial Services and Article 4(1)(b) of the Package Travel Directives require that information be disclosed in 'good time' prior to the conclusion of the contract, Article 4(2) of the Package Travel and the Consumer Rights Directives have no such requirement. This implies that even if the information is given just before the conclusion of the contract, the trader/organiser has discharged his obligations under the Directive. This cannot be a satisfactory state of affairs if one believes that such information is necessary for the consumer to make an informed decision.

All the Directives emphasise clarity, durability of medium and timeliness in relation to information disclosure. This enables the consumer to understand and process the information in his own time and make an informed choice before committing himself to the conclusion of the contract in question. It may be doubted whether and to what extent this technique actually works, especially in view of the fact that each of the Directives requires a varying amount of detail to be given. As a result, the amount of information to be given in each case depends on the Directive regulating the particular consumer contract. However, as noted, it remains a popular technique with the EU legislator and it cannot be disputed that it at least forces some information onto the consumer. It is then up to the consumer to use, or not, the information handed to him. This may lead one to conclude that the conception of the consumer at EU level which has permeated into the Directives is one of a reasonably circumspect consumer who will make good use of the information provided, as opposed to some wider notion of the consumer as an individual acting outside the remit of

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<sup>41</sup> Timeshare Directive, art 4.

<sup>42</sup> Distance Financial Services Directive, art 3.

<sup>43</sup> Package Travel Directive, art 4(1)(b).

<sup>44</sup> *Ibid.*, art 4(2).

<sup>45</sup> Consumer Rights Directive, arts 5(1) and 6(1).



his business, trade or profession, which is how the consumer is defined in the consumer protection Directives.<sup>46</sup>

## 2.2 Prohibiting Unfair Commercial Practices

### 2.2.1 The Nature of the UCPD

The EU legislator felt it necessary to contribute to the proper functioning of the internal market and achieve 'a high level of consumer protection'<sup>47</sup> to regulate traders' behaviour by prohibiting unfair commercial practices. In doing so, the EU legislator has indirectly prescribed the way in which information is presented to the consumer, and in this respect the Unfair Commercial Practices Directive (hereinafter the '**UCPD**') may be seen as an extension to information disclosure. Such a proposition is supported by the particular prohibition of misleading commercial practices which focuses on misleading information or omitting information in order to mislead the consumer.<sup>48</sup>

However, to simply see this Directive as a branch of information disclosure would be to oversimplify matters. The UCPD prohibits all unfair commercial practices,<sup>49</sup> which are practices contrary to the requirements of professional diligence and which materially distort, or are likely to, the economic behaviour of the average consumer.<sup>50</sup> Therefore the practices prohibited relate directly to the consumer making a free choice and not simply an informed one, especially with the particular prohibition of aggressive commercial practices. The reference in the Directive to a material distortion of the economic behaviour of the average consumer and the definition of this phrase in Article 2(e), support the view that the focus of the UCPD is also on consumers making a free choice and not just an informed choice.

Although the Directive applies to unfair business-to-consumer commercial practices before, during and after the commercial transaction,<sup>51</sup> unfair commercial practices materially distorting the consumer's economic behaviour are more likely to be carried out pre-contractually. Distortion at subsequent stages is likely to occur where the consumer has a continuing relationship with the trader, where there is the possibility of contract

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<sup>46</sup> See the definition sections in each of the directives listed in Table 1.

<sup>47</sup> UCPD, art 1.

<sup>48</sup> See also Jules Stuyck and others, 'Confidence through Fairness? The New Directive on Unfair Business-to-Consumer Commercial Practices in the Internal Market' (2006) 42 Common Market Law Review 107, 108.

<sup>49</sup>UCPD, art 5(1).

<sup>50</sup>Ibid., art 5(2).

<sup>51</sup> Ibid., art 3(1).

renewal or when the trader undertakes practices to dissuade the consumer from exercising his rights.<sup>52</sup> Innovatively, this Directive considers the possibility of consumers with varying degrees of capabilities.<sup>53</sup>

This Directive intends to create maximum harmonisation except in the field of financial services and immovable property where Member States are free to have more restrictive legislation.<sup>54</sup> Moreover, it is a horizontal or framework Directive which does not just apply to specific sectors. It thus cannot be circumvented by imaginative rogue traders.<sup>55</sup> The CJEU has confirmed that the Directive ‘gives a particularly wide definition to the concept of commercial practices’.<sup>56</sup> As a result, the breadth of protection stretches to any business-to-consumer transaction.

### 2.2.2 Misleading and Aggressive Practices

The scheme of the Directive takes the form of an ‘inverted pyramid’. The Directive first establishes a general prohibition. It then focuses on particularly misleading and aggressive practices. Finally, it creates a black list of practices which are *de jure* prohibited. The general prohibition is intended to capture those instances which cannot be considered as misleading or aggressive but are still unfair. This ensures that the Directive is ‘future-proof’ meaning the consumer continues to be protected even if current or future practices are not considered aggressive or misleading.<sup>57</sup>

The emphasis is whether the average consumer would have taken that transactional decision had there been no unfair practice. The consumer need not actually have taken the said decision—the likelihood of the unfair practice to influence him is enough. The same test is found under both the general prohibition and the specific prohibitions, except that misleading or aggressive practices are assumed to be contrary to professional diligence and thus the complainant has one less ground to prove. Moreover, it need not be proven that a

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<sup>52</sup> See Giuseppe B Abbamonte, ‘The Unfair Commercial Practices Directive and its General Prohibition’ in Stephen Weatherill and Ulf Bernitz (eds) *The Regulation of Unfair commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing, 2007), 11.

<sup>53</sup> UCPD, arts 5(2)(b) and 5(3).

<sup>54</sup> UCPD, art 3.

<sup>55</sup> See Abbamonte (n 52).

<sup>56</sup> Joined Cases C-261&299/07 *VTV-VAB v Total Belgium and Galatea BVBA* [2009] ECR I-1949 para 49; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewebs v Plus Warenhandelsgesellschaft mbH* nyr 14 January 2010 para 36; Case C-540/08 *Mediaprint Zeitungs-und Zeitschriftenverlag GmbH v Österreich-Zeitungsverlag GmbH* nyr 9 November 2010 para 17.

<sup>57</sup> Abbamonte (n 52) 20-21.

consumer is actually affected by the unfair commercial practice—just that the practice has the potentiality of affecting the average consumer.

The problem with this Directive is that notwithstanding relatively objective tests, much relies on its interpretation and application by national authorities and courts, especially in relation to the interpretation of particular terms used in the Directive. Stuyck and others for instance indicate that there is no guidance in the Directive on how to apply the ‘general fairness test’.<sup>58</sup> Bernitz concludes that it will be necessary to have ‘quite a considerable number of cases referred to the [CJEU] for preliminary ruling before a level playing field will emerge’.<sup>59</sup>

That said, the UCPD is the first example of an EU Directive that takes a broad, non-sectoral approach to consumer protection; that is a Directive which does not apply simply to a particular sector or to particular consumer contracts, but applies notwithstanding the context within which the unfair commercial practices are utilised. The UCPD is also the first Directive which considers particularly vulnerable consumers. It is quite comprehensive and though dependant on a number of tests, it cannot be doubted that the UCPD is a positive step forward in terms of consumer protection on an EU level.

## **2.3 Regulation of Advertising**

### **2.3.1 How Does Regulating Advertising Protect the Consumer?**

More so than is the case with unfair commercial practices, the regulation of advertising can be viewed as regulating information disclosure. This proposition is lent some credence by the fact that certain Directives, namely the Timeshare,<sup>60</sup> Package Travel,<sup>61</sup> and Credit Agreements<sup>62</sup> Directives contain provisions detailing what information must be included in advertisements.

Advertising is ‘indispensable in securing changes in existing market patterns’ and is ‘a method of consumer information and a basis for widening consumer choice’.<sup>63</sup> It informs the consumer of the goods and services on the market and brings to his attention a wider

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<sup>58</sup> Stuyck and others (n 48) 125.

<sup>59</sup> Ulf Bernitz, ‘The Unfair Commercial Practices Directive: Its Scope, Ambitions are Relation to the Law of Unfair Competition’ in Stephen Weatherill and Ulf Bernitz (eds) *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart Publishing, 2007) 33, 46.

<sup>60</sup> Timeshare Directive, art 3

<sup>61</sup> Package Travel Directive, art 3.

<sup>62</sup> Credit Agreements Directive, art 4.

<sup>63</sup> Weatherill (n 1) 170.

range of products. As a 'major feature of the modern market economy',<sup>64</sup> advertising must be regulated in order not to mislead the consumer.

The Advertising Directive is not aimed at consumer protection. Its purpose is to protect traders from their competitors,<sup>65</sup> however, by laying down requirements which must be met by adverts it indirectly ensures that consumers are receiving the appropriate information and are consequently properly informed. As a result, regulating advertising protects the consumer prior to his entering into a contract as it ensures that the consumer is influenced by 'proper' advertising.<sup>66</sup>

The Advertising Directive aims at creating 'fair play'. The idea behind this Directive is that traders should not engage in the practices prohibited therein because they unjustly harm their competitors. Consumer protection is only a by-product of this aim, however consumers stand to benefit in two ways. First, they will reap the benefits of there being competition in the market, such as wider choice and lower prices. Secondly, there should be consumer confidence in advertisements to the extent that advertisements will not be misleading or unfairly comparative.

### **3. Protection at the Contractual Stage—Regulating the Substance of Consumer Contracts and Ensuring Conformity Among Consumer Contracts**

#### **3.1 Regulating the Substance of Consumer Contracts**

##### **3.1.1 Should Contractual Terms be Regulated?**

The 'increasing complexity of the goods and products offered, in combination with the fact that the consumer is usually deprived of any bargaining power'<sup>67</sup> means that simply regulating the environment in which a consumer contract is concluded may not be sufficient to achieve effective protection. However, regulating the substance of a contract goes against the notion of freedom to contract—a basic legal principle found in every EU Member State. Moreover imposing legal control over unfair terms involves value-judgements about the content of a bargain that is divorced from the parties' perception at the time of contracting.<sup>68</sup>

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<sup>64</sup> Ibid.

<sup>65</sup> Advertising Directive, art 1.

<sup>66</sup> There are other directives regulating advertising, however the Advertising Directive is the only one which can clearly be seen to have a pro-consumer effect rather than focusing on eliminating national barriers.

<sup>67</sup> Paolisa Nebbia and Tony Askham, *EU Consumer Law* (Richmond, 2004) 255.

<sup>68</sup> Howells and Weatherill (n 20) 261.

On the other hand there exists the notion that ‘the idea of free negotiation is a myth’.<sup>69</sup> There is hardly any negotiation with respect to consumer contracts and thus no expression of individual will.<sup>70</sup> Frequently consumer contracts are mass-produced and standard form contracts are used. In some circumstances, the consumer may not even be aware of some contractual conditions or may be referred to a separate document which is not readily available. As a result, although contractual regulation may not be ideal, in practice it is a necessity in the market in which suppliers and consumers actually operate. As explained by the CJEU, the ‘imbalance between the consumer and the seller or supplier may only be corrected by positive action unconnected with the actual parties to the contract’.<sup>71</sup> The positive (re)action taken by the EU is the enactment of the Unfair Terms Directive.

### 3.1.2 The Substantive Provisions of the Unfair Terms Directive

The Unfair Terms Directive applies with respect to contracts which have not been individually negotiated.<sup>72</sup> Article 3(2) specifies that a term is not individually negotiated where it has been drafted in advance and the consumer was unable to influence its substance, which is the case with standard form contracts. Unfair terms which are not individually negotiated are not binding and are unenforceable.<sup>73</sup>

One might argue that the exclusion of negotiated contracts is not justified, as if one ‘assumes an endemic power imbalance [...] [n]egotiation may simply provide the supplier with greater opportunity to exploit his [...] superior economic strength’.<sup>74</sup> Since the purpose of the Directive is to regulate contracts between suppliers and consumers<sup>75</sup> the consumer should always be protected, not only when standard form contracts are used, as the imbalance in negotiating power subsists even when the contract is individually

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<sup>69</sup> Weatherill (n 1) 114.

<sup>70</sup> Ibid.

<sup>71</sup> Case C-168/05 *Elisa María Mostaza Claro v Centro Movíl Milenium* [2006] ECR I-10421 paras 25,26; see Joined Cases C-240/98-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941; Case C-243/08 *Pannon GSM Zrt v Erzébet Sustikné Gyórfi* [2009] ECR I-4713; Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid v Asociacion de Usuarios de Servicios Bancarios (Ausbanc)* nyr 3 June 2010.

<sup>72</sup> Unfair Terms Directive, art 3.

<sup>73</sup> Ibid., art 6(1).

<sup>74</sup> Howells and Weatherill (n 20) 262.

<sup>75</sup> Unfair Terms Directive, art 1(1).

negotiated.<sup>76</sup> However, the Unfair Terms Directive seems to take the view that negotiation means that there is a freely concluded bargain and thus the law need not intervene.

Articles 3 and 6 are worthless if 'unfair' remains undefined. The Directive lays down that a term is unfair if, contrary to good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.<sup>77</sup> This does not really clarify what unfairness means. The CJEU has failed to provide a Union-wide definition, preferring instead to say that the concept should be considered in the light of the particular circumstances of the case in question,<sup>78</sup> an assessment normally undertaken by the national courts.<sup>79</sup> This would be in line with Article 4 which specifies that unfairness must be judged taking into account the nature of the goods or services and by referring to the circumstances and all the terms of the contract. The consequences of the term under the law applicable to the contract must be considered.<sup>80</sup> Therefore much remains at the discretion of the national courts, since it is the national courts which must finally determine whether a term in a consumer contract is unfair according to the circumstances of the case, including the nature of the contract and the consequences of the term.

The Directive lays down a significant limitation on the assessment of unfairness and consequently on the level of consumer protection required. Article 4(2) specifies that this assessment cannot relate to the definition of the main subject matter of the contract or to the adequacy of the price and remuneration against the services or goods supplied, if these terms are in plain intelligible language. Thus core terms in consumer contracts are outside the Directive's remit. This is not a satisfactory state of affairs from a purely consumer protection point of view, as in many circumstances the consumer finds himself at a disadvantage because of the unfairness of terms in the contract relating to such matters. However Member States are free not to transpose Article 4(2) into their national legislation since the Unfair Terms Directive is a minimum harmonisation Directive.<sup>81</sup> Consequently, such Member States would be offering their consumers a higher level of protection than that laid down in the Directive.

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<sup>76</sup> See *Nebbia and Askham* (n 6) 256.

<sup>77</sup> Unfair Terms Directive, art 3(1).

<sup>78</sup> Case C-237/02 *Freiburger Kommunalbauten GmbH v Ludger Hofstetter* [2004] ECR I-3403 para 22.

<sup>79</sup> *Pannon*, (n 71) para 43; see Hans-W Micklitz and others, *Materials and Text on Consumer Law* (Hart Publishing, 2010) 298.

<sup>80</sup> *Hofstetter* (n 78) para 21.

<sup>81</sup> *Ausbanc* (n 71).

Although the notion of ‘unfairness’ may be unclear, the Annex to the Directive contains an ‘indicative and non-exhaustive list’<sup>82</sup> of terms which may be regarded as unfair. The CJEU has clarified that a term in the list is not necessarily unfair and a term not in the list may still be unfair.<sup>83</sup> Although the terms in the list will only be regarded as unfair if in the circumstances of the case they can be so considered, this ‘grey’ list provides a model against which one may judge the fairness of a clause.<sup>84</sup>

The Directive also provides that where the terms are offered to the consumer in writing, they must be drafted in plain, intelligible language and where there is doubt about the meaning of a term, the interpretation most favourable to the consumer prevails.<sup>85</sup> The limitation to the former requirement is that what is plain, intelligible language has to be assessed in each and every case. This obligation to draft consumer terms comprehensibly is protected by the *contra preferentem* rule. This rule ensures that the consumer is protected from vague and ambiguous drafting which a trader may otherwise take advantage of or even purposely create.

The CJEU has extended the protection offered to consumers by finding in various judgments that the unfairness of terms within the scope of the Directive can be raised by the national court *ex officio*.<sup>86</sup> As a result, even if the consumer is not aware of the unfairness of the term, or of the fact that such protection exists, the consumer is still protected as the national court has been deemed to be the watchdog and preserver of consumer rights. This protection is only extended to the consumer in so far as he wants it. If the consumer opposes the term’s non-application, the court must apply the term in question.<sup>87</sup> Additionally, fixing a time limit on the court’s power to set aside unfair terms is precluded by the Directive.<sup>88</sup> Thus, while the Directive is severely limited in some ways as illustrated above, the CJEU’s intrusion has extended the reach of the Directive in order to ensure effective consumer protection, although this intervention is made redundant if the consumer does not assert his rights judicially.

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<sup>82</sup> Unfair Terms Directive, art 3(3).

<sup>83</sup> *Hofstetter* (n 78) para 20.

<sup>84</sup> *Nebbia and Askham* (n 67) 259.

<sup>85</sup> Unfair Terms Directive, art 5.

<sup>86</sup> *Pannon* (n 71); *Centro Movil* (n 71); *Oceano* (n 71); Case C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-9579.

<sup>87</sup> *Pannon* (n 71) paras 33-35.

<sup>88</sup> Case C-473/00 *Cofidis SA v Jean-Louis Fredout* [2002] ECR I-10875.



## **3.2 Regulation of Consumer Sales Contracts**

### **3.2.1 The Purpose of the Guarantees Directive**

While the Unfair Terms Directive envisages negative control by rendering unfair terms unenforceable, the Guarantees Directive tends towards positive intervention 'by inserting a basic protective term governing product quality into consumer contracts'.<sup>89</sup> The Directive does three things. First, it deals with the standard of quality which the consumer can expect of the goods. Secondly, it provides remedies when this standard is not met. Finally, it makes provision with respect to guarantees. In short then, this Directive ensures that the consumer contract is respected in its performance and provides the consumer with remedies when this is not the case.

### **3.2.2 The Mechanisms of Protection Envisaged**

The Directive obliges the seller to deliver goods which are in conformity with the contract of sale.<sup>90</sup> Article 2(2) specifies when the goods are presumed to be in conformity with the contract, although there is also a presumption against conformity if the consumer was aware of, or could not reasonably be unaware of, the lack of conformity or if the lack of conformity originates from materials supplied by the consumer.

The elements of the presumption in Article 2(2) are mostly subjective, referring to the negotiations and agreement entered into between the seller and consumer for the most part, yet also tempered with objective elements such as the goods being fit for purposes for which similar goods are used. Although there are a number of defences available to the seller,<sup>91</sup> he is in general bound by any public statements, that is advertising and labelling, which should hinder sellers from making exaggerated or untrue claims. Sellers must also ensure that any installation instructions provided do not have any 'shortcomings', and they must ensure that if they offer installation as part of the sale, the persons engaged to install the goods are capable and competent.<sup>92</sup> The seller must also give due attention to the consumer when he is making his wishes and requirements known.

The Directive specifies that the seller is liable to the consumer for any lack of conformity, whether apparent or not, existing at delivery.<sup>93</sup> The Directive places liability on the seller since the consumer can easily identify him, having acquired the product from him, and

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<sup>89</sup> Weatherill (n 1) 138.

<sup>90</sup> Guarantees Directive, art 2.

<sup>91</sup> *Ibid.*, art 2(3).

<sup>92</sup> See *ibid.*, art 2(5).

<sup>93</sup> *Ibid.*, art 3(1).



assert his rights against him. On the other hand, this provision limits the consumer's rights as by imposing liability only upon the seller, the consumer cannot enforce this legal guarantee against manufacturers or intermediate sellers, which he may need to do in case of the seller's insolvency.<sup>94</sup>

However, Article 5 lays down several layers of protection with respect to the seller's liability. The first level of protection is that of providing the consumer with a right to a remedy for two years after delivery. Deards points out that this period is considerably less than the expected working life of many products. However, it is noted that a longer time period would possibly be detrimental to traders and thus this period can be seen as a compromise between consumer protection and business freedom.<sup>95</sup> In fact the CJEU asserts that the two year time limit is meant to protect the seller's financial interests.<sup>96</sup> Member States may provide for a longer period should they so choose. This first level of protection is limited by allowing Member States to oblige the consumer to notify the seller of the defect within two months. Should a Member State decide to avail itself of this discretion, the consumer would in fact lose his right of action if he fails to inform the seller within this period—a strange state of affairs if one considers that this means that the high level of consumer protection originally envisaged for the consumer can be so easily invalidated.

The second level of protection is a rebuttable presumption that a defect which appears within six months must have existed at the time of delivery. The consumer is not bound to prove any additional elements once he can show that the lack of conformity became apparent within six months. This presumption applies unless it is incompatible with the nature of the lack of conformity or the nature of the goods. The burden of rebutting the presumption is on the seller; rebutting such a presumption is in most cases difficult to do. It is thus submitted that the presumption comes close to conferring strict liability. This provision is still subject to the consumer commencing an action within two years and informing the seller of the defect within two months of discovery if necessary.

In case of non-conformity the consumer can either have the goods brought into conformity by repair or replacement or receive a reduction in price, or have the contract rescinded.<sup>97</sup> First, the consumer must seek to have the goods repaired or replaced, in either case free of charge, unless this is impossible or disproportionate. The CJEU has opined that the purpose

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<sup>94</sup> Elspeth Deards, "The Proposed Guarantees Directive: Is it Fit for the Purpose?" (1998) 21 *Journal of Consumer Policy* 99, 102.

<sup>95</sup> *Ibid.*, 105.

<sup>96</sup> Case C-404/06 *Quelle AG v Bundesverband der Verbraucherzentralen* [2008] ECR I-2685, para 42; Cases C-65/09 and 87/09 *Gebr. Weber GmbH v Wittmer and Putz v Medianess Electronics GmbH*, nyr 16 June 2011 para 58.

<sup>97</sup> Unfair Terms Directive, art 3.

of the 'free of charge' requirement is to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights; thus Article 3 precludes national legislation under which a seller may require payment of compensation for the use of the defective goods.<sup>98</sup>

Since replacement has to be free of charge, if the consumer, in good faith, has already installed or commenced installation of the product in accordance with the nature of the product, the seller must remove the goods and reinstall them at his expense, whether the seller uninstalls and reinstalls the goods himself or bears the costs.<sup>99</sup> According to the CJEU, this is required in order to bring the parties to the same position they would have been had the seller delivered goods which conformed to the contract at the outset.<sup>100</sup> In the Court's view, although the seller may have to bear an unexpected financial burden, such an interpretation is equitable since:

the fact remains that by delivering goods not in conformity the seller fails correctly to perform the obligation which he accepted in the contract of sale, and must therefore bear the consequences of that faulty performance. On the other hand, the consumer, for his part, paid the selling price and therefore correctly performed his contractual obligations.<sup>101</sup>

The Directive itself lays down when the remedy is deemed to be disproportionate—if it imposes costs on the seller which are unreasonable when compared to the alternative remedy. This is meant to protect the seller's financial interests<sup>102</sup> and thus aimed at trying to balance the consumer's interests with those of the seller. However, if there is only one possible remedy the seller does not have the right to refuse to undertake that remedy, although in such a case part of the cost of remedying the non-conforming goods may be borne by the consumer.<sup>103</sup> If either repair or replacement is not available, or the seller has not completed them within a reasonable time or without significant inconvenience to the consumer, the consumer can demand an appropriate reduction of the price or that the contract is rescinded.<sup>104</sup>

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<sup>98</sup> *Quelle* (n 96) para 34.

<sup>99</sup> *Weber and Putz* (n 96), para 50-52, 61-62.

<sup>100</sup> *Ibid.*, para 60.

<sup>101</sup> *Ibid.*, para 56.

<sup>102</sup> *Quelle* (n 96), para 42.

<sup>103</sup> *Weber and Putz* (n 96), para 78.

<sup>104</sup> Art 3.

A number of observations seem appropriate at this juncture. First of all, there is a hierarchy of remedies. The consumer must first make a choice between repair or replacement. If such remedies are not effective, the remedies with more serious consequences, that is reduction in price or rescission may be demanded, again at the consumer's choice. Secondly, a number of terms used require value-judgments to be made, which depend on the circumstances and context of the case. Article 3 speaks of repair or replacement unless 'impossible or disproportionate'; of the completion of these remedies being made 'within a reasonable time' and 'without any significant inconvenience to the consumer' and that lack of conformity cannot be 'minor' for the contract to be rescinded. Although some guidance is provided in the Directive itself, these terms still remain to be determined according to the case at hand.

These provisions are considered legal guarantees to the consumer. However, it is exceedingly common for sellers and producers to offer consumers their own guarantees, commonly referred to as 'commercial guarantees', which often form an important inducement to the consumer pondering a possible purchase.<sup>105</sup> While legal guarantees must be offered by the seller, it is up to him whether to offer commercial guarantees at all.<sup>106</sup>

Article 6 states that a guarantee is legally binding on the offeror under the conditions laid down in the guarantee statement and associated advertising. The commercial guarantee must put the consumer in a better position than that resulting from internal national consumer sales law<sup>107</sup> as harmonised by the Guarantees Directive. The commercial guarantee must state that the consumer has legal rights which remain unaffected by that commercial guarantee. The commercial guarantee must be written in plain intelligible language and must contain the 'essential particulars' necessary to make claims under it. These provisions are clearly aimed at ensuring that the consumer is aware of any additional protection the seller is offering and how to exercise his rights, as well as ensuring that the consumer is aware of the fact that the law itself provides a guarantee in the case of lack of conformity. Even if these formal requirements are infringed, the consumer may still rely on the commercial guarantee. This avoids the seller claiming that the guarantee is invalid when the consumer tries to make a claim.

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<sup>105</sup> Weatherill (n 1) 132.

<sup>106</sup> Deards (n 94) 107.

<sup>107</sup> See Nebbia and Askham (n 56) 264; Deards (n 82) 107.

## 4. Protection During the Post-contractual Stage—Cooling-off Periods and Access to Justice

### 4.1 Cooling-off Periods

#### 4.1.1 What is the Cooling-off Period?

The cooling-off period is a period ‘within which the consumer is entitled to exercise a right to withdraw from an agreed deal’.<sup>108</sup> Like information disclosure it does not address the content of consumer contracts,<sup>109</sup> but aims instead at correcting the environment in which negotiations take place.

Cooling-off periods provide time for reflection, where the consumer who has been taken by surprise—many times, as with doorstep or distance contracts, in an environment where the consumer feels at ease—will have time to compare the product and price with similar products and experience whether the product actually matches his expectations. The consumer can then determine whether he would rather rescind the contract or keep it in force. In many of the situations where there is a right of withdrawal, the right exists because consumers rather than shop around for better products or lower prices, suffer from a reduced perception of risk and make irrational decisions.

This does not mean that the provision of a cooling-off period is a panacea. Consumers may be tempted to abuse of this right, particularly in the case of goods; since they may obtain the good for a particular purpose and then withdraw from the contract when that purpose is served. Moreover, periods of withdrawal cause delay and uncertainty because the contract is not perfected until the period for withdrawal has actually expired. Furthermore, assessing the correct time-period is problematic.<sup>110</sup>

The correct time period depends on the nature of the goods and the ‘particular experience dimensions of the commodity’.<sup>111</sup> The now repealed minimum harmonisation Directives, that is, the Distance Selling and Doorstep Selling Directives, laid down a relatively short period of seven days.<sup>112</sup> It may be doubted whether this provided enough time for the consumer to experience the product and decide whether he wanted to maintain the contract in force. On the other hand, that period was simply a minimum period which Member States could lengthen when transposing into national legislation. The maximum

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<sup>108</sup> Weatherill (n 1) 84.

<sup>109</sup> Ibid.

<sup>110</sup> Pamela Rekaiti and Roger Van den Bergh, ‘Cooling-Off Periods in the Consumer Laws of the EC Member States. A comparative Law and Economics Approach’ (2000) 23 *Journal of Consumer Policy* 271, 381-5.

<sup>111</sup> Ibid., 386.

<sup>112</sup> Doorstep Selling Directive, art 5 and Distance Selling Directive, art 6.

harmonisation Directives contain a fourteen day period of withdrawal. While this is significantly better, it has to be remembered that being pre-emptive measures they preclude Member States from maintaining longer withdrawal periods. Moreover, it is submitted that in view of some of the consumer contracts at issue, such as timeshare, financial services and credit agreements, a fourteen day period is still not enough for the consumer to really know what the contract entails. On the other hand, a longer time period may mean that the contract is in practice held in abeyance for much too long.

#### **4.1.2 Where and How is this Technique Used?**

The right of withdrawal is present in six of the Directives examined.<sup>113</sup> Although these Directives can be broadly divided into two with reference to their nature and the period provided for withdrawal, this does not mean that the right of withdrawal works in the same way in each of the Directives. Moreover, although *prima facie* it appears that after the coming into force of the Consumer Rights Directive there is only one time period to contend with, in reality the Directives lay down an extension to the withdrawal period in certain cases.

Article 5 of the Doorstep Selling Directive provided that the consumer had the right to renounce the contract by sending notice to the seller within a period of not less than seven days from receipt of the notice of his right of cancellation. The withdrawal period in the Distance Selling Directive was of at least seven working days which is longer than the period laid down in the Doorstep Selling Directive, which was one of seven running days. The Consumer Rights Directive has now repealed both these Directives and provides for a fourteen day period for consumers to withdraw from distance and doorstep contracts. In certain respects the Consumer Rights Directive amalgamates the provisions contained in both repealed Directives, as well as certain decisions by the CJEU. However, in other instances, the new Directive significantly alters the position of both traders and consumers.

For instance, although Article 11 of the Consumer Rights Directive now provides that a consumer may use the model form in Annex I(B) to withdraw from a contract, this is without prejudice to the consumer exercising this right by any other 'unequivocal statement setting out his decision to withdraw from the contract'. The consumer however is now specifically burdened with the onus of proving withdrawal. This is resonant with the decision in *Travel Vac* on the Doorstep Selling Directive, which had held that Article 5(1) of that Directive should not be interpreted as requiring notice to be sent in writing or any other particular form.<sup>114</sup> Furthermore, the CJEU held that the consumer is completely released from any obligations under the contract, including any penalty clauses. Holding

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<sup>113</sup> Namely the Doorstep Selling Directive, art 5; Distance Selling Directive, art 6; Consumer Rights Directive, art 6; Credit Agreements Directive, arts 9-16 and Annex I, Consumer Credit, arts 14 and 15(1); Timeshare Directive, arts 6-11 and Annex V and Distance Selling of Financial Services, arts 6 and 7.

<sup>114</sup> Case C-423/97 *Travel Vac SL v Manuel José Antelm Sanchis* [1999] ECR I-2195, para 43.

otherwise, would be tantamount to imposing a penalty on the consumer for exercising his legal rights, detracting from the protection given to the consumer under the Directive.<sup>115</sup> This decision is now reflected in Article 12 of the Consumer Rights Directive.

However, the Consumer Rights Directive also protects the trader. Rather than providing that if the trader does not provide information on the right of withdrawal, time starts to run from the day the consumer gets to know of his rights, as was the case under the Doorstep Selling Directive,<sup>116</sup> Article 10 provides that the withdrawal period expires a year after the expiration of the withdrawal period had the trader provided the consumer information as to his rights. On the other hand, this is an improvement on the provisions of the Distance Selling Directive, which provided that when the supplier failed to provide written confirmation of information, the period of withdrawal was extended to three months running from the day of receipt of the goods or conclusion of the services contract.

The Distance Selling Directive also specified that the supplier was obliged to reimburse the consumer any sums paid within thirty days, although the consumer may be charged for the direct cost of returning the goods.<sup>117</sup> These obligations are now contained in Articles 13 and 14 of the Consumer Rights Directive, with the added obligation on the seller to reimburse the consumer within fourteen days. The CJEU had clarified, when considering the Distance Selling Directive, that the seller cannot charge the consumer for delivery costs incurred in delivering the goods to the consumer, as this might deter consumers from exercising their right of withdrawal.<sup>118</sup> The fact that obliging the consumer to pay for returning the goods, especially in the case of low-cost goods, may also deter such individual from exercising the right of withdrawal seems to have been ignored. The situation in this respect is largely the same in the Consumer Rights Directive although in the case of doorstep contracts, if the goods cannot be returned by post, the costs shall be borne by the trader.<sup>119</sup> Article 14 however also provides for rental payment by the consumer for use of the goods—this is in line with the other maximum harmonisation Directives. This reduces the protection afforded to consumers by the repealed Directives since consumers are now liable to effect payments in lieu of the use they have made of the product. On the other hand, the exertion of a rental payment may be considered as an instance of balancing business interests with consumer interests, and in addition circumvents possible abuse of

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<sup>115</sup> *Ibid.*, para 57-8.

<sup>116</sup> Case C-227/08 *Eva Martín Martín v EDP Editores* nyr 17 December 2009, para 25; Case C-412/06 *Annelore Hamilton v Volksbank Filder eG* [2008] ECR I-2383, para 35; Case C-215/08 *E Friz GmbH v Carsten von der Heyden* nyr 15 April 2010, para 39.

<sup>117</sup> Distance Selling Directive, art 6.

<sup>118</sup> Case C-511/08 *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen* nyr 15 April 2010.

<sup>119</sup> Consumer Rights Directive, art 14(1).

the right of withdrawal by the consumer. In fact, when interpreting the Distance Selling Directive, the CJEU held that in the case of withdrawal by a consumer within the withdrawal period, a seller cannot claim compensation for the value of the use of the consumer goods acquired under a distance contract, although the consumer may be required to pay compensation for the use of the goods in the case where he has made use of those goods in a manner incompatible with the principles of civil law.<sup>120</sup>

The Consumer Rights Directive does not provide a right of withdrawal in respect of all distance contracts. Article 16 mirrors the list of exceptions contained in Articles 3(1), 3(2), and 6 of the Distance Selling Directive, which list is now also applicable to doorstep contracts. Some of these exceptions are more justifiable than others. For instance consumables and newsprint would be worthless by the time the cooling-off period expires and the supplier would be unfairly prejudiced if forced to take them back. In the case of goods or services which vary in price, the exception avoids the consumer's moral hazard; the consumer may feel aggrieved by the fact that the price has decreased, although already aware of this possibility, and may seek to have the contract rescinded. However, Dickie commenting on the Distance Selling Directive, warns that although this exception is understandable in highly volatile markets where the consumer could make a profit by judicious use of the right of withdrawal, the same provision could be applied 'to a wide range of goods and services' meaning that the consumer could find himself unprotected in a potentially wide range of situations.<sup>121</sup> According to the CJEU the provision of accommodation, transport, catering or leisure services was excluded from the scope of the Directive because the suppliers of services in this case suffer a disproportionate burden from cancellation of bookings,<sup>122</sup> an explanation accepted by some.<sup>123</sup> Although some protection may be given to the consumer by the application of other Directives and national norms, the consumer still finds himself less protected when entering into such contracts.<sup>124</sup>

The Distance Financial Services Directive provides for a cooling-off period of fourteen calendar days, which however is extended to thirty calendar days in the case of life

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<sup>120</sup> Case C-489/07 *Pia Messner v Firma Stefan Kruger* [2009] ECR I-7315.

<sup>121</sup> John Dickie, 'Consumer Confidence and the EC Directive on Distance Contracts' (1998) 21 *Journal of Consumer Policy* 217, 224.

<sup>122</sup> Case C-336/03 *easyCar (UK) Ltd v Office of Fair Trading* [2005] ECR I-1947, para 28.

<sup>123</sup> Elizabeth Hall, 'Cancellation rights in distance – selling contracts for services: exemptions and consumer protection' [2007] *Journal of Business Law* 683.

<sup>124</sup> Josep Maria Bech Serrat, 'Why is there a Separation between Distance Selling in EU Law and the Tourism Industry?' (2010) 33 *Journal of Consumer Policy* 75, 78-9.



insurance contracts and personal pensions.<sup>125</sup> The period starts to run from the day of the conclusion of the contract or the day the consumer receives the contractual terms and conditions and information required by the Directive.<sup>126</sup>

This Directive contains a number of exceptions and lists several contracts or financial services in respect of which there is no right of withdrawal, or those in respect of which Member States may provide that a right of withdrawal does not exist. As a result, although this is a maximum harmonisation Directive, a consumer in a particular Member State may find himself less protected than his counterpart in another Member State where these exceptions were not implemented.

Article 6(6) obliges the consumer to notify withdrawal by following the instructions given to him according to the pre-contractual information disclosure requirements. This ties the right of withdrawal with the technique of information provision and ensures that utility of information disclosure is not negated through being discounted by either party. As with the Timeshare and Credit Agreements Directives, the deadline is deemed to have been observed if the notification, when on paper or another durable medium, is dispatched before the expiry of the deadline and an ancillary contract attached to the main contract is cancelled without penalty if the consumer exercises his right of withdrawal in respect of the main contract.<sup>127</sup>

According to Article 7, when the consumer exercises a right of withdrawal he may only be required to pay for the service the supplier actually provided and only if the consumer gave his approval to the commencement of performance of the contract. Moreover, the supplier must prove that the consumer was fully informed about the amounts payable. Thus while this Directive permits 'rental payments', it tempers this with various conditions.

The supplier has a further obligation to return any sums received except those for services already provided. The consumer has a corresponding obligation to return any sums or property received from the supplier. These obligations have to be performed within thirty calendar days from the notification of withdrawal. This provision ensures that if the consumer exercises his right of withdrawal the parties are put in the *status quo ante*.

The Credit Agreements Directive follows a near identical pattern. The consumer again has a withdrawal period of fourteen calendar days from the day of conclusion of the agreement or receipt of the contractual conditions.<sup>128</sup> The consumer is obliged to notify withdrawal in the manner provided for in the contract by means which can be proven in accordance with

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<sup>125</sup> Distance Financial Services Directive, art 6(1).

<sup>126</sup> Distance Financial Services Directive, art 6(1).

<sup>127</sup> Ibid., art 6(7); Timeshare Directive, arts 7, 11; Credit Agreements Directive, arts 14(4), 15(1).

<sup>128</sup> Credit Agreements Directive, art 14(1).



national law. The consumer is also obliged to pay the creditor the capital and the interest accrued thereon within thirty calendar days after dispatch of notification. The creditor however is not entitled to any other compensation, except for any non-returnable charges paid to a public administrative body.<sup>129</sup> This Directive too affords Member States with some discretion—Article 14(6) lays down that Member States may determine that Articles 14(1) to 14(4) are not applicable to agreements concluded through a notary and Article 14(7) clarifies that any rule of national law establishing a period of time during which performance of a contract may not begin is not affected by Article 14.

The default withdrawal period in the Timeshare Directive is fourteen days.<sup>130</sup> However where a separate standard withdrawal form has been provided within a year from the date of conclusion of the contract the period of withdrawal starts on that day. When the information required to be disclosed is provided to the consumer in writing three months after the said date, the withdrawal period starts from the day of receipt of the information by the consumer. Even more exceptionally, the withdrawal period is considerably extended when a separate standard withdrawal form or the information required to be provided by the Timeshare Directive is not in fact provided. In the former case the withdrawal period is one year and fourteen days, in the latter three months and fourteen days.

These provisions clearly provide the consumer with more protection. By moving the point from which the withdrawal period is calculated, the trader is indirectly punished for failing to comply with the information provision obligations laid down in the Directive and correspondingly the consumer's rights are safeguarded. However in stark contrast to the position taken in the other Directives, by laying down a date when the withdrawal period expires if information is not provided, certainty is favoured over consumer protection. This Directive requires notification to be done on paper;<sup>131</sup> a standard withdrawal form is provided in Annex V.

Article 8 clarifies that the exercise of the right of withdrawal terminates the obligation of the parties to perform the contract. Moreover the consumer neither bears any costs nor is liable for any rental payments—unlike the case with financial services or credit agreements. Furthermore, Member States are called upon to ensure that advance payments are prohibited.<sup>132</sup> These provisions should encourage consumers to exercise their withdrawal right as they reassure consumers that such an exercise will not entail any negative consequences since such persons will not be liable to perform any part of the

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<sup>129</sup> *Ibid.*, art 14(3).

<sup>130</sup> Timeshare Directive, art 6.

<sup>131</sup> *Ibid.*, art 7.

<sup>132</sup> *Ibid.*, art 9.

contract nor for any services already performed; nor is there any danger of the consumer losing any money he may have advanced.

### 4.1.3 Final Points

It is evident that no two mechanics of cooling-off periods are exactly the same. Adjustments and variations occur due to both the experience of the EU legislator with previous Directives as well as because of the subject-matter of the particular Directives.

Is the cooling-off period an adequate technique for consumer protection? Just because it is available, it does not mean that it will be availed of. First of all, consumers, although informed of this right, may not fully understand its import and thus not exercise it. Moreover, they may be afraid of exercising their rights as they may fear the trader's reaction. Furthermore, especially in the case of small sums, they may prefer to take the hit rather than go through with what they perceive to be a hassle in order to rescind the contract. It has to be remembered that in certain cases exercising the right of withdrawal may still require effort, time and perhaps even money, which the consumer may find to be more costly than the benefit of exercising his rights.

It should also be noted that with the advent of the Consumer Rights Directive, the EU seems to have entered a new, streamlined era when it comes to consumer protection. Directives are increasingly following the same pattern, which leads to the question—is the consumer being sufficiently protected if a *pro forma* Directive is used for different types of consumer contracts?

## 4.2 Access to Justice

### 4.2.1 Introduction

If any of the provisions of the Directives which have been examined are not respected, the consumer must have access to justice in order to remedy the situation. Because legal action is known to be costly, slow and stressful and consumers may only have a limited understanding of the law, consumers are reluctant to 'convert complaint into formal proceedings, especially where their loss is relatively small'.<sup>133</sup> This is particularly pertinent in the EU context as the 'ability of a cross-border consumer to assert legal rights against a trader located in a state other than his [...] own' is questioned.<sup>134</sup>

Although there is an acknowledged problem, it is equally recognised that one cannot simply legislate 'effective access to justice' into being.<sup>135</sup> The issue can only be addressed

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<sup>133</sup> Weatherill (n1) 227.

<sup>134</sup> Ibid. For the relevance of access to justice in relation to the cooling-off period, see Rekaiti and Van den Bergh (n 110) 392-3.

<sup>135</sup> Weatherill (n1) 236.

either by educating the consumer as to his legal rights or facilitating the pursuit of complaints. Both these measures remain largely within the remit of the Member States<sup>136</sup> especially in view of the subsidiarity principle.

This notwithstanding, the EU institutions have still managed to enact some measures with the aim of facilitating legal redress such as Regulation(EC) No861/2007 establishing a European small claims procedure<sup>137</sup> or Regulation(EC) No2006/2004 on cooperation between national authorities.<sup>138</sup> These measures however are outside the scope of this paper. Measures within the scope of this paper frequently exhort Member States to ensure there is proper judicial and administrative redress, out-of-court redress and sanctions for breach of national provisions adopted pursuant to the Directive in question.

**Table 3: Provisions concerning judicial redress, out-of-court settlements and sanctions**

Directive	Article
Unfair Commercial Practices	11-13
Electronic Commerce	17-20
Misleading and Comparative Advertising	5-7
Distance Selling (repealed)	11
Distance Financial Services	11, 13-15
Timeshare	13-15
Consumer Credit Agreements	23 + 24
Consumer Rights	23 + 24

Most common are provisions relating to judicial redress which generally follow a similar pattern. First, they require Member States to ensure that there are adequate and effective means to ensure compliance with the Directive in question in the interests of consumers. This idea is vague and wide in its terms. It does not specifically refer to judicial or administrative proceedings, but must necessarily include them. Secondly, it is specified that these means should include legal provisions through which persons regarded under

<sup>136</sup> Ibid.

<sup>137</sup> [2007]OJ L199/1.

<sup>138</sup> [2004]OJ L 364/1.

national law as having an interest in the proper implementation of the Directive, such as public bodies and consumer and professional organisations, may bring appropriate actions. Thus the Directives actively encourage Member States to allow representative bodies to bring actions in the interests of the consumers as a whole, acknowledging the fact that consumers rarely bring individual actions.

The Commission believes<sup>139</sup> that mediation, conciliation and arbitration are a viable alternative in the case of consumer complaints as they avoid the high costs of legal consultation and long delays and psychological barriers related to the complexity of court procedures. However it is arguable that out-of-court procedures in reality suffer from these same problems. Because of this commitment to out-of-court procedures, some Directives on consumer protection oblige Member States to ensure there are adequate and effective out-of-court dispute resolution procedures and to encourage the bodies responsible to cooperate for the resolution of cross-border disputes.<sup>140</sup>

As regards the imposition of penalties, the Directives usually oblige Member States to provide for appropriate penalties in the event of the trader's failure to comply with the national provisions adopted pursuant to the relevant Directive. Most Directives<sup>141</sup> also specify that Member States are to take all necessary measures to ensure that these penalties are enforced. In all cases, the Directives clarify that these penalties have to be effective, proportionate, and dissuasive.

All these provisions oblige Member States to act and leave much to their discretion. It may be claimed that these provisions are ineffective, however it has to be remembered that failure by the Member States to provide for effective court actions, out-of-court proceedings and sanctions would mean that they are failing in their obligations in terms of EU law and would be subject to an action of enforcement in terms of Articles 258 or 259 TFEU.

#### **4.2.2 The Injunctions Directive**

The current Injunctions Directive recodifies Directive 98/27/EC<sup>142</sup> which had been enacted in order to try to avoid collective action breaking down when the trader is based in a

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<sup>139</sup> See Communication from the Commission of 30 March 1998 on the out-of-court settlement of consumer disputes (COM(1998) 198 final) and Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (COM(1998) 198 final) [1998]OJ L115/31.

<sup>140</sup> Credit Agreements Directive, art 24; Timeshare Directive, art 14; Distance Financial Services Directive, art 14.

<sup>141</sup> All the directives indicated in Table 5 except for the Timeshare and Distance Financial Services Directives.

<sup>142</sup> [1998]OJ L166/51.

Member State different from that where the affected consumers are based.<sup>143</sup> This happens as agencies in the State where loss is suffered lack the capacity to take legal action while those in the State where the practice originates lack interest in pursuing the issue.<sup>144</sup>

The Directive addresses this problem by doing three things. First, it obliges Member States to designate courts or administrative authorities competent to rule on proceedings commenced by qualified entities seeking an expedient order requiring the cessation or prohibition of an infringement; to give adequate measures to eliminate the continuing effects of the infringement, or to order against the losing defendant for disbursement into the public purse or another designated beneficiary.<sup>145</sup> The infringement must be of one of the Directives listed in Annex I, which in essence includes all the consumer protection Directives. Secondly it indicates what a 'qualified entity' means—a body with a legitimate interest in ensuring that an infringement of the consumer Directives is brought to an end, in particular independent public bodies and organisations created to protect the interests protected by the Directives.<sup>146</sup> Thirdly it provides in Article 4 that Member States must ensure that qualified entities in other Member States may make an application to the designated court or authority of the first Member State.

This Directive does not require Member States to introduce legal standing for consumer associations, but provides for the mutual recognition of the legal standing of such organisations.<sup>147</sup> Neither does it confer any specific rights on individual consumers, nor does it provide for representative action in favour of specific consumers. Moreover, there is no requirement on Member States to allow associations to claim payment into their own purse or that of the consumers they represent, which might reduce their interest in litigation. The prior consultation requirements in Article 5 may also be a major obstacle to consumer protection.<sup>148</sup>

The use of the Injunctions Directive has proved to be nearly non-existent. As at 2008 only two cross-border cases were brought under the old Directive.<sup>149</sup> The main reasons for this

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<sup>143</sup> European Commission, 'Green Paper on Access to Justice' (COM(93) 576).

<sup>144</sup> Weatherill (n 1) 240.

<sup>145</sup> Injunctions Directive, art 2.

<sup>146</sup> *Ibid.*, art 3.

<sup>147</sup> *Ibid.*, arts 3 and 4.

<sup>148</sup> Peter Rott 'The Protection of Consumers' Interests After the Implementation of the EC Injunctions Directive into German and English Law' (2001) 24 *Journal of Consumer Policy* 401.

<sup>149</sup> European Commission, 'Green Paper on Consumer Collective Redress' COM(2008) 794 final.

were the financial risk involved for the entity bringing the case and the complexity and diversity of national injunctive proceedings.<sup>150</sup>

As a result although the introduction of the Injunctions Directive has to be lauded as a positive step forward in assisting access to justice, efforts cannot stop there since this is clearly not enough. This has been recognised by the EU institutions, which, as noted, have taken other measures in order to facilitate consumer redress and representation. The Commission has also issued a Green Paper on Consumer Collective Redress in order to gauge the relevance of class actions; however, no other measures have been forthcoming in this respect. The Commission has also issued two proposals in 2011, one on consumer online dispute resolution<sup>151</sup> and one on alternative dispute resolution;<sup>152</sup> their relevance, and indeed whether they will be enacted in the first place, remains to be determined.

## 5. Conclusions

It should by now be evident that though the consumer is protected by the measures examined, this protection is by no means unlimited or all-encompassing. It is generally assumed that the consumer is in a weak position on the market and that he should therefore be protected. This assumption is by no means unchallenged—some believe that the consumer should no longer be seen as a pathetic, weak figure as this is no longer the case.<sup>153</sup> Others however continue to extol the virtues of protection.<sup>154</sup> Undoubtedly, the EU still believes that protection is required, especially if the consumer is to be encouraged to take advantage of the single market and help in the elimination of barriers to free movement.

The EU's position in this respect has been re-affirmed with the recent proposal for a Common European Sales Law<sup>155</sup> which, by utilising all these techniques in one measure relating to the sale of goods, also re-affirms the EU's commitment to the techniques

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<sup>150</sup> Ibid.

<sup>151</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR)' COM(2011) 794 final.

<sup>152</sup> European Commission, 'Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR)' COM(2011) 793 final.

<sup>153</sup> Tom Hartlief, 'Freedom and Protection in Contemporary Contract Law' (2004) 27 *Journal of Consumer Policy* 253.

<sup>154</sup> Ewoud Hondius, 'The Protection of the Weak Party in a Harmonised European Contract Law: A Synthesis' (2004) 27 *Journal of Consumer Policy* 245.

<sup>155</sup> European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law' COM(2011) 635 final.

examined above. The proposal also adds a number of provisions which are applicable to all buyers and not just to consumers, and includes a standard withdrawal form. All these provisions are however only applicable when parties to a cross-border contract agree to their applicability.<sup>156</sup> It remains to be seen if and how the proposal will make it to a legislative act, however it is interesting to note that with respect to consumers, the proposal requires the trader to inform the consumer about the possible applicability of the Common European Sales Law<sup>157</sup> and requires the consumer to give an explicit statement of consent to its application.<sup>158</sup> This state of affairs once again begs the question whether most consumers are or would be in a position to properly consent to the applicability of the Common European Sales Law; that is whether they would be able to fully comprehend the consequences of giving their consent.

The EU Directives examined in this paper provide protection for the consumer in the market by creating extraordinary measures which derogate from the general principles of contract law. Whereas under the private law systems of the Member States it is widely held that a contract is perfected upon agreement and that *pacta sunt servanda*, they provide for mandatory disclosure and cooling-off periods or else prescribe what should not be contained in a contract. However, these measures, rather than derogations from contract law can be seen as safeguarding its respect; for instance requiring the consumer to be given information so as to ensure that his consent is real.

There are various tensions at play when one considers consumer protection. The issue which plagues the EU legislator is whether to uphold consumer protection or legislate in favour of consumer choice. This tension is inherent in the free movement cases and is evident in the Directives examined, particularly since no Directive can hinder the functioning of the internal market, as this would go against its legal basis in Articles 114 or 115 TFEU. Moreover, although Member States may legislate to a degree higher than the minimum harmonisation Directives, they are checked by the Treaty rules on free movement, meaning that higher protection is only allowed in so far as there are no undue obstacles to the internal market.<sup>159</sup> As a result, the very measures which protect the consumer are limited to some extent by ensuring that the consumer enjoys the benefits of a single market.

The Directives taken as a whole ensure that the consumer is afforded some protection before, during and after the conclusion of the contract. However, as noted above, the various techniques themselves may be flawed. Moreover, all the Directives contain

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<sup>156</sup> Ibid., art 3.

<sup>157</sup> Ibid., art 9.

<sup>158</sup> Ibid., art 8.

<sup>159</sup> See Case C-441/04 *A-Punkt Schmuckhandels GmbH v Claudia Schmidt* [2006] ECR I-2093.



exemptions or exceptions which limit the reach of protection offered by the Directives. Even if this were not the case, due to the mostly sectoral nature of consumer protection in the EU, it is possible that certain contracts fall outside the scope of the Directives and would be considered legitimate even though they in fact harm the consumer. Rogue traders may take advantage of this and arrange their trading practices in such a way so as to fall outside the remit of the Directives, although this situation has been somewhat remedied by the Unfair Commercial Practices Directive.

It is in any case clear that no one technique is enough in order to protect the consumer in the market. This is implicitly recognised by the Directives themselves, since many contain two or more of the techniques analysed. For instance all the Directives containing a right of withdrawal—such as the Consumer Rights and Credit Agreements Directives—contain obligations on the trader to provide information. The more recent Directives, namely those on Credit Agreements, Distance Financial Services and Timeshare make provision for techniques of protection before, during and after the contract is concluded. This is the result of two factors: first, a recognition that one technique of protection is simply not enough; second, that once the EU legislator is enacting maximum harmonisation measures, these have to be as comprehensive as possible in order to try to mitigate the possible reduction of consumer protection in Member States. This latter point is linked to another issue—the current trend for the EU legislator to move from minimum to maximum harmonisation Directives, which besides affecting the content of consumer protection Directives, has fuelled the debate on how the consumer is better protected.

The Directives, even if pre-emptive, suffer from another limitation. All the Directives use terms which require interpretation by national courts and authorities. As a result, the consumer in a particular Member State may be offered protection which is different to that envisaged in the Directive, and which in turn may be different to that offered to the consumer in another Member State. It may in fact be argued that by leaving the interpretation to national authorities, the Directives indirectly re-introduce Member State regulation of consumer protection. This argument is strengthened if one considers that all the Directives make reference to national laws and remedies and leave it to the Member States to enforce the consumer rights contained in the Directives.

The scope of each of these Directives is also affected by the judgments of the CJEU. In many circumstances, such as in *Quelle*,<sup>160</sup> *Travel Vac*,<sup>161</sup> or *Asturcom*<sup>162</sup> the Court has asserted consumer protection and ensured that the provisions of the Directives were respected by the Member States. In this way the CJEU extends, or rather enhances, consumer protection. In other cases however the CJEU has recognised that there are limits to consumer

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<sup>160</sup> (n 96).

<sup>161</sup> (n 114).

<sup>162</sup> (n 86).



protection, and it has recognised that in certain instances the consumer may also be liable towards the trader.<sup>163</sup> It has also recognised that some provisions are intended for the protection of the interests of suppliers who would otherwise suffer disproportionate consequences.<sup>164</sup> While consumer protection advocates may take offence at such bland statements, it has to be recognised that consumer protection must be balanced against business freedom.

Finally, one should not forget that consumer protection is intrinsically linked with consumer confidence. The purpose of protecting the consumer is not only to ensure that the consumer operates on a safe market, but also that the consumer is confident and secure enough to participate in the market in the first place. This is even more the case within the EU context where the consumer has to be encouraged to be a player in the internal market. The Directives examined, notwithstanding any limitations highlighted, manage to do this. Although not without faults, the Directives still make a significant contribution to consumer protection within the EU.

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<sup>163</sup> *Friz* (n 116).

<sup>164</sup> *easyCar* (n 121).