



The European Consumers' Organisation

BEUC/X/042/2005

24 October, 2005
Contact : Cornelia Kutterer
Email : cku@beuc.org
Lang : EN/FR

REVIEW OF THE CONSUMER LAW ACQUIS

—

PRELIMINARY BEUC COMMENTS

Bureau Européen des Unions de Consommateurs, Avenue de Tervueren 36, bte 4, B-1040 Bruxelles

Tel: +32(0)27 43 15 90, Fax: +32(0)27 40 28 02, consumers@beuc.org, <http://www.beuc.org>

Europäischer Verbraucherverband
Europese Consumentenorganisatie
Organización Europea de Consumidores
Organização Europeia de Consumidores
Organizzazione Europea dei Consumatori

Neytendasamtök Evrópu
Európai Fogyasztók Szervezete
Evropska potrošniška organizacija
Den Europeiske Forbrugerorganisasjonen

Euroopan Kuluttajaliitto
Europejska Organizacja Konsumentów
Ευρωπαϊκή Οργάνωση Καταναλωτών
Den Europæiske Forbrugerorganisation
Den Europeiska Konsumentorganisationen

This is a position paper from BEUC, the European Consumers Organisation setting out preliminary comments and general considerations on the review of the consumer protection law acquis.

THE MOST IMPORTANT CONSIDERATIONS

It is essential that the general commitment of consumer policy, i.e. a high level of consumer protection within the European Union, be maintained, effectively implemented, steadily developed and rigorously enforced. Bringing the consumer law acquis to a level of high consumer protection in all European countries, appropriate to the present day, needs to involve the following considerations:

- **Strengthening of the legal base for EC consumer protection is necessary, ideally through amendments in both relevant EC Treaty provisions, Article 95 EC and Article 153 EC.**
- **The revision of the consumer law acquis needs to go beyond the development of a Common Frame of Reference (CFR) in EU contract law and be pursued on its own merits.**
- **The future CFR must acknowledge consumer contract law as being a “sui generis” law. Business-to-Business (B2B) and Business-to-Consumer (B2C) contracts need to be distinguished clearly.**
- **Consumer protection needs to adapt constantly to current problems of B2C transactions and to be apt to deal with challenges such as new technologies or new business models.**
- **Codification and consolidation must not jettison standards achieved in European or national law.**
- **Simplification of regulation (or “better regulation”) should in fact mean effective regulation to meet the terms and objectives of consumer policy.**
- **Any move towards maximum harmonisation should be subject to a broad and open debate and on a case by case basis. In addition, the Commission must provide clear evidence that the Internal Market will not function properly with minimum directives before any further moves towards total harmonisation are being made.**
- **The acquis must be coherently implemented in Member States and cross border.**
- **The improvement of effective enforcement mechanism is crucial to a high level of consumer protection.**

LINKING THE CONSUMER LAW ACQUIS TO THE CFR EXERCISE

We look forward to the promised publication on the review of the consumer acquis early next year since the Commission has failed to explain in any detail how it intends to improve the existing consumer protection law acquis. The questions put forward in the Communication 2004 do not enlighten the attentive reader as to the direction the Commission intends to go.¹

Besides, the recently published progress report on the Common Frame of Reference (CFR)² has considerably strengthened the link between the revision of the acquis and the development of a CFR (and narrowed down the immediate use of the CFR). But if the main aim of the CFR process is to focus on the consumer acquis, why has it taken on the proportions it has? The review of the consumer acquis is a subject to be approached distinctly, on its own terms.

BEUC is committed member of the CFR-Net and as such contributes to the discussions on the CFR in the workshops. Nevertheless, we remain critical as to some shortcomings of linking the review of the consumer law acquis to the CFR exercise:

¹ COM(2004) 651 final.

² COM(2005) 456 final.

- The CFR-Net workshops are a challenging exercise but it also involves short timescales and a very high volume of work and commitment to follow. Therefore we have the practical question of how much resources we as a consumer association should apply to this issue, given the many other conflicting demands that we face. To take a decision like this we need far more clarity about the precise nature of the CFR procedure and the likely outcomes that might follow the review process. Is this essentially a matter for the experts at this time or is it also a partly political process, as the Commission is recorded as saying in the workshop on “Notions and Functions of Contract”?
- The considerations to be taken into account for a consumer law review extend far beyond the scope of the CFR process – why then the close association between the two? The CFR process appears to be a review of the fundamentals of contract law generally but currently the consumer acquis contains most if not all of the EU provisions to date on contract law.
- The wisdom of the Commission setting a somewhat arbitrary deadline for the completion of the CFR process raises difficulties because of a lack of clarity as to the nature and planned outcome of that process. A deadline for the review of the consumer acquis is welcome – it is a relatively clearly defined process. The notion of a “tool for lawmaking” however is not that easy to define, nor indeed is the idea of seeking a “clear agreement from all institutions to use this tool”. Can we be sure at this stage of the utility of the tool?
- The eight directives which form part of this review cover indeed the main areas of consumer protection law. However, while two of these directives, namely the Injunction Directive and the Price Indication Directive are not related to the contract law acquis, others – namely the distance marketing of financial services, the E-commerce Directive and the proposal on consumer credit will not be reviewed nor seem to be included at this stage; all of which contain significant consumer contract law provisions.
- Consumer protection law is a mixture of civil (or contract) law, tort, criminal, and administrative law. We are therefore concerned that the commitment of the Commission to review the consumer law acquis in the light of a draft CFR may fall short of the necessities to take all aspects into account, in particular effective enforcement, to improve the protections of consumers in the internal market.
- The CFR uses as starting point the existing Principles of European Contract Law (PECL) which do not contain consumer provisions. Reference is also made to the Convention on the International Sale of Goods (CISG) which expressly excludes consumers from its scope. National and European consumer protection law takes a radically different approach, namely the consumer as the weaker contract party needs to be protected by specific rules which are essentially mandatory and cannot be derogated from by contract clauses.
- The principle of freedom of contract is paramount for the whole CFR work. This principle involves that both parties have sufficient margin of manoeuvre, in terms of transaction costs, to negotiate and agree on the terms and conditions of contracts. The principle of mandatory provisions ensuring the appropriate contract balance while preventing unjustified obstacles for the proper functioning of the Internal Market, are paramount when assessing the consumer acquis. Pursuing the CFR under the guidance of freedom of contract and general (comparative) contract law rules, but introducing specific consumer law considerations as a “defence”, would disregard that consumer law has developed largely as a respected law sui generis. It is also not clear how the – mandatory – consumer law should be placed within an instrument that is mostly related to “facilitative” law.
- We welcome the Commission’s indication in its progress report that the CFR process will distinguish clearly between B2B and B2C. However, some principles may be developed that while not “set in stone” may still become part of the established wisdom or amount to a presumption that would later be difficult to displace. The CFR process might in some sense set the culture or agenda for the review of the consumer acquis. The CFR process should not be the starting point for the review of the consumer acquis. This would be to start from the wrong place. We would welcome therefore a clear and distinct approach to B2C, focusing on the consumer as a private non-professional person. We would strongly oppose any attempt to equate even SMEs with private consumers in this context. They are different and must be treated differently.

The Commission has discussed several options over the last couple of years and finally opted for consumer law becoming a candidate for the actual use of the CFR. However, more creative options are

discussed and should be looked at without prejudice.³ A separate codification of EU consumer law could, for example, avoid many of the risks set forth above, in particular the opportunity obviously seen by business stakeholders to weaken the scope of consumer protection within the CFR-network exercise - as we have seen in particular in recent CFR workshops on the notion of consumers⁴ and on e-commerce.

If the structure of the CFR – on the other hand – entails a “general consumer law” section with mandatory character regarding definition of the consumer, information obligations or the calculation of withdrawal periods, we see the benefit for both business and consumers alike. However, substantial law should not be dealt with in a “toolbox” and it must be avoided that policy decision that need to be taken in a legislative process following the revision of the *acquis* are pre-empted through the CFR.

If there is need, benefit and opportunity for a horizontal approach, this must be dealt with considerable care and after in-depth stock-taking of the existing *acquis*. It should not be forgotten that vertical directives provide business, as well as consumers, with clarity and certainty. This reduces the need for businesses to obtain legal advice, and saves them money (some business organisations themselves say that they prefer the vertical legislation to the UCP Directive for this reason).

We welcome in so far as it goes the fact that the Commission takes note of several options in its 2005 progress report.⁵

THE INTERNAL MARKET AND MINIMUM HARMONISATION

Since the publication of the Commission’s Consumer Policy Programme 2002-2006⁶, it is the Commission’s declared intention that the existing consumer protection directives should be adapted from minimum to full harmonisation measures. According to the Commission, the differences in national law are the cause for fragmentation of the internal market to the detriment of consumer and business. It therefore comes as no surprise that the Commission in its Communication 2004 sets out that the revision of the eight consumer protection directives will particularly look at the “minimum harmonisation” clauses they contain.

BEUC is very worried that apparently the ruling out of minimum harmonisation appears to be the Commission’s driving concern not only in consumer policy making in general but also in relation to the revision of the *acquis*. In our opinion the Commission’s goal for the revision, which is to improve the quality and the coherence of the *acquis*, cannot be achieved in this way, but requires a more balanced and nuanced approach.

When revising the directives it should not be forgotten that the *acquis* in consumer protection legislation exists only because of the flexibility which minimum harmonisation brought about to Member States. We therefore maintain that any move towards maximum harmonisation should be subject to a broad and open debate and on a case by case basis – in line with the commitment made to the European Parliament by Commissioner Kyprianou during his confirmation hearing in September 2004. There are many factors that should influence the choice of minimum or maximum harmonisation, including the extent to which progress is achieved in other areas such as enforcement and redress across the single market.

³ See for example Towards a Handbook on European Contract Law and Beyond: The Commission’s 2004 Communication “European Contract Law and the Revision of the *Acquis*: The Way Forward” Jens Karsten & Gösta Petri in JCP 2005 Volume 28; And “A European Contract Law, or an EU Contract Law Regulation for Consumers?” in JPC, Prof. Dr. Norbert Reich, not yet published.

⁴ On 21 June 2005, the Commission held a CFR-expert meeting on the definition of the notion of consumer. Chaired by Giuseppe Abbamonte, head of the unit responsible for the revision of the consumer law *acquis*, the link between these two processes came – for the first time – truly apparent. BEUC has been alarmed by the discussion that took place, in particular by the apparent willingness of the Commission to cut down the scope of application of consumer protection law.

⁵ COM (2005) 456, page 9 and 10.

⁶ Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - Consumer policy strategy 2002-2006, COM(2002) 208 final

The Commission's policy shift to full harmonisation applies both to "old" directives, but even more to new proposals, as recently the Unfair Commercial Practices Directive has shown. Unlike previous directives it has taken an approach to maximum harmonisation that will come into effect on 2011. Before that deadline, it is essential to review the operation and likely future impact of the move towards maximum harmonisation.

Some industries (but by no means all) argue that the minimum provisions of the current directives have hampered the ability to remove barriers to the internal market. However the question might be better put as to whether the current differences in fact represent such barriers and distortions of competition. Unless the answer is positive and is backed up with evidence, then one of the key benefits of harmonisation will not be achieved. For those that say that the effect of the minimal directives is to present a barrier to trade, we would ask them to produce the evidence. One should not disregard the fact that a directive aimed at maximum harmonization has in the final analysis only insignificantly less impact than a Regulation in its effect and especially in the intensity of its intervention in national legal systems.

In addition, the treaties only confer legislative power to the European legislators under certain conditions and to a limited extent according to the principles of subsidiarity and proportionality. We have therefore to examine to what extent the full or maximum harmonization of substantive law is required or whether the harmonization of private international law would be a sufficient tool in some cases.

CONSUMER PROTECTION - A BURDEN ON BUSINESS?

We have some doubts whether the questions asked by the Commission in its Communication 2004 aim at achieving a high level of consumer protection in the European Union. There are indications that the consumer law review is basically seen as an occasion to simplify the *acquis* with a priority of "better regulation" aspects. This could seriously jeopardize the maintenance of protection. In fact, the questions in Communication 2004 appear to be biased by plans of the Commission to put an end to red tape legislation. The regulatory framework in which businesses operate is a key determinant of their competitiveness, growth and employment performance. However, "less red tape means more growth" does not always come true if consumers are left without the adequate protection that fosters trust and confidence and consequently consumption. Fostering competition (and thus consumer choice) and the objective to seek a high level of consumer protection do go hand in hand. Thus, in the waxing and waning of deregulation and re-regulation, consumer protection should not fall short.

Since in the development of the CFR the transposition laws of Member States will also have to be scrutinized the consumer benefits of going beyond minimum clauses in directives will also need to be assessed. But it must also be assessed whether directives did not go far enough to achieve a high level of consumer protection.

Of course, some inconsistencies have arisen from differences in drafting and the elimination of such inconsistencies would make no significant difference. For example, the definitions of 'consumer' in the Sale of Goods and Guarantees Directive and the Unfair Terms Directive are differently worded although there seems to be no real difference between them⁷. This type of inconsistency is uncontroversial and its removal will only improve the efficacy of the legislation.

However, those who defend a high level of consumer protection will have to be vigilant, because the review of existing law risks culminating in the lowest common denominator.

⁷ Blair and Brent, A single European Law of Contract? Combar conference paper, Stockholm 2003.

SCOPE OF CONSUMER PROTECTION

Consumer policy is one of the few EU policy areas which are tangible in EU citizens every day life. The review of the consumer law acquis – linked to the development of a CFR – falls short when aiming at a more visionary scope of consumer protection.

In the context of the revision of the acquis and particularly in relation to the examination of the minimum/maximum harmonisation issue, we consider that unavoidably the question of the legal base for EC consumer protection policy must come into play.

For consumer protection, there are in principle two provisions relevant for consumer protection, Article 95 EC and Article 153 EC. The only directive, however, based on Article 153 EC (ex Article 129a EC) is the Unit Price Directive. Article 153(3)(a) EC foresees that regularly measures taken for the realization of the internal market according to Article 95 EC shall contribute to consumer protection in the Community. That puts the consumer in the context of the internal market. Article 95(3) EC obliges the Commission to take as a base a high level of protection, however, the wording does not require the Commission to pass a measure which is in compliance with the highest standard achieved in one of the Member States. While it nevertheless should prevent a “race to the bottom” of low protective standards, it can directly force a Member State to change national law that was meant to protect the consumer in particular through the use of minimum clauses in directives, and thereby reduce its protective standards. There is thus a considerable risk that certain measures may weaken the protective standards achieved in a respective country.⁸

We are worried that the present Article 153 EC does not provide for a strong and independent legal base for EC consumer policy.⁹ The reasons for our concern are as follows: On the one hand there is the Commission’s – in our opinion not plausible - radical policy shift towards maximum harmonisation, which is not at all reflected in Article 153 EC. On the other hand there is – since the Tobacco Case – a significant uncertainty in relation to the interpretation of Article 95 EC and its capacity to provide the base for minimum harmonisation measures, which so far has not been settled¹⁰.

Firstly, the Tobacco Case raises questions about the viability of Article 95 EC to develop consumer protection that is not demonstrably attached to the completion of the internal market. The European Court of Justice (ECJ) held that harmonization has clearly the effect of eliminating certain obstacles to trade which justifies the recourse to Article 95 EC as the legal basis. The Court yet made it clear that mere reference to the establishment and functioning of the internal market is not enough to justify the use of the Article 95 EC procedure; substantive reasons have to be given. Secondly, Article 95 EC has been lately interpreted by the Court to lead to the adoption of measures that exclude national competence to apply stricter rules of consumer protection (other than via the managed procedure set out in Articles 95(4) EC et seq.).

Although we have doubts that the Tobacco Case which dealt with health matters can be applied as such to consumer protection considering that there are crucial differences between Article 152 EC and Article 153 EC, a clarification is urgently needed. We therefore continue to support that a strengthening of the legal base for EU consumer protection is necessary, ideally through amendments in both relevant Treaty provisions, Article 95 EC and Article 153 EC.

⁸ This has been one of the reason for which Denmark and Sweden adopted a resolution on the Common Position on the Unfair Commercial Practice Directive opposing this legislative measure as it would considerably soften the protective standards already achieved in these countries, 11 April 2005, 2003/0134 (COD) 7860/05 ADD1. Another example is Directive 97/55 concerning misleading advertising in relation to comparative advertising. Directive 2000/31 on certain aspects of electronic commerce in the Internal Market serves as yet another example by acknowledging the “country of origin”-principle for e-commerce. That means that consumer law of the country of the seller or supplier applies on the consumer contract that falls under the scope of the directive.

⁹ See discussion in “EU Treaty Revision and Consumer Protection”, Hans-W. Micklitz, Norbert Reich and Stephen Weatherill in JCP Volume 27, 2004 pp. 367-399.

¹⁰ See for example the analyses by Stephen Weatherill and the conclusions drawn by the ECLG, in the ECLG report “Legal bases for EC consumer policy”, ECLG/036/05, February 2005, which can be found at: www.europeanconsumerlawgroup.org

Consumer policy is one of the few EU policy areas which are tangible in EU citizens every day life. As the Constitution apparently has failed its intention to bring the EU closer to citizens, consumer policy should become more important and standards of protection should go up, not down.

BEUC wishes to see a clear commitment to maintain the level of protection provided by the directives and increase protection where necessary. BEUC also wishes to see a creative and visionary scope of consumer protection policy.

The revision should by no means be abused as a tool to force Member States to undermine consumer protection standards attained through their lawful use of minimum clauses in directives. Any harmonisation would need to be an upwards measure as regards consumer protection, for example within the transport sector. The growth of e-commerce and the resulting increase in cross border trade has made such protection vital for the future of this nascent trading medium. It may even be necessary to continue harmonisation of substantive consumer protection law as conflict of law provisions do not necessarily provide sufficient consumer protection for 'active' or 'mobile' consumers.

PRELIMINARY COMMENTS ON THE NEED TO ENHANCE THE EXISTING CONSUMER LAW ACQUIS

The Commission will in particular examine whether the level of consumer protection is high enough to ensure consumer confidence. The answer to this first question set forth in Communication 2004 may very much depend on how the directives were implemented into national law and whether the Member States in question – as always promoted by the Commission in earlier years – considered higher consumer protection necessary to protect consumers adequately and to foster competition and a well-functioning market.

It goes without saying that the individual directives will merit more extensive comments at a later stage - after the stocktaking exercise of the Commission.

- **Sale of Goods & Guarantees Directive 99/44/EC**

While BEUC welcomed the directive at the time of adoption, important elements, such as the option to introduce an obligation for the consumer to notify the default or the lack of conformity within two months after having detected it, or the non-introduction of the producer liability remained disappointing. Regarding the changes brought about with this directive, a priori, the main point is the duration of the **legal guarantee period and the remedies regime**. In many Member States the **2 years guarantee period** has been an improvement, yet in other Member States the existing periods have been as long or longer even before the implementation of this directive. As the directive is a minimum harmonizing tool, there have been presumably no negative impacts of the directive in this respect, but only improvements. It seems to be evident that in those Member States where the directive brought about an increase of the guarantee period; this increase did not lead to an explosion of complaints – as often predicted by industry.¹¹ Regarding the **regime for remedies** it is much harder to tell what the concrete effects have been. According to Article 3 of the directive, the consumer has the choice in a first instance between repair and replacement, unless this is not possible or disproportionate. Again we do not have the necessary data available, yet it is clear that it is very difficult for a consumer to assess if a business who claims that the request for replacement would be disproportionate is right or not. BEUC has criticized recital 11 of the directive which provides for an indication of what might be considered to be "disproportionate", thereby only referring to the costs for the seller, and not taking into account the legitimate expectations of the consumer. The tendency might well be that industry applies the disproportional rule to their advantage. This should be examined by the Commission. Another area of concern is the application of the **six month presumption rule** (Article 3 para. 5 of the directive). It appears that sellers - after the six month period is over - are more restrictive in terms of what they request

¹¹ See ECLG report 020/2005 "Interim report on directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees", February 2005, which provides data for Denmark (the increase in cases brought before the consumer complaints board in 2003 made a difference of only 1, 5%).

as proof for the lack of conformity than they had been before the introduction of the directive¹². Finally, we would draw the Commission's attention again to the issue of the **joint and several liability of the seller and the producer**, an issue which the Commission is obliged to consider in the implementation report due next year. BEUC from the very beginning has argued in favour of the establishment of such a joint liability regime, as it could do a lot for the consumers in cross-border cases. By only providing liability for the seller, but not for the producer or his representative, the directive does not live up to the demands of the internal market and in particular it does not correspond to the consumers needs in new forms of commerce, such as e-commerce etc. The need for a joint liability is even more urgent, as the directive does not harmonize some very important practical aspects of a sale transaction, such as the question of who has to **pay for the transport** of the good in case it has to be sent back to the seller. We ask the Commission to take into account these aspects as well, when examining the situation.

- **Price Indication Directive 98/6/EC**

The benefits of unit pricing for consumers are obvious. In fact, it allows them to save money and not to be misled by certain types of packaging, while fostering competition at the same time. Such information system should be maintained and kept simple and understandable for consumers. BEUC has always supported a compulsory selling price and unit pricing for all products, with limited exemptions on the grounds of practical reasons, such as products sold in bulk for instance. These exemptions should be kept to a minimum, especially due to the growing trend of consumer cross-border shopping and cross-border advertising. Often, promotions are made with net prices adding additional 'fees' (taxes, fees for processing, electronic payment fees, security taxes, fuel taxes, etc) at the moment of confirmation or billing. In addition, the Commission should consider introducing unit pricing for certain services, such as mobile telecommunications and services of general interest and travel booking where more transparency is needed and where the economic interest of consumers is at peril. In some Member States national law already requires unit pricing for services but not always are these requirements adhered to by business.¹³ The exemption for small retail businesses should not be permanent and therefore such businesses should no longer be excluded from the scope of the directive. Furthermore, the directive should catch up with technological developments and new retail models and should therefore apply to Internet retail shopping or 'home shopping', where retail products can be bought online and delivered at home. New technologies make it also easy for business to indicate prices. BEUC awaits with interest the Commission's report on the application of the directive, and especially on Article 6, accompanied by a proposal.

- **Doorstep Selling Directive 85/577/EC**

The scope of application of the Doorstep Selling Directive needs to be broadened to reflect the actual changes in the direct selling business. The directive must encompass modern marketing tools and methods of approaching consumers and should include new potentially harmful methods that appeared on the market such as multilevel marketing (MLM) practices. The directive should also clearly condemn as illegal such trading schemes as it has been done in annex I of the Unfair Commercial Practices (UCP) Directive¹⁴. However, a clear legal framework with clear-cut criteria must be created for MLM practices within this specific directive. Accordingly, the role and protection of 'consumer/trader' will also need to be addressed. The cooling-off period and cancellation rights must be available to all consumers, irrespective of whether the trader's visit is unsolicited or solicited. In addition, more deterrent measures should be established to ensure that the trader respects the consumer's right to cancellation that – simultaneously - needs to be facilitated (model form for cancellation, reimbursement...).

- **Distance Selling Directive 97/7/EC**

The scope of application should be modified to be technologically neutral so that new and future commercial tools used in the distance selling business (digital TV, Internet, MMS, SMS, mobile phones...) are taken into account and should include expressively online auctions and online supermarket shopping. Furthermore, following the ECJ decision on online car rental (case C-336/03 easyCar) the inclusion of online car rental services should be re-considered. At this stage many consumers assume that travel

¹² See ECLG report 020/2005, Footnote 1, page 2.

¹³ See article « Suppléments de prix dans le transport aérien : trop de diversité, pas de transparence », 19 July 2005 at : <http://www.test-achats.be/map/src/356561.htm>

¹⁴ Directive 2005/29/EC on Unfair Commercial Practices.

bookings are included in the right of withdrawal – as they should be. Provisions on the costs for return of goods or advance payment need to be clear and should not unreasonably burden the consumer. The three main problems encountered by consumers in distance selling, i.e. lack of information, non delivery of the product ordered or delivery of a defective product and redress are paramount. The distinction between examination of the good and the right to compensation for use must be clarified. In the light of the Unfair Commercial Practices Directive, direct marketing that invites orders from minors should be explicitly outlawed. Given that reimbursement is one of the major cause of consumer dissatisfaction, the introduction of a genuine financial security for consumers and the ban of pre-payments of goods and services before the end of the cooling-off period should be envisioned.

- **Unfair Terms Directive 93/13/EEC**

The annex of unfair terms needs to be revised both as to its effectiveness in the light of new business models as well as to its indicative character. It will be crucial to evaluate higher standards in Member States on which the revision could and should be based. In the light of the ECJ judgment *Codfis C-472/00* where the judge held that contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party, particularly in the transport area, shall not be subject to the provisions of this Directive, must be examined.

- **Timeshare Directive 94/47/EC**

The directive has clearly failed to offer a sufficient level of protection to consumers. While fraud is widespread¹⁵ the market of timeshare has evolved very rapidly overriding the scope of the directive by new forms of “timeshare”. The issues that the future directive should deal with are, among others: (i) the nature of timeshare and the scope of the directive including contracts of less than three years and practices such as points club, holiday clubs¹⁶ and resale¹⁷, (ii) access to the profession of timeshare selling through an accreditation system accompanied by financial protection to consumers, i.e. an insurance scheme, which insures the execution by the vendor of all its contractual obligations; (iii) a secure system of payments to enable the consumer to recover the amounts already paid under specific circumstances (fraud, misrepresentation, breach of contract¹⁸), (iv) the practice of automatic “repossession” of the timeshare rights in case the buyer fails to pay or delays the payment for whatever reason¹⁹, (v) an obligation of taking out insurance up to an amount sufficient to cover the eventual insolvency of the company, (vi) joint and strict liability vis-à-vis the consumer.²⁰

- **Package Travel Directive 90/314/EEC**

Over the last 10 or 15 years, the market of tourism and accommodation has significantly changed and evolved, also following consumer trends and attitudes. For instance, the market offers now the possibility for the consumer to book holidays through the Internet and to put together a package by him or herself. The directive should therefore be amended and improved as regards: (i) the scope of the directive (extending the definition to situations where only one tourist service is bought (only accommodation or

¹⁵ The total consumer fraud each year is estimated at 500M Euro, or 20% of the gross domestic product of the Industry (for instance cash-back scam, upgrade scam, resale scam...). In particular resale scams are increasing as most owners find it difficult to get out of their timeshare without being swindled by dishonest traders (See Report of Timeshare Consumers Association, 2004).

¹⁶ The general view is that holiday clubs were invented to circumvent the provisions of the directive, in particular the provisions regarding the banning to take a deposit and the requirement to provide a cooling-off period.

¹⁷ Audiencia Provincial de Málaga, Spain, sec 4°, S24-2-2004, rec. 615/2003

¹⁸ In the UK, if the consumer proves any of these, he /she has the right to recover the sums paid from credit card companies. But the system does not apply outside this country.

¹⁹ Most timeshare contracts contain unfair contract terms that deprive the buyer of his/her rights, including all the sums already paid, should he/she fail to make one payment on time (for instance the annual charges).

²⁰ Usually the consumer has to deal with at least 8 separate entities: an enticer, an enticement provider who is supposed to deliver the enticement (“free” holiday etc), a marketer, a provider (usually the developer), a trustee, a management company, a club and a resale broker. Since the developer usually subcontracts a number of services to marketers, intermediaries or agents, those should also be liable vis-à-vis the consumer, Audiencia Provincial de Sta Cruz de Tenerife, sec. 4°, S 12-7-2004, n° 310/2004.

only a flight) and to packages that have not been pre-arranged²¹ or arranged by a travel agency at the request of the consumer²²), (ii) contractual conditions (definition of “reasonable notice”, easy transferability of packages), (iii) joint liability regime of the tour operator and the travel agency (considering that the latter has always the possibility to have recourse against the tour operator or vice-versa), (iv) compensation when the cancellation is on grounds of the insufficient number of travellers contracting the package and, in line with the jurisprudence of the ECJ²³, the express compensations for non-material damages, (vi) insolvency and bankruptcy (a harmonized guarantee scheme at EU level²⁴, insurance against bankruptcy for travel agencies), and (vii) other liabilities according to current ECJ case law²⁵. Overall more detailed provisions regarding the handling of consumer complaints must be included in the revision of the directive. The revised directive should compel the organizer to inform consumers about ways of redress, either judicial or extra-judicial (ADR).

EFFECTIVENESS NEEDS ENFORCEMENT

A final answer as to whether the directives are applied effectively naturally needs to await the stocktaking exercise of the Commission. However, repeated infringement procedure for late or insufficient implementation show that Member States often lack the care to implement directive in time or according to the standards set forth in the specific directives. We therefore welcome the Commission’s expressed intention to closely monitor and control the proper implementation of the Unfair Commercial Practise Directive at an early stage.

As a whole a stricter control from the Commission over enforcement bodies whose creation and composition is left to the discretion of Member States is desirable (in some cases the necessary independence of those bodies is called into question).

The directives leave it entirely to the Member States how to enforce the directives. The effectiveness of a directive may, however, depend largely on the fines, penalties and sanctions national law offers to ensure compliance with the provisions. Strict fines, withdrawal of their operation permit for a certain period of time, and public naming should be provided on a European-wide basis.

The **Injunctions Directive** represents an improvement towards proper enforcement. It allows “community qualified entities” to take action in the courts of the other Member States. We understand that the order only applies to the company’s operation of the illegal practise into the destination country: it leaves it free to carry out the same rip-off into other Member States²⁶. It is also free to switch its operation to a third Member States and then continue to target consumers of the initial destination country. Indeed, in theory at least, 25 national enforcement bodies could need to bring actions in the courts of 24 other Member States – 600 in all - to deal with a single EU-wide scam. There is a serious imbalance here: while mutual recognition enables legitimate commercial practices to take place in any Member State, action against practices in breach of EU consumer protection law still has to be dealt with on a State-by-State basis.

²¹ In order to escape the application of the directive, some organizers put together a combination only after the order is made and not in advance.

²² C-400/00, Club Tour v. Garrido: 2. “... the definition of package referred to in Article 2(1) of Directive 90/314 on package travel, package holidays and package tours includes holidays organized in accordance with the consumer's specifications, the term pre-arranged combination used in that provision necessarily covers cases where the combination of tourist services is the result of the wishes expressed by the consumer up to the moment when the parties reach an agreement and conclude the contract. The term pre-arranged combination used in Article 2(1) of Directive 90/314 must be interpreted so as include combinations of tourist services put together at the time when the contract is concluded between the travel agency and the consumer”.

²³ C-168/2000, Leitner.

²⁴ The EU guarantee scheme should be regulated in detail including, for example, the percentage of the turnover of the tour operator that should be covered by insurance. It should emulate current best practices in MS like the UK (25%) and the Czech Republic (30%).

²⁵ ECJ, C-364/96, VIK vs Osterreichische Kreditversicherung. For instance, Greece and Portugal provide in their respective legislations transposing the directive, that article 7 applies to all the vendor’s contractual obligations.

²⁶ This point has been illustrated in a recent case taken by the OFT before the Brussels Commercial Court against Duchesne SA in relation to unsolicited mailings concerning a prize draw; OFT press release 63/04, 5 April 2004.

Also, it only allows for an act or infringement to be brought to an end, but it does not allow for recovery of damages suffered by consumers individually.

In some Member States, public bodies are empowered to enforce consumer law. But there are no such public bodies in other Member States and cases, where they are pursued, are taken by private consumer groups or self-regulatory trade organizations. The problems raised by this will be most acutely felt in cross border cases. The **Enforcement Co-operation Regulation**²⁷ will of course assist in enabling enforcement bodies to take more concerted action. It may also be that this problem can be addressed through the recognition of judgment orders, particularly if an injunction in one Member State were to apply automatically in all Member States.

The **ECC-net** (European Consumer Centres Network), which aims to help consumers solve cross-border disputes, is still at a quite early stage but dealing with a growing number of complaints. However, the fact that there is not at the moment a binding legal framework for Alternative Dispute Resolution (ADR) bodies across the EU undermines the effectiveness of cross-border out-of court dispute resolution.

Private enforcement of consumer rights is still at its infancy although the value of rights conferred to consumers in the current *acquis* depends to a large extent on the existence of an enforcement system that can discourage businesses from acting against the law. **Class actions** do not exist in all Member States although any failure from the business side to comply with the contractual conditions may for example concern a large number of consumers, each one affected at a small scale. This relatively new situation does represent a challenge for the existing system of enforcement based on individual law-suits and certainly calls for its revision to bring it in line with the realities of modern society. According to a recent Eurobarometer survey, 67% of European Union citizens would be more willing to defend their rights before a court if they could join with other consumers who complain about the same issue.²⁸ In addition, the fact that dishonest businesses are left unpunished or are not prosecuted is to the detriment of the healthiness of the market as a whole and leads ultimately to distortions of competition. Collective actions²⁹ are particularly suitable to obtain compensation for damages that concern a large number of consumers but that, if handled individually, would never be brought to courts by the victim. In this regard collective actions come in to bridge the gap between the recognition of individual rights and the effective possibility of enforcing those rights. We believe that a class action system at EU level should be established.³⁰

The most effective way to ensure that directives are enforced and applied is to ensure that enforcers can rely on the cooperation of their counterparts in other Member States. This process could be encouraged by an “European Enforcement Agency” probably within the new Executive Agency for Consumer Policy (and health). Such an agency or unit could help to provide a more strategic approach to EU enforcement generally. It could complement (but not replace) national enforcement bodies: indeed, it would be essential that a European agency did not in any way constrain the ability of national enforcement bodies to act rapidly and independently. It could also take on the co-ordination role to be undertaken by the committee under the enforcement co-operation regulation.

END

²⁷ Council Regulation 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation).

²⁸ Eurobarometer survey – European Union Citizens and Access to Justice, October 2004, p.36.

²⁹ The concept of collective action generally refers to the various forms of judicial action that differ from the traditionally two-party lawsuit and permit the defence of interests others than the interests of the parties in court.

³⁰ Different collective actions systems already exist in European countries (for instance in Sweden, Portugal or Italy). However in many countries the different restrictions and conditions under which collective actions are allowed prevent consumers from fully taking advantage of potential positive effects. In general the plaintiff has to prove a direct interest in the action and often consumers’ organizations cannot submit a case without being accompanied by some consumers that have suffered direct damage.