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Unfair Commercial Practice

A comparison between European Directives and Swedish Legislation

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Abstract

In the ongoing work to harmonize legislation throughout the European Union the focus is now set on protecting the weaker party in a contractual agreement. With the increased cross-border trade the consumers rights are put to risk due to different national rules throughout the Member States. Consumers that are not familiar with the legislations in other Member States will choose to shop locally so as to prevent any problems arising from cross-border purchases.

A consumer is to some extent protected under national law but the question becomes one of whether the same rules can be applied throughout the whole of the European Union. One of the main scopes of the European Union is the free movement of goods and services which aims to remove the national barriers that prevent cross-border trade between a businessman and a consumer.

Several Directives outline the importance to protect the right of the consumer and to prevent unfair terms in contractual agreements. There are still inconsistencies in the regulatory framework even though efforts to harmonize the rules within the European Union started a long time ago.

Abbreviations

ARN	the National Board for Consumer Complaints
COM	Communication from the Commission of the European Communities
Council	Council of the European Communities
EC	European Community
ECC-Net	European Consumer Centre Network
ECJ	European Court of Justice
EC-Law	European Community Law
EU	European Union
MD	Market Court
Prop.	Proposition
SKR	Swedish Krona
SOU	Statens Offentliga Utredningar
Treaty	Treaty of the European Community
UCPD	Unfair Commercial Practice Directive

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ANNEX I

1 Introduction

In 2005, for the third year in a row, Swedish consumers reported the most complaints and disputes against other foreign web traders stated in a summary and analysis of consumer complaints reported to the European Consumer Centre Network (hereinafter ECC-Net).¹ Due to a series of different factors e.g. Sweden has a population of 9 million people (July 2006 est.) of which 6.8 million of them are Internet users (2005)² and that the general price level is high in Sweden compared to the rest of the European Union (hereinafter the EU) inspires the Swedish consumers to look for foreign suppliers. A high level of cross-border transactions could explain the number of complaints and disputes.

The Swedish structure, with its extensive consumer protection (e.g. The Consumer Agency, The National Board for Consumer Complaints and the local Municipal Consumer Advisers) could, according to the aforementioned study, be a contributing factor to most cross-border complaints and disputes.³ One of the main objectives for the EU is to create an internal market and the Scope of the Consumer Policy within the EU is to ensure a high level of protection.⁴ Consumers should be protected from abusive practices as stated in EU Directive 2005/29/EC. Barriers preventing cross-border trade shall be removed so a consumer can enjoy and explore “the greater choice, lower prices, and the affordability and availability of essential services”.⁵

The EU has addressed the need for legislative actions to avoid future distortion of the internal market by initiating the so called “Consumer Policy Strategy 2000-2006”⁶ One of the three objectives in this policy strategy being the importance of “a high common level of consumer protection” which was followed up by a Green Paper on EU Consumer Protection (e.g. Protection in the Internal Market and Future Directions, in October 2001).⁷ The works to harmonize the main objectives are in motion and involve about 20 Community Directives in addition to EU Case Law and the different rules of the Member States.⁸

¹ ECC-Net Study, 2005, page 19 f.

² Information from the World Fact Book, 2006: <https://www.cia.gov/cia/publications/factbook/index.html>

³ ECC-Net Study, 2005, page 19

⁴ Article 153, EC Treaty

⁵ COM (2002) 208 final, chapter 2.1, page 6 f.

⁶ See aforementioned Communication

⁷ COM (2001) 351 final

⁸ COM (2002) 289 final, Follow-up Communication to the Green Paper on EU Consumer Protection

1.2 Purpose and Questions of Research

One of the most important aspects of the European Treaty is the Freedom to Provide Services and the Free Movement of Goods. This paper aims to outline the regulations in the European Community (hereinafter the EC) that concern Unfair Commercial Practices. Furthermore, the Swedish legislation in this paper will be used to exemplify the inconsistency of regulations concerning Consumer Protection. The objective in this paper is to answer following questions:

1. Has Sweden made any effort to increase its Consumer Protection?
2. Can Swedish Consumers exercise the same rights in cross-border trade?

1.3 Delimitations

With the lack of relevant literature and case law from Directive 2005/29/EC concerning Consumer Protection in the EU this paper is delimited to the two original Directives concerning Consumer Protection in a contractual agreement from 1993 and 1997. The procedural process, the question of applicable law and e-commerce is not to be discussed in this paper. Other Member States rules have been examined lightly but are not discussed fully due to the breadth of this paper.

1.4 Method

In order to answer the proposed questions, I have used a traditional legal method meaning that I have studied the Treaty, Directives and proposals of both, Commission reports as well as other sources from the European Community. Additionally, since the regulatory framework has proven insufficient, the European Court of Justice has some case law relevant to this study. In conjunction to this, national Swedish case law has been examined too.

1.5 Outline

This paper is to be outlined as follows:

The first section of the paper, chapter I, will be the introduction. Chapter II will explain the European framework and its purpose will be to elucidate the law in practice within the EC. This will be conducted by examining the Directives and proposals regarding unfair commercial practice. In addition, European case law will be examined thoroughly. Chapter III will address the Swedish framework and will outline the background for the questions of research.

In chapter IV an analysis will be made as to whether the European efforts are beneficial to the Swedish consumer. In this last chapter, the questions set forth in this paper will be answered.

2 European Framework

In the 1960's the first legal acts were enacted in various parts of Europe with the sole purpose of protecting the weaker party in contractual agreements, the consumer. At this time, the EC started to acknowledge these protection issues. Since this period, the EC and later the EU has become a prominent developer of consumer protection legislation.⁹ It is not an exaggeration to say that this development constitutes a prominent part of the harmonization process regarding private law in Europe. This initiative is a long standing project which is focused on making consumer protection more coherent. The Commission is thinking of a 'soft law' instrument: a common frame of reference, also described as a toolbox which will contain coherent definitions for several sectoral instruments. The project finds its origin in consumer law and the Common Framework of Reference will go hand in hand with the review of the EU consumer protection legislation.¹⁰

2.1 The European Community Treaty

Sweden became an EU member on January 1, 1995 and has since been subject to European Community law (hereinafter EC- law). The fundamental thought of the EC is to have a unified internal market wherein goods, persons, services and capital can freely move across the national borders within the EC. Any obstacles in fields such as competition, establishment, providing and receiving the freedoms, are aimed to be overcome. In this chapter, I will put emphasis on the European case law as it is the single most important source of law regarding consumer protection

There are only a few references found in the Treaty of the European Community from 2001 (hereinafter the Treaty) concerning protection of the consumer.

Article 153 (ex Article 129a based on Directive on *price labeling of products offered to consumers*¹¹) in the Treaty provides that the EC must "ensure a high level" of consumer protection. Furthermore, the EC shall "contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests."¹² To maintain the same level of protection within the EU, the EC shall according to Article 153(3)

⁹ Acknowledgement found in Directives e.g. Council Directive 85/577/EEC, Council Directive 87/02/EEC, amended in Council Directive 90/88/EEC, Council Directive 93/13/EEC etc.

¹⁰ More information about European Contract Law is found at:

<http://www.europa.eu/scadplus/leg/en/lvb/l33158.htm>

¹¹ Directive 79/112/EEC

¹² Art 153(1) EC Treaty

“contribute to the attainment of the objectives referred to in paragraph 1 through /.../ measures adopted pursuant to Article 95 in the context of the completion of the internal market.”¹³

The 1984 Directive on *misleading advertising*¹⁴ and the 1997 Directive on *the protection of consumers in respect of contracts negotiated at a distance*¹⁵ were both based on Article 100a which is now Article 95.

Article 95 regarding harmonization¹⁶ throughout the Member states, provides that the Council of the European Communities (hereinafter the Council) shall “adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”¹⁷

2.2 The Four Freedoms

The European Court of Justice (hereinafter ECJ) often refers to the fundamental four freedoms of EC-law¹⁸. The interpretation of the four freedoms constitutes an important role, as the Treaty has many loopholes.¹⁹ In order to understand the case law presented later in this chapter, the basic and most relevant of the four freedoms will be outlined. The four freedoms derived from the Treaty are the free movement of goods and services, freedom of establishment, free movement of persons and free movement of capital.

The free movement of goods and services is one of the cornerstones of the internal market in the EU. This principle aims to remove the national barrier concerning the movement of goods within the Member States. Difficulties enforcing cross-border cases undermine the confidence of the consumer in making cross-border purchases. The goal is to maintain quality and consistency when enforcing cross-border legislation meant to protect the consumer. To achieve that goal harmonization of the free movement of goods and services principle within the EU is required. Skeptics claim that a harmonization “would result in an increase in fragmentation of the internal market” and instead suggests more “simplified existing rules”.²⁰ The ECJ stated in *Alpine Investment*²¹ that the Consumer Protection is best regulated in the Member State where the business is located rather than the Member State where the consumer may be located.

¹³ Article 153(3) EC Treaty

¹⁴ Directive 84/450/EEC

¹⁵ Directive 97/7/EC

¹⁶ The process by which different Member States adopt the same laws throughout the EU

¹⁷ Article 95 p. 1 EC Treaty

¹⁸ http://curia.europa.eu/en/instit/presentationfr/index_cje.htm

¹⁹ See Case 120/78 *Cassis de Dijon*, C-19/92 *Kraus*, C-415-93 *Bosman*

²⁰ COM (2002) 289 final, Section 1(13)

²¹ Opinion of Advocate General Jacobs in *Alpine Investments BV v Minister van Financien*, C-384/93

2.3 Directive 2005/29EC

In order to simplify existing rules knowledge about the Directives from the EC is required. Due to the lack of relevant case law and literature concerning Directive 2005/29/EC²² this section will mainly elucidate the relevant sections of two previous Directives that aim to protect the consumer.

Directive 2005/29/EC is also known as the Unfair Commercial Practice Directive (hereinafter UCPD) and aims to clarify the consumers right in cross-border trade. With a harmonization of the Consumer Protection within the EU the UCPD can help to increase the cross-border trade between a businessman and a consumer. Certain practices such as pressure selling, misleading marketing and unfair advertising should be prohibited all over the EU. Both consumers and businesses will benefit in the clarification and harmonization of the rules.²³

The goal of the Directive is twofold; to harmonize the existing- and diverging national rules on unfair commercial practices so as to improve the smooth and agile functioning of the European internal market in goods and services and to achieve a high level of consumer protection in comparison with commercial practices by companies capable of harming the economical interests of consumers.²⁴

In the process to harmonize, the Member States must adopt the rules set in the European legislation to ensure a higher standard within the EU.

According to Article 19 the Member States must pass laws no later than June 12, 2007 and implement them into national law by December 12, 2007.

2.3.1 Directive 93/13/EEC

The purpose of Directive 93/13/EEC, according to Article 1(1), is to prevent “unfair terms in contracts concluded between a seller or supplier and a consumer”. Furthermore, according to Article 3(1), a contractual term that has not been “individually negotiated” is to be regarded as unfair. Unfair terms are defined as “limiting the legal rights of the consumer” or “obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his”.²⁵ Article 3(2) section 3 provides that if the contract concerns “standard terms” and the seller claims that it has been “individually negotiated”, the burden of proof is on the seller. Below is the most relevant Article in Directive 93/13/EEC for understanding the following case law.

To ensure the consumers protection in a contractual obligation Article 6(1) of the aforementioned Directive provides that unfair terms in a contractual agreement between a seller and a consumer shall “not be binding on the consumer”. Article 6(2) provides that it is the Member States responsibility to ensure that “the consumer does not lose the

²² Directive 2005/29/EC concerns unfair business-to-consumer commercial practices in the internal market and amends Directives 97/7/EC and 2002/65/EC.

²³ Ibid.

²⁴ Article 1 2005/29/EC

²⁵ See Annex, Directive 93/13/EEC for more definitions on “unfair terms”

protection granted by this Directive”. A Member State therefore has to implement the aforementioned Directive to make sure that the consumer can exercise his or her rights in a contractual agreement.

2.3.2 Directives 2002/65/EC (97/7/EC)

The UCPD amends Directive 2002/65/EC and Directive 97/7/EC which concerns the protection of consumers with respect to distance contracts. The definition of a ‘distance contract’ is “any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract, makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded”.²⁶ Directive 97/7/EC aims to help consumers in cross-border trading and to strengthen the consumer protection within the EU. The Directive on unfair commercial practice presents new “sharp practices” which will prohibit actions like pressure selling, misleading marketing and unfair advertising, the consumer will receive the same protection whether they buy locally or from another Member State.²⁷ The aforementioned Directive is a Minimal Directive, i.e. it shall establish a “minimum protection requirement” in the Member States that is valid throughout the Internal Market.²⁸ Below are Articles of the Directive 97/7/EC that concerns Consumer Protection most relevant to this paper.

Duty to Inform

In a distant sales agreement the seller shall, according to Article 5(1) of Directive 97/7/EC, “communicate to the consumer of all the contractual terms and conditions and the information /.../ on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer given by the consumer” e.g. the existence of a right of withdrawal.²⁹ The information must be provided in a “clear and comprehensive manner” to the consumer.³⁰ This information is comparable with the information the consumer would have access to in a direct sale situation, such as the characteristics of the goods or service. In some Member States such as the Czech Republic only the identity and location is required in writing from the seller.³¹

The term ‘durable medium’ is still not used consistently in the Member States whereas “Italy has avoided interpretation problems by introducing stricter rules i.e. confirmation

²⁶ Article 2(a) 2002/65/EC

²⁷ http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/index_en.htm

²⁸ More information is to be found at The EU Information Centre, Swedish Parliament, http://www.eu-upplysningen.se/templates/EUU/standardRightMenuTemplate____1784.aspx

²⁹ For an exhaustive list, see Article 4(1a-i) 97/7/EC and Article 3(1a-e) 2002/65/EC

³⁰ Article 4(2) 97/7/EC

³¹ COM(2006) 514 final, p. 9

can only be given in another durable medium if the consumer so chooses.”³² Lithuania, Czech Republic, Slovakia and Poland have opted not to refer to the term ‘durable medium’ in their interpretation.

Furthermore, the seller must, according to Article 5(1), provide the consumer with written information about how to exercise the right of withdrawal, a geographical address to where the consumer can send possible complaints, information about possible after-sales services and available guarantees and, finally, how to cancel the contract.

Cooling-off Period

In addition to the information from the seller, a consumer is according to Article 6(1) of the aforementioned Directive entitled to “a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason” (i.e. a Cooling-off Period). The Cooling-off Period is different throughout the Member States and most of the Member States use seven days as a Cooling-off Period. Austria has seven working days but expressly excludes Saturday. France has seven working days but the term “jours francs” (eng. money day) is, according to the EU, in need of clarification. Greece, Italy and Poland all have ten working days. Only Latvia has extended the Cooling-off Period to a minimum of 14 days.³³

A consumer that exercises the right of withdrawal shall not suffer any consequences due to his or her action and shall be refunded of the amount in question as soon as possible whereas “the only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods”³⁴ Not all of the Member States such as the Czech Republic have transposed Article 6(2) and Germany and Lithuania have not, according to the COM “referred to the time limit for refund”.³⁵

Note that not all purchases automatically comes with a Cooling-off Period and Article 6(3) provides a list of restrictions to the consumer’s right to exercise the right of withdrawal. Some of these restrictions are listed below:

- The performance of the service in question has already begun with the consumer’s approval.
- A financial market fluctuation influences the price beyond the seller’s control.
- Goods are made according to the consumer’s specification and therefore cannot be returned due to agreement between seller and consumer.
- Computer programs and audio/video products with a manufacturing seal cannot be returned if the consumer has broken the seal.
- The goods are newspapers or magazines.
- The service concerns gaming or lottery services.

³² Ibid.

³³ Aforementioned Communication, Annex IV, p. 19

³⁴ Article 6(2) 97/7/EC

³⁵ COM(2006) 514 final, p. 10

These exemptions are the same throughout the EU but some clarification is still needed. Spain, Italy and Poland have a wider definition of the fourth exemption concerning 'Computer programs' than the Directive allows.³⁶ The interpretations of these exemptions are not consistent throughout the EU. "In Belgium, the exemptions do not apply where a supplier has failed to mention in the course of providing prior information that the right of withdrawal does not exist whereas in Denmark the exemption for newspapers only applies in given circumstances."³⁷

Performance

The consumer is, according to Article 7 in the aforementioned Directive, protected against unreasonable delivery delays (i.e. delays caused by the seller or delays that a seller could foresee). Article 7(1) provides that unless "agreed otherwise, the supplier must execute the order within a maximum of 30 days" from the day when a consumer's order reaches the supplier. If the supplier fails to perform, Article 7(2) provides that "the consumer must be informed of this situation and must be able to obtain a refund of any sums he has paid as soon as possible and within 30 days". When a seller either fails or neglects any of these above-mentioned rules, a municipal consumer ombudsman can aid the consumer at risk.

There are also inconsistencies in the Directive 2005/29/EC especially in Article 7. Article 7 refers to "days" whereas Article 6 refers to "working days". The start of the Period is specified in Article 7(1) "from the days following the order". The legislation regarding performance time have been interpreted differently and some Member States, such as Greece, Latvia, Austria and the United Kingdom have, according to the COM, "interpreted the timing requirement as applying only to the refund".³⁸ Finland, Slovenia and Slovakia have, according to the COM, "tightened all or some of the time requirements". France and Denmark "impose a financial penalty in the form of interest".³⁹

Article 7(3) of the aforementioned Directive states that a consumer must be informed in a "clear and comprehensible manner" in regard the possibility to be provided with replacement of goods or services from the seller. According to COM (2006) 514 final, Italy has no reference to the aforementioned term and Estonia avoided the problem by "incorporating this information requirement to the provisions transposing Articles 4 and 5."⁴⁰ (Refer to above-mentioned section on 'duty to inform').

³⁶ COM(2006) 514 final, p. 10

³⁷ Aforementioned Communication, p. 11

³⁸ Aforementioned Communication, p. 11.

³⁹ Ibid.

⁴⁰ Ibid.

2.4 Consumer Protection Organizations

Although this paper is not the place to discuss the work of Consumer Organizations, the Member States responsibility towards a consumer is important, as provided in Article 7(1) in the aforementioned Directive, where the goal is to “prevent the continued use of unfair terms in contracts” between sellers and consumers. Furthermore, Article 7(2) states that specific organizations, one of them being the ECC-Net⁴¹, that have “a legitimate interest /.../ in protecting consumers”, shall be given authority to apply “appropriate and effective measures” to stop the continuation of unfair terms in consumer contracts. The ECC-Net exists in 26 countries in Europe and helps consumers with their rights in contractual agreements.⁴²

2.5 European Case Law on Unfair Commercial Practice

C-168/05 Mostaza Claro v Centro Movil Milenium

This case concerns a Spanish woman that signed a cell phone subscribers agreement. Included in the standard-form contract was an arbitration clause and when the Spanish woman did not meet the minimum period of commitment the telephone operator initiated an arbitration proceeding.

The Spanish woman defended herself without claiming the arbitration clause void which resulted in her losing the case. She instituted a proceeding against the arbitration and claimed that the arbitration clause was unreasonable and therefore void. The Spanish Court established that the arbitration contract was without doubt unreasonable due to the clause. Due to negligence from the woman’s side (she did not claim the invalidity during the arbitration), the Spanish Court could not lift the arbitration sentence. They, in turn, sought out the ECJ to ask if that kind of qualification was given through the Directive 93/13/EEC concerning unfair terms in consumer contracts.

The ECJ stated in C-126/97 *Eco Swiss*⁴³ that a Member State has the right of self-determination in procedural questions as long as the equivalence principle and the efficiency principle are considered. The protective norm behind the aforementioned Directive is based on the fact that the consumer is in an inferior position to that of the businessman. The uneven situation can only be counterbalanced through an actual intervention from someone else aside from the contractual parties.

The possibility for the courts to ex officio examine if the contractual terms are unfair has been considered necessary to ensure a high level of protection for the consumer. The consumer protection comprises cases where a consumer fails to invoke that a term is unfair due to the lack of knowledge of his or her rights or see the costs of a legal action as deterrent. If a court cannot try the invalidity of an arbitration clause

⁴¹ See http://ec.europa.eu/consumers/redress/ecc_network/ecc_network_centers.pdf for a list of Consumer Organizations within the EU

⁴² For more information about the ECC-Net see http://ec.europa.eu/consumers/redress/ecc_network/index_en.htm

⁴³ Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 35 and 37

considering the consumer did not claim the invalidity during the arbitration proceedings, the aims of the Directive would not be reached and the protective system would become undermined. If a national court, according to the internal rules, sustains a claim to lift the arbitration due to a postponed reason of the national legal system, it shall sustain a claim based on a postponed unified regulation of this kind.

Directive 93/13/EEC provides that unfair terms in consumer contracts are not binding to the consumer. This is a peremptory legal rule with the purpose to replace the formal counterbalance between the rights of the party and the obligations of the contract, with a realistic counterbalance so the parties become equal. Creating a Directive that aims to enhance the consumers protection is an excellent way to raise the standard of living and quality of life within the European Community (states the ECJ). Furthermore, the ECJ expresses that:

“The nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier”.

C-237/02 Freiburger v Hofstetter

A municipal construction company, Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG (hereinafter Freiburger Kommunalbauten), sold a parking space to Mr. and Mrs. Hofstetter in a car park that Freiburger Kommunalbauten was to build. Under a clause included in the contract, the whole of the price was due upon delivery of a bank guarantee by the contractor. In the event of a delayed payment, the consumer was liable to pay default interest. In addition, the guarantor undertook to any guarantee claims Mr. and Mrs. Hofstetter might emphasize against Freiburger Kommunalbauten for repayment of the purchase price.

Mr. and Mrs. Hofstetter repudiated the payment and claimed that the clause requiring the whole payment was not consistent with Paragraph 9 of the Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen (Law on standard business terms) that stated:

“Provisions in standard business terms are invalid if, contrary to the requirement of good faith, they place the contractual partner of the user at an unreasonable disadvantage”.

In addition to the above-mentioned, Section 641 of the Bürgerliches Gesetzbuch (German civil code) stated:

“In non-mandatory terms, a rule relating to the circumstances in which payment may be demanded; payment is due upon acceptance of the work.”

Freiburger Kommunalbauten claimed default interest for late payment. The Regional Court sustained the claim whereas the Higher Regional Court dismissed the claim. The German Supreme Court turned to the ECJ for a preliminary ruling.

Freiburger Kommunalbauten submitted that the disputed clause was not unfair whereas

“the disadvantages to which a consumer might be exposed as a result of the obligation to pay the price before performance of the contract are counterbalanced by the bank guarantee provided by the builder”.

Mr. and Mrs. Hofstetter submitted that the disputed clause was unfair according to the rules under Annex of Directive 93/13/EEC and added that “the clause is highly unusual, that it is unclear and that it was imposed by a builder who was in a monopoly situation.”

The ECJ stated that the Annex of Directive 93/13/EEC contained a non-exhaustive list of terms that *may be* regarded as unfair. Furthermore a term on that list “need not necessarily be considered unfair” and a term not featured on that list “may none the less be regarded as unfair” as previously stated in *Commission v Sweden*.⁴⁴

Therefore it is up to the National Court to decide whether the contractual term is to be regarded as unfair under Article 3(1) of Directive 93/13/EEC. Although the Court may interpret general criteria in Community legislation to define the concept of unfair terms, the Court shall consider the matter “in the light of the particular circumstances of the case in question.”⁴⁵

In addition, the terms of the Directive are not to be construed in a common way all through the EU; only the decision regarding an individual clause is to be decided by the Court in a Member State.

2.6 Summary

The European Union was created to further prosperity and to maintain peace in Europe. One of its most important purposes is to unify legislation and provisions within the Member States to aid consumers and business’ objectives. The principle of free movement of goods and services aims to remove any barrier within the Member States and to facilitate cross-border trade. In the work to harmonize Consumer Protection in the EU each Member State has to implement Directives by the EC to “ensure a high level” of protection as stated in Article 153 of the Treaty. There are many mandatory rules in the Directives such as the obligation of a seller to inform the consumer before and after entering a contract. The consumer also has the right to claim damage due to a sellers lack of performance.

Basically, the aim is to make sure that a consumer has the same rights nationally and internationally. Nevertheless it is up to the Member State to implement the Directives to protect a consumers right in a contractual agreement as well as to individually try the terms in a consumer contract.

⁴⁴ Case C-478/99 *Commission v Sweden* [2002] ECR I4147, paragraph 20

⁴⁵ See paragraph 22, 25

3 Swedish Framework

Consumer protection in contractual obligations became of interest in Sweden during the 1970's. The motivation to protect consumers has varied throughout time. The preliminary work of the 1971 Door-to-door Sales Act, which was one of the first Swedish civil laws aimed for consumer protection, stated that a consumer purchase made in a store was assumed to be an initiative from the consumer and that the consumer had the funds to finance the purchase whereas a Door-to-Door Sale puts the consumer in an inferior position and the salesman has the advantage to persuade the consumer into buying a product. The consumers ability to judge the salesman's details and arguments with a critical eye was reduced.⁴⁶ In 1972 an investigation confirmed the lack of consumer protection in the 1905 Sale of Goods Act. This motivated the introduction of mandatory rules to benefit the consumer which resulted in the 1973 Consumer Sales Act. Legislation was considered necessary due to the apparent inferior position of the consumer. According to the preliminary work, the consumer was considered "unable to invoke civil rights".⁴⁷ Presently Sweden has extensive consumer protection in the majority of the legislation regarding business to consumer sales and services. Although Sweden is well equipped to protect consumers, there is still more work to be done to ensure that the Swedish consumer has a stronger position against unfair terms and business tactics as presented below.

3.1 National Legislation

Sweden has a lot of legislation with the sole purpose of protecting the consumer.⁴⁸ In this chapter I will look at consumer protection through the legislation currently in action throughout Sweden relevant to this subject.

3.1.1 Distant Sales and Door-to-Door Sales Act

The Distant Sales and Door-to-Door Sales Act from 2005 covers goods or services that are sold from a distance whether it is sold over the phone, on the Internet, by mail order or at the consumers home. Chapter two of the aforementioned Act provides different ways to protect the consumer. Below are some of the most important sections that help protect the consumers rights in different situations.

⁴⁶ See Proposition 1971:86, page 16

⁴⁷ See SOU 1972:28, page 27 and Proposition 1973:138, page 28

⁴⁸ See relevant parts of e.g. The Marketing Act (1995:450), The Product Safety Act (2004:451), The Consumer Credit Act (1992:830), The Consumers Services Act (1985:716), The Consumer Insurance Act (1980:38), The Price Information Act (2004:347) etc.

Duty to Inform

According to the Distant Sales and Door-to-Door Sales Act from 2005, the seller has an obligation to inform the consumer of his cancellation right when the goods are being marketed and when the sales agreement is made. Furthermore Chapter 2 Section 6 of the aforementioned Act provides that the seller must provide basic information which has to be “clear and understandable” for the consumer before entering into a contract. Chapter 2 Section 7 of the aforementioned Act provides that the seller also must provide information in writing or another permanent form after the consumer has entered the contract. If the seller fails to inform, the consumers cancellation period becomes extended to one year. In a situation where the seller fails to meet his obligations with regards to other information, this period is extended to three months.⁴⁹

Cooling-off Period

According to the Distant Sales and Door-to-Door Sales Act from 2005, goods or services which are sold at a distance whether over the phone, on the Internet, by mail order or in the consumers home, entitles the consumer to cancel the purchase within 14 days after he or she receives the goods (i.e. the cooling-off period clause).⁵⁰ In a statement from the Swedish Consumer Agency in 1985 the mandatory Cooling-off Period is not applicable to Home Party’s (e.g. Tupperware etc).⁵¹ Furthermore, the seller must provide a cancellation form to the consumer to facilitate the exercise of the right to cancel within 14 days⁵² in order to fulfill the obligations.

A list of exclusions is included in paragraph 4 and 5 of the Distant Sales and Door-to-Door Sales Act that limits the consumers right to cancel a contract, see Section 2.2.5.2.

Performance

The Distant Sales and Door-to-Door Sales Act also protects the consumer against delivery delays due to the seller. Chapter 2 Section 17 of the aforementioned Act provides that a seller is obligated to fulfill his performance “within a reasonable time”. Furthermore, if not both parties “agreed otherwise”, the seller shall fulfill his performance within a period of 30 days from the time of the order. If the seller fails to perform as described above, the consumer has the right to cancel the contract. The seller must “inform the consumer of this right” and if the consumer chooses to exercise his cancellation right, he or she “shall obtain a refund of any sums the consumer has paid /.../ within 30 days”.⁵³

⁴⁹ See Distant Sales and Door-to-Door Sales Act (2005:59), chapter 2 paragraph 11

⁵⁰ See Distant Sales and Door-to-Door Sales Act (2005:59), chapter 2 paragraph 9

⁵¹ Statement from the Consumer Agency’s Committee, KOVB 85/K721

⁵² Statement from the Consumer Agency’s Committee, KOVB 86/K2640

⁵³ See Distant Sales and Door-to-Door Sales Act (2005:59), chapter 2 paragraph 17 Section 2

3.1.2 Consumer Sales Act

The Consumer Sales Act from 1990 concerns personal chattels sales between a businessman and a consumer, sales conveyed by a businessman between two consumers, tangible property trade by a consumer as means of payment and manufacturing agreements no matter who's providing the material.⁵⁴

The Consumer Sales Act is a peremptory legal rule to benefit the consumer e.g. the rights provided by this Act cannot be reduced neither can a businessman give a consumer worse contractual stipulation than the Act permits.⁵⁵ Below are some of the most relevant paragraphs for this paper that concerns national consumer protection.

Performance

A consumer is protected, for example, against delivery delays caused by a seller. According to section 10 of the aforementioned Act, a delivery delay caused by a seller gives the consumer the right to hold back any payment as collateral (reference to Section 11 of the aforementioned Act). A consumer can choose between demanding fulfillment from a seller⁵⁶ or to cancel the purchase⁵⁷. The above-mentioned Section 14 of the aforementioned Act provides that a consumer can bring action for damages against a seller due to delivery delays.

Defective Product

A consumer is also protected against defective products (e.g. difference from prescribed kind, amount or characteristics in an oral or written contract).⁵⁸ If the product is defective as stated in Sections 16-21a of the Consumer Sales Act, the consumer has the right to the removal of faults, re-delivery of the product⁵⁹, reduction of the price or cancellation of the purchase⁶⁰. In addition, Section 23 of the aforementioned Act states that a complaint has to be made "within reasonable time" after the consumer discovered the defect. The time-frame varies throughout doctrine and case law but according to the National Board for Consumer Complaints⁶¹ (hereinafter ARN) the general time frame is two months.⁶²

⁵⁴ See Area of Application, Consumer Sales Act (1990:932), paragraph 1-2

⁵⁵ Aforementioned Act, paragraph 3

⁵⁶ Aforementioned Act, paragraph 12

⁵⁷ Aforementioned Act, paragraph 13

⁵⁸ See paragraphs 16-21 of the aforementioned Act for an exhausted list

⁵⁹ Aforementioned Act, paragraphs 26-27

⁶⁰ Aforementioned Act, paragraphs 28-29

⁶¹ http://www.arn.se/templates/Page_158.aspx

⁶² See ARN 2004-8429, "application of the so called two month-rule in paragraph 23 of the Consumer Sales Act (1990:932)

Buying on Approval

As an extension to consumer protection many department stores, chains and independent stores in Sweden exercise a buying on approval-principle, for example, a consumer will get his money back if he or she regrets a purchase and returns the product within a predetermined time set by the seller.⁶³ Even though this principle is generally accepted throughout the EU, a consumer is not to assume that every purchase gives the right to buy-on-approval. Consumer sales on a sale-or-return basis are optional for the seller and are not regulated in Swedish legislation.⁶⁴

Since the above-mentioned is optional in a contractual agreement the case law concerning the buying on approval-principle is minimal. The ARN case below is from 1982 and only used as an example that the principle can benefit a consumer.

S bought a table cloth on a sale-or-return basis to make sure the length of the cloth was right for the dining table. The table cloth was factory folded in a complicated way. S measured the cloth in her home and realized that the cloth did not fit the table in question. As S was to return the table cloth the shop assistant refused to take it back due to improper folding of the cloth.

The Consumer Agency Committee stated that S had the right to remove the table cloth from its package in order to measure it. Furthermore the Committee stated that S was not obligated to return the cloth in the exact same condition as it was bought. S was given the right to return the table cloth.⁶⁵

3.2 Swedish Case Law on Unfair Commercial Practices

The cases below aim to illustrate the above-mentioned facts and provisions laid down concerning Swedish consumer protection. The names in the cases are fictitious and used to simplify the context of the case.

MD 2005:37 Optimal Telecom

The company Optimal Telecom (hereinafter Optimal) sells telephone services via the telephone or the Internet to consumers in Sweden. Optimal have in their offer to the consumer an option to choose not to use the Cooling-off period to speed up the process and get the consumer started right away with their services. The Consumer Agency brought action against Optimal's methods which they called

⁶³ More information is to be found at:

http://www.konsumenteuropa.se/mallar/en/lista_artiklar.asp?lngCategoryId=1373

⁶⁴ See Konsument Europa, ECC Network,

<http://www.konsumenteuropa.se/mallar/en/artikel.asp?lngCategoryId=1373&lngArticleId=2669>

⁶⁵ ARN 82/R82, "Buying on approval"

improper and deceptive marketing. The Consumer Agency stated in their claim that the Cooling-off Period is mandatory and cannot be removed before the purchase as laid down in Chapter 2 Section 9 of the Distant Sales and Door-to-Door Sales Act from 2005.

The Market Court prohibited Optimal, under penalty of a fine of 400 000 Swedish Kronor (hereinafter SKR), from continuing to market the removal of the Cooling-off Period from Consumer Contracts. Furthermore the Market Court stated that the Cooling-off Period starts when the consumer has received the goods and cannot be excluded in a Distant Sale or a Door-to-Door Sale at the time of entering a contract. If a seller wants to remove the Cooling-off Period the consumer must leave his or hers consent during the 14 days of the aforementioned period.

ARN 1997-6427 Delayed Delivery

Peter ordered a brand new car in May 1997. The car was to be manufactured in August and delivered in September the same year. Peter sold his old car in the beginning of September and shortly after that received a message that the new car was to be delivered no later than November that year. Due to the delay Peter received compensation, totaling 2500 SKR, but he was not satisfied with the money. Peter had been without a vehicle for a long time and had to cancel a vacation due to the delay. After a while Peter brought action for damages against the car company and claimed compensation of 20 000 SKR for the delay. Furthermore he also claimed compensation for his everyday trips back and forth to work.

The car company repudiated to Peter's legal actions and stated that Peter accepted the compensation of 2500 SKR and that Peter could have reduced the inconvenience by not selling the old car before he received the new one.

The Committee stated that it was clear that Peter ordered a car to be delivered in September and that delivery had been delayed. Peter admitted that he had received money as compensation for the delay and later stated that he would like to go to court to see if he was eligible for further compensation.

The car company stated that they gave compensation to Peter in with the intention of creating an amicable contract.

The Committee's opinion was that, if compensation was offered and the consumer accepted, then it is up to the seller to inform the consumer that he or she has renounced the right to further the case. In this case the Committee was of the opinion that no information was given to the consumer. Section 14 of the Consumer Sales Act (1990:932) provides that a consumer has a right to compensation due to delivery delays caused by the seller. This compensation is to cover such things as the loss of income and possible price differences.⁶⁶ According to the Consumer Sales Act preliminary works⁶⁷, compensation can in some situations be disbursed even if the consumer could not use the product as intended. An incurred damage such as discomfort, uneasiness and irritation evoked by the breach of a contract is not reason enough for compensation. Other inconveniences such as

⁶⁶ See list, Consumer Sales Act (1990:932), Paragraph 32

⁶⁷ Proposition 1989/90:89 page 42 and 136

loss in connection to the consumers field of application of the purchased product, can cause the breach of contract and the damage to limit the responsibility of the seller. Peter's plans on how to use the new car could not be considered known to the seller. The Committee stated that Peter's compensation claim for loss of vacation would, according to above-mentioned, not be sustained. Peter had incurred, according to the investigation, an expense of 1200 SKR for a bus pass. This expense was considered to be covered by the 2500 SKR that he received from the car company earlier as compensation.

ARN 1996-5650 Defective Product

Gaby bought a sweater in September 1995. She used it a couple of times, washed it and then put it away with other winter clothes. When she unpacked it a year later she noticed that the fluff had fallen off and all that was left was some knitting. The sweater was useless so Gaby claimed to receive a sweater equivalent to the ragged one.

The Seller repudiated Gaby's claim and stated that the complaint occurred to late. Furthermore they also stated that they had received many customer complaints about the quality of the sweater and had many returns.

The Committee examined the sweater and established that the sweater was damaged. If a consumer wants to claim a defective product it has to be within a reasonable time after the consumer discovered the defect. The Committee states that Gaby should have discovered the defect after washing the sweater and that she should have contacted the seller about her being dissatisfied sooner than she did. The claim was made after such a long time that the Committee could not sustain Gaby's claim.

3.3 Summary

The Swedish legislation concerning Consumer Protection is very extensive and aids the everyday consumer in his or her purchases. A businessman is more likely to have the knowledge about legislations and provisions meaning that a consumer should be able to rely on the information provided by the seller such as how to cancel a contract, the cooling-off period and right to compensation. Not all sellers will inform their customers about the aforementioned; therefore Sweden has legislation that protect the weaker party in a contractual agreement (i.e., in this paper, the consumer). This does not mean that the consumer is always right and can get away with every claim thus noticed in the above-mentioned cases from ARN and the Market Court (MD). When implementing the Directives from the EC, Sweden adds extensive protection to benefit the Swedish consumers (see Section 3.2.1.1 about extended complaint period).

4 Concluding Discussion

Due to the matter of the subject discussed in this paper, there were difficulties finding relevant case-law and literature. Most of the information was found on the Internet and contained mostly development work in Consumer Protection. My focus is therefore to look into some important sections in the Directives concerning Consumer Protection in Distant Sales and Unfair Terms in Contracts from 1993 and 1997. The different targeted sections from both EC-law and Swedish law are presented below. In this concluding discussion I will compare the European Directives and the Swedish legislation to be able to answer the questions of research.

Duty to Inform

Sweden have in its legislation increased the consumer protection by adding an extended complaint period clause if the seller fails to inform a consumer, see Section 3.1.1.

This national extension is a step to further ensure that a seller always informs a consumer whereas Directive 97/7/EC does not specify any consequences for the seller if he or she choose not to fully inform the consumer. The national law creators that increased the protection level for the consumer wanted to see a sanction for a negligent seller whereas the maker of the Directive put it on to the Member State to decide whether negligence should have a price or not. Without consequences stated in the Directive, the rule becomes insignificant in a Member State that chooses not to add a sanction into the national law.

There are also inconsistencies regarding the term 'durable medium' and the interpretation between Member States varies a lot. Some Member States only require the name and location of the seller whereas some do not use any 'durable medium' in a contractual agreement.

Cooling-off Period

This is, according to me, one of the most important rules concerning Consumer Protection within the EU. Directive 97/7/EC state that a Member State shall give the consumer a certain amount of days to exercise the right of withdrawal. In the amendment to the aforementioned Directive the Cooling-off Period has been specified to a *minimum* of 7 days whereas Sweden gives the consumer 14 days to exercise the right to cancel the purchase. Other Member States, such as Austria and France, interpreted the Directive so the rule only applies to working days. In French legislation the term "jours francs" can be translated as "money day" if the word "francs" is interpret as their former currency. This term is unclear according to the EU and could mean that the Cooling-off Period is only applied during the working days when the consumer is getting paid from his or her labour. Latvia decided on a minimum of 14 days but the information in the COM does not specify any maximum amount of days. Article 6(1) of Directive 97/7EC is an example of the inconsistency in the regulatory

framework as the cooling-off period varies between Member States concerning consumer protection due to the minimal clause in Article 14 of the aforementioned directive.

Performance

Sweden has, in the performance sector, applied the rules of the Directive without any major changes to benefit the consumers position.

The term "a reasonable time" is never a set time and is dependent on the type of performance which makes the term hard to define. It is always up to the seller to inform the consumer about his or her rights to cancel or bring action against a delayed delivery. Not all sellers inform their costumers whereas the 'duty to inform' is more important in a contractual agreement between a businessman and a consumer.

The inconsistencies in Article 6 and 7 regarding 'days' and 'working days' will be a problem in cross-border trade. Overall, dealing with performance in contractual agreements gives rise to problems associated with timing unless the rules are unified.

European Case Law

The ECJ states in C-168/05 that the national Court should have the possibility to ex officio examine if a contractual term is to be considered unfair or not. As stated in Directive 93/13/EEC this is an unfair term in a contract not binding to the consumer. The statement benefits the national Courts in the way that they can decide whether a term should be considered 'unfair' or not in a given Member State. Furthermore the national Court shall, according to ruling in C-237/02, decide whether the contractual term is to be regarded as unfair under Article 3(1) of Directive 93/13/EEC. Both cases are relevant to "ensure a high level of protection" in a Member States as laid down in Article 153 of the Treaty.

Swedish Case Law

The Consumer Agency Committee's statement in case MD 2005:37 changed the business in a way that the seller cannot force a consumer to exclude the right to a Cooling-off Period. It might seem like a simple ruling made by the Committee but in the Distant Sales and Door-to-Door Sales Act of 2005 Chapter 2 Section 9 it states that a consumer can cancel the contract *after receiving* the product. The withdrawal period in Sweden is, as above-mentioned, 14 days whereas in other Member States it varies from seven days up to a minimum of 14 days as above-mentioned. After the expiry of those days the consumer cannot claim the right to withdrawal based on the Cooling-off principle. Even though a consumer has the right to cancel a contract and claim damage due to delivery delays the consumer shall not always assume that the seller has all the information as stated in ARN 1997-6427. En contraire; to be able to exercise the aforementioned rights, the consumer must inform the seller about his or hers intentions with the purchase and cannot expect to always have right as stated in ARN 1996-5650.

4.1 Answering the Questions of Research

(1) As shown, Sweden has extensive Consumer Protection. This paper shows that the Swedish Consumer is protected against unfair terms in contracts, i.e. the term is not binding to the consumer and the national Court has the right to decide what contractual terms that are to be regarded as unfair.

In Distant Sales and Door-to-Door Sales the consumer always has the right to receive information to ensure the credibility of the seller and the right to cancel the purchase within 14 days without having to specify the reason as to the cancellation. The rules of the aforementioned Directive only specify a *minimum* of seven days and most of the Member States have adopted the seven days whereas Sweden extended the time to 14 days.

The Swedish timeframe does not specify 'working days' or any other exceptions to the Cooling-off Period. It does not matter if there is a weekend or a holiday within those 14 days.

If the seller neglects to inform a consumer of the aforementioned rights, the consumers position is still secured with the right to enjoy an extended Cooling-off Period up to one year. This rule is only found in Swedish legislation and is not specified in the aforementioned Directives. If the delivery is delayed due to the seller, the consumer has the right to claim damage or even cancel the purchase depending on the circumstances.

(2) A Swedish Consumer has the right to exercise similar rights in cross-border trade with a few differences when shopping within the EU.

The Cooling-off Period is set to a minimum of seven days (not all the Member States have a mandatory 14 days as above-mentioned) and in some Member States is the period is only applicable on working days. Only Austria and France specified 'working days' in their Cooling-off Period. Another issue could occur if the seller fails to inform the consumer about certain important information (the length of the Cooling-off Period or how to exercise the right to withdrawal). Swedish law states that the complaint period is extended up to a year if the seller fails to inform a consumer. (See Section 3.1.1) No similar rules could be found in Directive 97/7/EC.

The creators of the Directive allow the rules to vary in the Member States due to the differences in interpreting existing Directives.

An attempt to clarify and unify the existing rules with the UCDP will benefit all the participants in the internal market.

List of References

European documentation

Directives

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

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.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising.

Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labeling, presentation and advertising of foodstuffs for sale to the ultimate consumer.

European Commission

COM (2006) 514 final, on the implementation of Directive 1997/7/EC of the European Parliament and of the Council of 20 May 1997 on the Protection of Consumers in respect of Distance Contracts

COM (2002) 289 final, Follow-up Communication to the Green Paper on EU Consumer Protection

COM (2002) 208 final, Communication from the Commission to the Council and the European Parliament: Consumer Policy Strategy 2002-2006, Brussels, 7.5.2002

COM (2001) 351 final

Other

The European Online Marketplace: Consumer Complaints 2005 - A summary and analysis of consumer complaints reported to the European Consumer Centre Network; http://www.ecic.ie/publications/reports/ecc_reports/eur_online_marketplace_20052.pdf - January 22, 2007

Swedish documentation

Swedish preparatory work

Prop. 1989/90:89	Proposition till Lag om konsumentköp
Prop. 1971:86	Proposition till Lag om hemförsäljning
Prop. 1973:138	Proposition till Lag om konsumentköp
SOU 1972:28	Statens Offentliga Utredningar om konsumentköp

Case Law

European Case Law

C-168/05	Elisa Maria Mostaza Claro v Centro Movil Milenium SL [2006] ECR, 26 October 2006
C-237/02	Freiburger Kommunalbauten GmbH Baugesellschaft & Co. KG v Ludger Hofstetter och Ulrike Hofstetter, C 106, p. 12-13, 30 April 2004
C-478/99	Commission of the European Communities v Kingdom of Sweden [2002] ECR I4147
C-126/97	Eco Swiss China Time Ltd v Benetton International NV [1999] ECR I-3055
C-415/93	Unon Royale Belge des Sociétés de Football association ASBL v Jean-Marc Bosman (Bosman), REG 1995, p. I-4921
C-384/93	Alpine Investments BV v Minister van Financien, 1995, ECR I-1141
C-19/92	Dieter Kraus v Land Baden-Württemberg (Kraus), 1993, Page I-01663
Case 120/78	Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon), REG 1979, p.649, volume 4

Swedish Case Law

MD 2005:37	Optimal Telecom
ARN 2004-8429	Two-month rule
ARN 1997-6427	Delayed Delivery
ARN 1996-5650	Defective Product
ARN 82/R82	Buying on approval

Internet

Konsument Europa, ECC Network, <http://www.konsumenteuropa.se>

National Board for Consumer Complaints, (ARN); <http://www.arn.se>

The Court of Justice of the European Communities, <http://curia.europa.eu/>

The European Union Online – <http://www.europa.eu>

The World Fact Book, 2006; <https://www.cia.gov/cia/publications/factbook/index.html>

ANNEX I

LENGTH OF THE COOLING OFF PERIOD IN THE MEMBER STATES

Member State Length of cooling off period

Austria 7 working days (expressly excludes Saturday)
Belgium 7 working days
Cyprus 14 days
Czech Republic 14 days
Denmark 14 days
Estonia 14 days
Finland 14 days
France 7 working days? (meaning of “jours francs” in need of clarification)
Germany 2 weeks
Greece 10 working days
Hungary 8 working days
Ireland 7 working days
Italy 10 working days
Latvia 14 days minimum
Lithuania 7 working days
Luxembourg 7 working days
Malta 15 days
Netherlands 7 working days
Poland 10 days
Portugal 14 days
Slovakia 7 working days
Slovenia 15 days
Spain 7 working days based on the law of country of delivery
Sweden 14 days
United Kingdom 7 working days

COM (2006) 514 final, COMMUNICATION FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN PARLIAMENT AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE on the implementation of Directive 1997/7/EC of the

European Parliament and of the Council of 20 May 1997 on the Protection of Consumers
in respect of Distance Contracts, Brussels, 21.9.2006
(January 22, 2007)

Austrian Presidency Contract Law Conference - 26 May 2006, Vienna

First of all I would like to thank the Austrian Presidency. Its commitment and focus on civil and commercial law issues has been unsurpassed and is most welcome. Civil justice has a great impact on daily lives of our citizens and enterprises. As a member of the European Parliament's Legal Affairs Committee, this is my fourth visit here during the presidency; that in itself speaks volumes. Vienna begins to feel a bit like home now so I am sorry that your Presidency is ending.

I am grateful for the opportunity today as a parliamentarian from the perspective both of the Legal Affairs and the Internal Market Committee to be able to provide some reflections on this important project surrounding European Contract Law. In many ways, this is the most important project currently underway in relation to EU civil law.

The European Parliament has a long standing and well known commitment to this project relating to the improvement of European contract law dating back to a Resolution in 1989. In the recent times, we have concentrated much effort, space, words on process and have in some ways been very critical of the processes set up by the Commission. However today I want to start with some positive words on the process and then move on to the other issues identified in the paper or note that has been circulated to help structure today's discussion. As a parliamentarian, I have had perhaps a unique opportunity to watch this very innovative project from various angles and viewpoints. Let me take the academic research groups first.

The research that is on-going is a once in a life time opportunity, indeed a once in a generation chance to have a thorough-going look at EU contract law, it should be done anyway. This updating process will build on PECL, and it is clear as the researchers go along they are discovering new possibilities and new challenges. This is a huge scientific work, absolutely worthy for its own sake. It is of course a huge undertaking probably only possible under the community's research budget.

Of course this means that it is not tailor made, for the CFR, nor for the European legislator. It is inevitable that there will be some tensions, but this should not be allowed to detract either from the need for the research nor its results.

Then the stakeholders groups. I think for once the Commission should be praised for an amazing undertaking in consultation. Of course the more you do the more scope there is for criticism! But lessons have to be learnt along the way. For the future, we need to consider how far stakeholders can or should be involved, who gets a seat at the table, how do you use the input and provide feedback. Stakeholders need to feel valued and that their work is being taken seriously too, or why should they bother to contribute along side their day jobs. That said they must be clear that they are not the legislators, they do not have the last say, it is merely one of the inputs we receive. This is a valuable and probably the most extensive exercise of this kind; it needs to be recognised as such even by its detractors.

Then the legislators. The European Parliament has been nervous, very nervous. We were worried that the legislative process was being taken away from us. Soft law

makes us nervous. It threatens democracy, some would say. Elected representatives feel their place is being taken by academics and stakeholders. Now of course the European Parliament is fully engaged with a functioning Project Group - and so it must be if we have to approve the final CFR as a binding instrument (although not as legislation). It would be impossible and unthinkable for the Commission to come to ourselves and the Council only at the end of this process. One of the most welcome developments reported on this morning is the meeting of Commissioners (McCreevy, Frattini, Kyprianou); something long argued for by us and which was highlighted in the recent European Parliament Resolution. This project requires, or rather demands horizontal coherence across the Commission.

So much for 'process'. There has been good progress. We are now waiting for the next report from the Commission. But other questions remain unanswered.

More clarity is still needed about what we are finally trying to achieve. Most I believe acknowledge that two central problems which we are seeking to solve through this whole process. Firstly to address the inconsistencies in consumer acquis (it has become messy and incoherent, dogged by sectoral differences) and secondly inconsistencies in EU general contract law which are bad for the good functioning of the Internal Market, which in turn undermines the possibility of fulfilling the Lisbon Agenda. One only has to look at the additional transactional costs revealed in the Clifford Chance survey to see that here is a problem waiting to be solved.

But there are political constraints on solving these problems. Firstly we are caught between two conflicting principles – on the one hand there is the consumer acquis with a high level of consumer protection whereas elsewhere in general contract law and the CFR there is the emphasis on freedom of contract, or party autonomy. We know of course that there is a distinction between tort, or non contractual obligations and contract itself where we want to respect the choice of the parties. Business especially will want to underline this. The difficulties of public policy formulation and the use mandatory rules at a community level are well illustrated by the UK's recent decision not opt into Rome I (a choice I do not support) - but it demonstrates the underlying tension. How far are we prepared to allow the EU legislator to set out the European values that could underpin general contract law.

The second constraint is our legislative ability at EU level - the Member States have in the main made the choice to go down the road of harmonising conflict rules (Rome II + Rome I) and not substantive law. Any legislative or binding instrument on general contract law might seem to fly in the face of this policy choice. Although I for one have always argued that EU conflict rules should point out not only which national law applies to a given situation but also when community law itself takes precedence.

Whatever, we are erecting a very tangled web, a web of conflict rules combined sometimes with a 26th legal regime. We should constantly ask ourselves is this the way to help the Internal Market and to provide the coherence we seek? We need to keep a view, or perspective on the whole not just concentrate on our own little corner of the edifice which we are constructing.

Yet being aware is a good starting point. We know that EU Consumer Law enjoys a high level of harmonisation and a treaty base. Reviewing the consumer acquis is in this sense a straightforward exercise. We are asked should the outcome be vertical or horizontal? Vertical sounds much like business as normal, more sectoral directives. Horizontal: yes let's build on the success of an instrument like Unfair Commercial Practices. But the more horizontal you go the more it begins to look like a Consumer Code. Where, and this is the conundrum, does this exercise or construct leave other contracts, and other elements of contract law? There are other weaker parties (employees, trustees, franchisees, commercial agents, and small business) who also need EU level protection. There should clearly be a B2B element in the horizontal approach, or rather perhaps the question is should B to B also benefit from a horizontal instrument. Where does Consumer Acquis finish and CFR start? There are of course cross cutting issues, but such cross cutting should not lead to a weakening of consumer protection.

This is surely the conundrum. The CFR process should inform the review of the consumer acquis. But how far beyond the consumer acquis do we go bearing in mind the constraints I mentioned earlier (party autonomy, choice of law rules)? If we don't go beyond consumer acquis what exactly are the stakeholders doing? They are mainly from business and professional organisations; there are numerically very few consumer stakeholders. Is this the right method for the exercise? Will it be pushing in one direction that could potentially lead to less EU legislation or regulation, the refrain we constantly hear from business, but in achieving that will it undermine the current level of consumer protection?

Clearly, there are many general principles of contract law where more coherence would help the Internal Market and it is this which the European Parliament should emphasise. The European Parliament project group will focus on a number of key issues and I have no doubt that will address issues that are cross-cutting. For instance we will look not just at the definition of a consumer, but also at the more general concept of a weaker party. We will also look at things like electronic contracts which can of course be B to C or B to B. We have also begun to look at the structure of the CFR, the original proposal for instance probably included to many specific contracts.

Whatever the final shape and content of the CFR it should at its best be able to deliver a huge boost to the whole better regulation agenda. This would be a more than acceptable outcome. However maybe we should have a little more of a vision of what we want EU contract law to be.

A few weeks ago I attended a conference at ERA in Trier on a very specific part of contract law, so called quasi contract; unjust enrichment and benevolent intervention in the affairs of another. This latter concept is more or less unknown to the common law. It was once described by one leading common law commentator as "officious meddling". This set me thinking. I don't want the EU to become an officious meddler in national contract law (although let me be clear my views could not be further from those of my Lord Chancellor as expressed at the London conference). I want the EU to be as an umbrella for national contract law having more the character of a 'caring helpmate'. I chose the words carefully. 'Caring', that does not mean a nanny state but that we should take care through the use of European values in basic contract law of the interests of the weakest and vulnerable, 'help' that EU contract law should be an

additional help or aid, not a constraint in drafting and construing contracts. Lastly wouldn't it be good for once to see the EU in the character of a 'mate', a friend and certainly not as a meddler!

Diana Wallis MEP
Vienna, 26 May 2006