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EU CONTRACT LAW

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1. Introduction

The European Community legislator has been active in the field of contract law for almost a quarter of a Century. The first two decades were characterised by a fragmentary approach which focused on very specific issues of contract law, such as consumer protection in doorstep selling situations or in the case of timesharing, or the protection of self-employed commercial agents in the case of termination of their contracts. After criticisms from the Member States, which had to transpose these directives into their national systems of contract law, and by legal scholars, the European Commission decided in 2003 to take action with a view to a more coherent European contract law. This new approach may prove to be an important step towards the common European private law that the European Parliament had called for in a series of resolutions since 1989. It was the starting point for the revision of the *acquis communautaire* which has led to the proposal for a Directive on consumer rights that was made by the Commission last autumn, and for the work on a Common Frame of Reference (CFR) that has led to a first draft that was submitted by a network of scholars to the Commission earlier this year. Both the proposed directive and the CFR are likely to be prominently on the agenda during the mandate of the next European Parliament.

2. Competence of the European Union and the legislative procedures in the field of contract law

Article 3 of the EC Treaty sets out the objectives of European Community. Primarily, this article is used for the interpretation of other provisions of the EC Treaty. In the case of contract law, this article is relevant with respect to Article 308 EC, one of the legal bases of European private law. This catch-all provision may seem to create general competence to adopt measures, but this competence is limited by the objective of the EC Treaty as defined in Article 3.

Article 3

1. For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein:

(...)

(c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital;

(...)

(h) the approximation of the laws of Member States to the extent required for the functioning of the common market;

(...)

(t) a contribution to the strengthening of consumer protection;

(...)

2. In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women.

Article 65 EC provides a legal basis for measures in the field of private international law, i.e. rules relating to applicable law (e.g. Regulation Rome I), judicial competence (e.g. Regulations Brussels I and Brussels II) and the recognition and execution of foreign judgements (e.g. Regulation Brussels I), but not for the harmonisation or unification of substantive law. However, in the Presidency Conclusions of the Tampere

European Council of 15th and 16th October 1999, whilst discussing the European area of justice, under the heading 'Greater convergence in civil law' the Council mentioned the approximation of Member States' legislation on substantive private law. Nevertheless, it seems somewhat far-fetched to conclude from this passage that the Council considers Article 65 EC to be a proper legal basis for the harmonization of rules of contract law of the Member States.

Since Article 65 EC only allows for measures in so far as necessary for the proper functioning of the internal market, it has been argued that the *Tobacco test*¹ also applies to this article.

The provision itself does not specify what type of measures it allows for. However, pursuant to Article 249 EC the European Parliament acting jointly with the Council, the Council and the Commission can make regulations, issue directives, take decisions, make recommendations or deliver opinions.

Article 65

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:

- the system for cross-border service of judicial and extrajudicial documents,

- cooperation in the taking of evidence,

- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Article 95 EC provides a legal basis for the adoption of measures for the approximation of the laws of the Member States which have as their object the establishment and functioning of the internal market. Both regulations and directives can be adopted pursuant this article. According to the European Court of Justice, 'measures for approximation' do not include Community measures that co-exist with national rules; they have to introduce uniform rules applicable under all circumstances.²

Any approximation measures pursuant to Article 95 EC must 'have as their object the establishment and the functioning of the internal market'. It follows from the ECJ case law that to have as its object the establishment and the functioning of the internal market, a measure must

'genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market.'³

¹ See below.

² Case C-436/03 *European Parliament v. Council* [2006] 3733.

³ Case C-376-98 *Germany v. European Parliament* [2000] ECR I-8419 para 83 ff (*Tobacco*).

In particular, the ECJ has held that the mere diversity of national legal systems with respect to a certain subject matter does not suffice to establish competence under Article 95 EC. The Court links these words to 'obstacles to the exercise of fundamental freedoms or of distortions of competitions'. The conclusion which can be drawn is that when either an obstacle to trade or an appreciable distortion of competition occurs or is likely to occur, there is a competence to harmonize. This test has been called the *Tobacco* test, referring to the original judgement.

An obstacle to trade occurs, *inter alia*, when an infringement of the free movement of goods (Article 28 EC) or services (Article 49 EC) is established or when it is likely to occur. Thus, with respect to private law rules it has to be ascertained to what extent these may result in an infringement of one of the free movements. Empirical research, consisting of a survey that was conducted in 2005 amongst 175 firms in 8 countries by an independent firm, suggests that the diversity of national systems of private law is a major cause for obstacles to trade with respect to business-to-business contracts,⁴ especially for small and starting companies.⁵ On the basis of, *inter alia*, these outcomes of preliminary research, it can be held that the existing measures on EC contract law comply with the *Tobacco* test. Commentators also drew the conclusion that '... a case can be made for further Community action in the field of European contract law on the basis of Article 95 EC.' However, this is a controversial point. It has been argued that, with hindsight, certain directives, notably the ones on doorstep selling and commercial agency, lack a sufficient legal basis.

In view of the fact that measures can only be adopted insofar there is an obstacle to trade or an appreciable distortion of competition, Community legislation, pursuant to this legal basis, is fragmentary and deals with specific obstacles and distortions.

A separate question is whether, the directives on EC contract law contain mainly but not exclusively mandatory rules with respect to contract law. Non-mandatory rules, which parties can set aside in their contract, raise questions on the permissibility of Article 95 EC for such legislation. From the *obiter dictum* of the *Alsthom Atlantique* case,⁶ where the ECJ held that in international commercial transactions parties are generally free to choose the law applicable from the contract and are thus free to avoid a legal system, it seems to follow that only internationally mandatory rules can constitute a violation of the free movement of goods, as they are the only ones that the parties cannot deviate from, neither by substantive clauses nor by a choice of the applicable law. As a result, non-mandatory rules of substantive law as a category could never be the object of harmonisation measures under Article 95 EC. Indeed, this has been the conclusion of several observers. Others, however, have pointed out that non-mandatory rules can be

⁴ S Vogenauer & S Weatherill, 'The European Community's competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate' in S Vogenauer & S Weatherill (eds), *The Harmonisation of European Contract Law, Implications for European Private Laws, Business and Legal Practice* (Hart Publishing 2006) 105-147.

⁵ TQ de Booy, EJA de Volder & D Raic, 'Bestaat er behoefte aan een gemeenschappelijk referentiekader voor Europees contractenrecht? Quick scan in het Nederlandse bedrijfsleven', The Hague, 16 December 2008.

⁶ Case C-339/89, *Alsthom Atlantique SA v Compagnie de construction mécanique Sulzer SA* [1991] ECR I-107.

under circumstances *de facto* mandatory, allowing for the use of Article 95 EC as a legal basis for non-mandatory rules.

Measures pursuant to Article 95 have to be adopted according to the procedure of Article 251 EC, which gives the European Parliament the right of codecision.

Article 95

1. By way of derogation from Article 94 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 14. The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, 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.

(...)

3. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.

(...)

Article 153 EC establishes that a high level of consumer protection is one of the objectives of the European Community. Although the EC Treaty does not give a definition of 'consumer', the definition 'natural person who is acting for purposes which are not related to his trade, business, profession or craft' is usually employed in the consumer directives.⁷ With regard to competence of the Community, it provides two types of measures that the Community can take for the attainment of this objective. First, the Community shall contribute through measures adopted pursuant to Article 95 EC. Secondly, the article provides a legal basis for measures that support, supplement and monitor the policy pursued by the Member States.

In the first type of measures, Article 153 is not a legal basis for the measure as such, but does provide a justification and requirement for a high level of consumer protection. The second type of measures can be characterised as flanking policy. Article 153 provides a legal basis for these measures, but all such measures have to allow Member State to maintain or adopt more stringent protective measures.

For both measures, the procedure of Article 251 EC applies, giving Parliament the right of codecision.

Article 153

1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.

⁷ The EC consumer law directives use slightly different definitions.

2. *Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.*

3. *The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:*

(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;

(b) measures which support, supplement and monitor the policy pursued by the Member States.

4. *The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).*

5. *Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.*

Article 308 EC is the catch-all provision of the EC Treaty. Only when the Treaty does not include any other powers according to which such measure can be established, the article provides competence to adopt measures. The implication is that Article 95 EC and Article 308 EC are mutually exclusive. On the basis of Article 308 EC several regulations have been adopted which introduced private law instruments, such as the *Societas Europea*, the *European Cooperative Society* and, the *Community Trade Mark*. The common dominators are that they all concern private law institutions on a European community level; they exist in addition to the various national types and the parties have a choice between the national instrument and the European one. Since none of these characteristics apply to existing EC contract law and Article 95 EC has been deemed a sufficient legal basis for these measures, it is unlikely that Article 308 can serve as a legal basis for the most common EC contract law measures. However, it could be considered as a basis for an optional instrument.

Although Article 308 EC is a catch-all provision for Community legislation, measures adopted pursuant to this article are only permitted insofar as they contribute to attaining one of the objectives of the Community as specified in the Articles 2 and 3 EC.

For adopting a measure under Article 308 EC unanimity within the Council and consultation of the European Parliament are required.⁸

Article 308

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the

⁸ In the Lisbon Treaty the wording is different. Once this Treaty is ratified the Council will need to obtain the consent of the European Parliament.

Commission and after consulting the European Parliament, take the appropriate measures.

3. State of play of EC contract law

The following paragraphs provide the state of play of EC contract law. The main instruments and related acts of EC secondary law in the field of contracts are summarised with a particular focus on the position of the European Parliament.

3.1. Secondary legislation on EC (consumer) contract law

3.1.1. Doorstep Selling Directive

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises⁹ is based on Article 100 EEC Treaty (currently Article 94 EC). In the recitals of the directive the traditional legitimisation for the use of Articles 94 (and 95 EC) has been employed: the laws of the Member States regulating the conclusion of contracts between a trader and a consumer away from business premises (also called 'doorstep selling') differed from one Member State to another, this could directly effect the functioning of the internal market and therefore EC legislation is required. However, the directive also has a strong emphasis on the protection of consumers.¹⁰ Since a consumer is generally unprepared if a trader initiates the conclusion of a contract in another surrounding than regular business premises, he is unable to compare the quality and the price of the offer. This puts a consumer in an unequal bargaining position towards the trader. The directive aims to equalise to bargaining power of both parties.

The directive distinguishes between three situations in which a contract is negotiated away from business premises and which fall under the scope of the directive. First (i) there is the traditional doorstep selling, either by visit of a trader or during an excursion organised by the trader. Secondly (ii) the directive includes the situation in which a consumer requests a visit of a trader and a contract is concluded for the supply of goods or services other than those which the consumer requested the visit for. Thirdly (iii) an offer made by a consumer under conditions similar to the situation (i) and (ii), whether or not the consumer is bound by his offer. However, several contracts, such as construction, sale and rental of immovable property are excluded from the scope of the directive.

The directive makes use of the instrument of a right of cancellation in order to equal the position of the consumer. In order to make the consumer aware of the right of cancellation, the trader has to give written notice of this right to the consumer. This notice has to be given (a) at the time of conclusion of the contract; (b) not later than at the time of conclusion of the contracts or (c) when the consumer makes the offer. It is left to the Member States to regulate the cases where no notice has been supplied. A consumer has the right to renounce the effects of his undertaking by sending a notice within a period of no less than seven days from receipt of the notice from the trader. It is not required that the trader

⁹ OJ 1985 L 372/31.

¹⁰ The recitals refer to the preliminary programme of the European Economic Community for consumer protection and information policy (OJ 1981 C 133/1). This reference is comparable to providing Article 153 EC, which was introduced by the Maastricht Treaty, as an additional legal basis.

received the notice before the end of the period. The cancellation by the consumer has the effect of releasing the consumer from any obligations under the cancelled contract.

The directive lays down minimum standards for the Member States. Member States are thus free to adopt or maintain more favourable provisions for the protection of consumers ('minimum harmonisation'). This includes a total or partial prohibition of doorstep selling; inclusion contracts that have been excluded by the directive (such as contracts relating to immovable property) and an increase of the amount of days the consumer has to withdraw from the contract. Member States are also allowed to exclude the applicability of the legislation based on the directive for contracts below a certain value.

Position of the European Parliament

Parliament, having the right of consultation, passed a resolution¹¹ in response to the proposal from the Commission to the Council. In this resolution the European Parliament welcomed the proposal and emphasised the significance of the consumer policy, which aimed at ensuring greater protection for the consumer. It made some suggestions for amendment with a view to enlarging the consumer protection in the directive. The proposed amendments included lowering the threshold from 25 euro to 15 euro (which the Council made optional), in order to give the directive the practical significance it should have. The MEPs believed that the activities of mail order companies should explicitly be excluded from the directive and that the Commission should prioritise the development of specific legislation on consumer credit, home-study courses, securities and insurance contracts. Parliament also called for a fast decision by the Council and a quick transposition in the national laws of the Member States.

3.1.2. Self-employed Commercial Agents Directive

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member State relating to self-employed commercial agents¹² is based on Articles 57(2) and 100 EEC Treaty (currently Articles 47(2) and 94 EC). Although the restrictions on the freedom of establishment and the freedom to provide services in commerce has been abolished in 1964, the differences in national laws regarding commercial representation were a de facto restriction of these freedoms, especially if the commercial agent and the principal were established in different Member States. The differences in national legalisation also had a detrimental effect on the protection of commercial agents vis-à-vis their principals and the security of commercial transactions in general. Since private international law could not take away these disadvantages, approximation of the legal systems of the Member States was required to ensure the proper functioning of the internal market.

The directive concerns the relation between self-employed commercial agents, i.e. an intermediary who is not employed by the principal and who works on a commercial basis on one hand, and the principal on the other. It regulates the main obligations of the parties, the remuneration of the commercial agent and the conclusion and termination of the agency contract.

Both parties have to act dutifully and in good faith towards each other. The commercial agent has to look after the interests of the principal, make proper

¹¹ OJ 1977 C241/26.

¹² OJ 1986 L 382/17.

efforts to negotiate and conclude the transactions, communicate to the principal all the necessary information and comply with his reasonable instructions. The principal is under the obligation to provide the necessary documentation, to obtain for the commercial agent the information necessary for the performance of the agency contract, to inform the commercial agent once he anticipates a significant decrease of transactions and to inform the commercial agent within a reasonable period of his acceptance or refusal of any commercial transaction the agent has procured. The parties may not derogate from these obligations.

The commercial agent is entitled to remuneration and commission, based on the agreement or in absence thereof, based on what is customary in the place of business of the commercial agent. If a transaction has been concluded during the period covered by the agency contract as a result of the action of the agent or if the transaction has been concluded with a third party but due to his acquisition of that customer, the commercial agent is entitled to commission. If a contract is concluded within the specific geographic area of the commercial agent, the agent is also entitled to commission, irrespective of (a lack of) his efforts. After termination of the agency contract, the commercial agent is entitled to commission for transactions that are mainly attributable to his efforts during the period covered in the contract. In the case that both a former and a current commercial agent would be entitled to commission under these rules, the commission is payable to the former agent. Most of the commercial agents' rights are mandatory and therefore cannot be waived or only after a dispute has arisen.

Although the contract does not have to be in writing (the Member States remain free to provide so), each party has the right to a written and signed statement on the terms of the contract. If an agency contract has been concluded for an indefinite period, it can be terminated by notice if a period of notice is respected. This period is a month for every year the agency contract has lasted, with a maximum of three months. Member States are allowed to extend the maximum period to six months. Unless the termination is attributable to the conduct of the commercial agent, the agent is entitled to indemnification and compensation after termination of the agency contract. The level of indemnification or compensation is regulated by the directive and the Commission is responsible for ensuring the proper implementation of this protection of the commercial agent after termination of the contract. An agreement which restricts the trade of the commercial agent in the period after termination is only valid if it is concluded in writing; the clause relates to a geographic area or a group of customers and is not for a longer period than two years.

Position of the European Parliament

Parliament, having the right of consultation, passed a resolution¹³ in response to the proposal made by the Commission. The European Parliament agreed with the Commission that the abolition of the restrictions on the freedom of establishment and the freedom to provide services in commerce required the subsequent approximation of the laws of the Member States regarding commercial agents. It, however, felt that part-time agents in mail-order sales should be excluded from the scope of the directive. Parliament expected and hoped that the Commission would soon propose legislation on commercial travellers, insurance agents and financial agents. In its resolution, the MEPs held that it was desirable that a separate provision for del credere agency contracts (i.e. contracts in which the agent guarantees the performance of the obligations of the third party to the principal) should be included in the directive. However, in the final version of the directive

¹³ OJ 1978 C 239/17.

these provisions have not been included. Likewise, Parliament proposed to amend the text to the effect that the period of notice for termination of the agency contract should be shortened to one month during the first year, subsequently 14 days for each additional year, with a maximum of at least three months. This amendment was ultimately rejected.

3.1.3. Package Travel Directive

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours¹⁴ is based on Article 100a EEC Treaty (currently Article 95 EC). Although there is a single legal basis, the objective of the directive is threefold: strengthening the internal market, consumer protection¹⁵ and development of tourism.¹⁶ Tourism plays an important role of the economies of the Member States and is characterised by cross-border activity. The packaging travel system, in which the consumer buys more than one tourist service at once, is a cornerstone of the tourism market. While the European consumers buy tourist services abroad, the package itself is usually bought in the home state of the consumer, which is ascribed to, inter alia, the disparities in the legal protection of consumers. Consumer protection is important since package travel typically involves the expenditure of substantial amounts of money in advance for services in another country. A minimum level of protection across the Community makes consumers more confident to buy a package outside their own Member State. This strengthens the internal market and stimulates the tourism in the Member States.

The directive employs three mechanisms to achieve the aforementioned objectives. It imposes information duties on the organiser or retailer¹⁷ of the package, regulation of the rules regarding the time between conclusion of the contract and the travel and regulation of the liability of the “seller”.

In general, the “seller” has a duty to provide the descriptive information in a way that it is not misleading. More specifically, if a “seller” makes a brochure available to the consumer,¹⁸ it has to include certain information. This information includes the destination; the means, characteristics and categories of transport; the type of accommodation and its characteristics. This information is binding on the “seller”, unless it changes have been communicated before the conclusion of the contract. In addition, the “seller” has to communicate passport and visa requirements and information on the health formalities required for the journey or stay in advance of the conclusion of the contract. The contract itself has at least to include the information listed in the annex to the directive and all the terms of the contract. Moreover, the “seller” has to provide information in writing regarding, among other things, the contract details of the representative of the “seller” and the times and places of intermediate stops.

¹⁴ OJ 1990 L 158/59.

¹⁵ Reference is made to the Council resolution of 19 May 1981 on a second programme of the European Economic Community for a consumer protection and information policy (OJ 1981 C 165/24).

¹⁶ See also Council resolution of 10 April 1984 on a Community policy on tourism (OJ 1984 C 115/1), cited in the recitals.

¹⁷ Member States have the option to appoint either the organiser or the retailer or both as the person who is liable for performance of the contract. For the sake of shortness, this report will use the term “seller” for the appointed party or parties.

¹⁸ The definition of consumer in the directive is broader than in other EC instruments on consumer law and includes professionals as well.

The directive contains several provisions for changes in circumstances during the time between the conclusion of the contract and the journey. First, the consumer has the right to transfer the booking to a third party that meets all conditions applicable to the package, in the case that the consumer is prevented from proceeding with the package. The consumer is liable for the additional costs to the “seller” and has to give the “seller” notice within reasonable time. Secondly, the prices laid down in the contract cannot be subject to revision unless it is stipulated in the contract on grounds of change in transportation costs, including costs of fuel, taxes and fees, and change in exchange rates. Such a stipulation has to provide the possibility for both upward and downward revision. During the 20 days before departure, the prices cannot be increased. Thirdly, if the change of circumstances affects the essential terms of the contract, the consumer has the right to withdraw from the contract or accept the offer for the alteration of the essential terms of the “seller”, at his choice. If the consumer withdraws from the contract or the “seller” cancels the travel for whatever reason, the consumer is entitled either to take a substitute travel of equal or higher quality or to be repaid all sums paid under the contract. In addition, the “seller” is liable for the damage incurred by the consumer, unless the travel is cancelled due to underenrolment or due to force majeure.

The liability of the “seller” is regulated in three ways. The “seller” is liable for any damage to the consumer resulting from failure to (properly) perform the contract, unless the failure is not attributable to any fault of the “seller” or to that of another supplier of services. Secondly, “sellers” cannot contractually exclude their liability. Thirdly, contractual limitation of liability for compensation is only allowed for damage other than personal injury, insofar as Member States allow such limitation. However such limitation may not be unreasonable.

In addition, the Member States are required to take measures so that consumers are protected against insolvency of the “seller”.

Position of the European Parliament

Parliament, having the right of cooperation, approved the Commission’s proposal, subject to its amendments.¹⁹ In general the amendments of the European Parliament called for more consumer protection in the directive. It proposed a prohibition of discrimination for insurance contracted in relation to a package travel. This non-discrimination clause has not been approved in the directive. However, the Council has accepted the amendment that a consumer may withdraw from the contract without penalty if the essential terms of the contract could not be met. Parliament’s proposal that a brochure forms part of the contract has been altered so that the information of the brochure is binding on the “seller”. The proposed strict liability for personal injury and death of the consumer has been mediated to a liability in which the “seller” is liable, unless it proves that it did not have any fault. Parliament objected to the system in which the Member States are free to appoint either the organiser or the retailer as the person liable for the performance of the contract, but this has not been taken over by the Council.

3.1.4. Unfair Terms Directive

Council Directive 93/13/EEC of 5 April 1993 relating to the approximation of the laws and administrative provisions of Member States concerning unfair terms in consumer contracts²⁰ is based on Article 100a EEC Treaty (currently Art 95 EC).

¹⁹ OJ 1989 C69/95.

²⁰ OJ 1993 L 95/29.

The purpose of the directive is the protection of the consumer in contractual relationships, in which the consumer is usually the weaker party.²¹ Since consumers are faced with contracts governed by a different legal system than their own when they conclude contracts in another Member State, of the content of which they are generally not aware, it is essential to remove unfair terms from those contracts, so that consumers are more confident to conclude contracts abroad. This enhances cross-border transactions and thus improves the internal market. Yet the consumer protective policy underlying the directive is the purpose; hence national measures increasing the level of consumer protection are still allowed.

The directive regulates the standard terms in consumer contracts. This has the implication that contract terms that have been individually negotiated and contracts between two professional parties are excluded from the scope of the directive. Contractual terms that reflect mandatory statutory or regulatory provisions or principles of international conventions, particularly in the transport area, are not subject to the provisions of the directive. The directive is based on minimum harmonisation and Member States are allowed to broaden the scope and include e.g. SMEs or all contract terms in their legislation. The directive deals with the substantive content of the contract, requires clear wording and obliges Member States to provide for a 'collective action' against unfair contract terms.

As a general rule, a contractual term which has not been individually negotiated is to be deemed unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Standard contracts and standard terms are always regarded as not individually negotiated. If a contractual term is found unfair, it does not bind the consumer. Although Member States are free to implement this provision in their legal system, courts have to apply the test *ex officio* (on their own motion), irrespective of the implementation.²² The test that the national courts have to apply, uses the general clauses 'unfair' and 'good faith', leaving discretion to the courts.²³ To compensate for the legal insecurity this use of general clauses creates, the annex of the directive contains an indicative and non-exhaustive list of terms which may be regarded as unfair. Member States are required to guarantee that the consumer is informed about the function and the contents of the appendix,²⁴ e.g. by means of implementation of the annex into their legislation. The unfairness test has to take into account all circumstances at the time of conclusion of the contract, the nature of the goods and services contracted for and all the other terms of the contract. However, the assessment does not relate to the definition of the subject matter of the contract or to the adequacy of the price.

In the case of a written contract, the terms must always be drafted in plain and intelligible language. The directive provides two remedies for breach of this provision. First, the directive provides that the exclusion of the assessment of the subject matter of the contract does not apply if these terms are not written in plain, intelligible language. Secondly, where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail.

²¹ The directive makes reference to the two Community programmes for a consumer protection and information policy (OJ 1975 C 92/1 and OJ 1981 C 133/1).

²² Joint Cases C-240/98 – C-244/98 *Océano Grupo v Quintero* [2000] ECR I-4941.

²³ See also Case C-237/02 *Freiburger Kommunalbauten v Hofstetter* [2002] ECR I-3403.

²⁴ Case C-478/00 *Commission v Sweden* [2002] ECR I-4147.

Member States also have to provide that persons or organisations, having a legitimate interest in protecting consumers, may take action before the national courts or administrative bodies ('a collective action') for a decision as to whether contractual terms drawn up for general use are unfair. In establishing whether such a term is unfair, the *contra proferentem* rule does not apply. If a term has been found unfair, appropriate means have to be offered to prevent the continued use of that term.

Position of the European Parliament

Parliament, having the right of cooperation, passed two resolutions²⁵ in which it responded to the Commission's proposals. Most amendments asked for a more consumer-friendly approach. For example, it suggested that unintelligible contract clauses should be deemed unfair and that the annex forms a 'binding but not exhaustive list' (contrary to 'an indicative list' as proposed by the Commission). These amendments have not been adopted. The proposal that an unfair clause 'shall not bind the consumer' instead of 'be void against the consumer' has been included in the directive.²⁶ The amendment of the European Parliament to provide for a Community Ombudsman who would be assigned with the task to monitor the application of the directive and unfair terms in general, has not been adopted in the directive. Parliament's demand to be informed on the operation of the directive, however, has been granted. Parliament has proposed 13 additional clauses to be added to the annex. Several of the proposition have been included in the final directive, such as clauses permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, clauses allowing the seller or supplier to assign his obligations to a third party, where this may serve to reduce the guarantees of the consumer, without consent of the consumer and clauses excluding or hindering the consumer's right to take legal action or exercise any other legal remedy. In addition, it suggested alterations of some provisions in the annex, of which several were adopted.

3.1.5. Distance Selling Directive

Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect to distance contracts²⁷ is based on Article 100a EC Treaty (currently Article 95 EC) that allows the approximation of the laws of the Member States with a view to repairing the functioning of the internal market. The recitals also refer to the communication 'A new impetus for consumer protection policy'²⁸ and to the Council resolution on future priorities for relaunching consumer protection policy,²⁹ indicating that in approximating the laws of the Member States a high level of consumer protection is aimed for.³⁰ The directive aims at strengthening the internal market by enabling consumers to have dealings with a business outside their country. Since the introduction of new technologies has increased the number of ways for consumers to obtain information about offers throughout the Community and to place the orders, consumers are now more able to engage in cross-border transactions. By putting the consumers that are using distance communication for the conclusion of sales and services contract in a similar position to persons concluding contracts in stores, consumers

²⁵ OJ 1991 C 326/108; OJ 1992 C 21/97

²⁶ This wording has been crucial in the *Océano* case for the ECJ to adopt a consumer-friendly interpretation of this provision.

²⁷ OJ 1997 L 144/19.

²⁸ OJ 1986 C 167/1.

²⁹ OJ 1989 C 294/1.

³⁰ The reference to these communications is comparable to the possibility today of providing Article 153 EC as an additional legal basis.

will be more confident in buying products or services by means of distance communication abroad. Additionally, the directive aims at removing the divergence in national laws with respect to distance selling that has a detrimental effect on competition between businesses in the internal market. With the adoption of Directive 2005/29/EC concerning unfair commercial practices,³¹ Article 9 of the Distance Selling Directive was amended.

The directive sets out minimum rules for contracts concluded between a supplier and a consumer under an organised distance sales scheme run by the provider. Contracts concluded *inter alia* by means of automatic vending machines or relating to financial services or immovable property are excluded from the scope of the directive. The directive uses the tools of information duties and right of withdrawal to equal the bargaining position of the consumer. Additionally, the directive provides for other regulation to make sure the consumer will be confident enough to engage in cross-border trade.

Prior to the conclusion of any distance contract, the provider has to present certain information to the consumer. This information includes the identity of the supplier (and his address if the consumer makes prior payment), the main characteristics of the goods or services, the price and costs, arrangements for payment and performance. The provider also has to inform the consumer about the right of withdrawal, if such a right exists under the contract. This information has to be provided using durable medium available and accessible to the consumer, e.g. in writing, ('a written confirmation') at the time of delivery at the latest. If the distance contract concerns services which are performed through the use of a means of distance communication, if they are supplied on only one occasion and are invoiced by the operator of the means of distance communication (such as an information telephone number) the written confirmation of information does not apply. However, the consumer must in all cases be able to obtain the geographical address of the supplier.

The consumer has a right of withdrawal from the contract of at least seven working days, without penalty and without giving any reason. The only cost that the consumer may incur is the direct cost of returning the goods. This period of at least seven working days begins from the day of receipt of the goods. In the case of a service contract the period starts from the day of conclusion of the contract or from the day of receiving the written confirmation. If the supplier has failed to fulfil the duty of written confirmation, the period shall be three months from the day of delivery or the day of conclusion of the contract in case of services. When the supplier provides the written confirmation within this three-month period, the seven working day period shall begin the day the consumer receives the confirmation. The right of withdrawal does not apply to certain types of contracts that due to their nature cannot be withdrawn from, such as unsealed audio, video and software; newspapers; gaming and lottery services; personalised products and products of which the price depends on fluctuations in the financial market. Member States may provide that a credit taken for the financing of a product to which this directive applies is also within the scope of the right of withdrawal.

Additionally, the directive requires that national laws of the Member States require performance within 30 days, if parties did not stipulate a different period. Where the supplier fails to perform his side of the contract on the ground that the goods or services are unavailable, the consumer must be informed as soon as possible and

³¹ Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ 2005 L 149/22.

be able to obtain a refund within 30 days, but Member States may lay down that the supplier may provide the consumer with goods or services of equivalent quality and price, if specified requirements are met. Member States also have to take measures in order that failure to respond to inertia selling (i.e. the sending of unsolicited goods) cannot constitute consent and to take measures so that consumers are protected if credit card fraud takes place in distance sales. The directive requires that certain techniques of distance communication may only be used with prior consent of the consumer, i.e. automatic calling machines and fax. Last, Member States have to provide that persons or organisations, having a legitimate interest in protecting consumers, may take action before the national courts or administrative bodies ('a collective action') for proper application of the national provisions for the implementation of the directive.

Position of the European Parliament

Parliament, having the right of cooperation, had two readings in which it amended the proposal of the Commission.³² In general the European Parliament pushed for more protective measure in the directive. For example, Parliament extended the period of the right of withdrawal from seven days to seven working days and moved some types of contracts from the list of contracts that are excluded from the scope of the directive to the list of contracts that do not have a right of withdrawal (consequently extending the scope of the directive). Other successful amendments include: the duty to provide information regarding the address of the supplier if the consumer makes prior payment; the prohibition of certain techniques of distance communication without prior consent and the explicit rule that the consumer does not only have the right of withdrawal without penalty, but also without any costs save the direct return charges. Unsuccessful were the amendments aiming, inter alia, at establishing a guarantee scheme for the purpose of the reimbursements of advance payment of the consumer, in case of insolvency of the supplier, and at including special provisions for the distance selling of drugs and distance contracts of an indefinite duration.

3.1.6. Consumer Sales Directive

Directive 1999/44/EC of the European Parliament and the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees³³ has Articles 95 and 153(1), (3) EC as its legal basis. The directive aims at harmonizing the rules on consumer sales contract of the Member States by means of standard rules of sales law with a high level of consumer protection, which Member States may raise, in order to strengthen the internal market. Since consumers are faced with different rules in this area, they need more confidence to enable them to make the most of the internal market. Especially the approximation of the rules concerning non-conformity helps to reach this objective. Additionally, by removing the barriers for consumers to engaging in cross-border sales, distortions in competition between sellers from different Member States may be restored.

The directive complements the Unfair Terms Directive. That latter directive only eliminates unfair terms in consumer contracts, but does not provide for provisions which are applicable in stead. This situation leaves room for divergence in the rights of consumers between the Member States and thus for barriers in the internal market. The Consumer Sales Directive aims at repairing this hiatus. The

³² OJ 1993 C 176/85 and OJ 1996 C17/51; in the third reading (OJ 1997 33/76) Parliament approved the Conciliation Committee joint text.

³³ OJ 1999 L 171/12.

rules in the directive have been modelled after the UN Convention for the International Sale of Goods of 1980 (CISG or Vienna Convention), the international standard of sales law. The directive, which applies to the sales of consumer goods, provides mandatory rules relating to the conformity of goods and relating to guarantees. Since the directive is based on minimum harmonisation, Member States are allowed to adopt or maintain more stringent provisions to ensure a higher level of consumer protection.

The seller is under an obligation to deliver goods which are in conformity with the contract. Consumer goods are presumed to be in conformity with the contract if they (i) comply with the description; (ii) are fit for the particular purpose of the consumer, if the seller knew this purpose at the time of conclusion of the contract; (iii) are fit for the purposes for which the goods are normally sold and (iv) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect. If the consumer was or should have been aware of the lack of conformity or if the lack of conformity has its origin in materials supplied by the consumer, the seller is not in breach of his obligation. Incorrect installation is equivalent to lack in conformity, if the installation of a consumer good forms part of the contract.

The seller is liable to the consumer for any lack of conformity which exists at the time of delivery of the goods. The directive introduces a hierarchy in the remedies available to the consumer for the lack of conformity. First the consumer may require that the seller repairs or replaces the goods free of charge, provided that the remedy is proportionate. A remedy is not proportionate if it imposes costs on the seller which, in comparison with the alternative remedy, are unreasonable. Only if the first set of remedies is not available,³⁴ the consumer has the right to the second set of remedies. In that case the consumer is allowed to rescind the contract or, at his choice, to require an appropriate reduction of the price. However, a consumer may not rescind from the contract if the lack of conformity is minor.

The directive sets a time limitation of two years after the delivery of the goods for claims of the consumer. Additionally, Member States are allowed to provide that, in order to benefit from his rights, a consumer has the duty to inform the seller of the lack of conformity within two months from the date on which he discovered such lack of conformity. However, if a lack of conformity becomes apparent within six months after delivery, it is presumed that this lack of conformity existed at the time of delivery.

The seller, who is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, has a right of redress against the person or persons liable in the contractual chain. Which person or persons are liable, together with the set of remedies available for the seller, has to be determined by national law.

Finally, the directive sets out several rules regarding guarantees on goods sold to consumers to ensure that consumers are not misled. Guarantees have to be provided in writing or another durable medium on the request of the consumer; the Member States may provide that such written document has to be drafted in one or more official languages of the respective Member State. The guarantee must

³⁴ Which could be either due to disproportion of a remedy from the first set of remedies or due to failure of the seller to complete the remedying within a reasonable time or without significant inconvenience.

state that the consumer has legal rights and make clear that the guarantee does not affect such legal rights. Additionally, the guarantee shall set out in plain and intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee. An infringement of these requirements does not affect the validity of the guarantee and a consumer can still rely on it.

Position of the European Parliament

After the first proposal of the Commission, Parliament, having the right of codecision, adopted several rather far-reaching amendments to the directive.³⁵ The most progressive amendment was the introduction of a direct liability of the producer or his representative if the seller is established in another Member State, has ceased trading or cannot be informed in good time of the lack of conformity. This amendment has not been accepted by the Council. The other innovative amendment was the introduction of a hierarchy of remedies for the consumer. Parliament felt that without such hierarchy, the directive would place too heavy a burden on the sellers. The Council agreed with this amendment. Other successful amendments of Parliament include the addition of Article 153 EC as an additional legal basis; liability for shortcomings in installation instructions and the explicit rule that the costs incurred in order to remedy the lack of conformity shall be borne by the seller. Parliament did not succeed in its amendment to suspend the time limitation in the period between notification by the consumer and full performance of the contract.

3.1.7. E-Commerce Directive

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market³⁶ uses Articles 47(2), 55 and 95 EC as its legal basis. The directive aims at improving the functioning of the internal market with respect to e-commerce by coordinating certain national laws and by clarifying legal concepts at Community level. The development of information society services within the Community is hampered by a number of legal obstacles which make less attractive the exercise of the freedom of establishment and the freedom to provide services. Since these obstacles are not only created by differences in the laws of the Member States, but also by the uncertainty of the applicable legal system, uniformity of certain legal provisions on e-commerce removes the obstacles. In providing a uniform and clear legal framework, the directive aims at creating consumer confidence as well. In order to achieve this aim, the directive employs maximum harmonisation, so that Member States are not allowed to adopt different measures from those in the directive, unless the directive explicitly provides for this possibility.

The framework of the directive consists of: the introduction of the country of origin principle for e-commerce service providers; the regulation concerning the establishment and information requirements of service providers (providers of e-commerce services); the regulation of commercial communication of service providers; the regulation of contracts concluded by electronic means and the liability of intermediary service providers. Additionally, the directive contains several miscellaneous provisions.

Information society services, that comply with the regulations of the Member State in which the e-commerce provider is established, may not be banned in another Member State for reasons of lack of compliance with the regulations of the latter

³⁵ OJ 1998 C 104/30 and OJ 1999 C 98/226.

³⁶ OJ 2000 L 178/1.

Member State (the so-called 'country of origin principle'). In principle, no prior authorisation is required for the establishment of a service provider. Deviation from this principle is only allowed insofar it is part of an authorisation scheme that is not specifically and exclusively targeted at information society services or which is covered by Directive 97/13/EC on a common framework for general authorizations and individual licences in the field of telecommunications services. Service providers are required to make certain information available to the recipients of the service and the competent authorities. This information shall include at least the name and address of the service provider, his contact details, trade register registration number, VAT number and, if applicable, information on the supervisory authority or regulating authority.

In addition to other information duties established by Community law, service providers have to clearly identify the following in commercial communication: the fact that it is a commercial communication, the identity of the service provider, the promotional offers and the conditions required to qualify for such offer and the promotional competitions or games. Moreover, service providers using unsolicited commercial communication by e-mail ('spam') need to be identifiable in the e-mail. Member States need to ensure that such service providers respect the opt-out register in which natural persons not wishing to receive such commercial communication can register. With respect to regulated professions, Member States shall ensure that professional rules also apply to commercial communication.

With respect to contract law, Member States allow for contracts to be concluded by electronic means. They may exclude from the scope of the provision: real estate contracts, contracts that require a public official (such as a civil law notary) for conclusion, suretyship contracts and contracts governed by family law and the law of succession. Service providers have to inform the other party, before the conclusion of the contract, on the different technical steps to follow, whether or not the concluded contract will be filed by the service provider, the technical means to correct input errors before conclusion of the contract and the languages offered for conclusion of the contract. Additionally, service providers have to inform a consumer on the codes of conduct to which the provider is subscribed. After the conclusion of the contract, the recipient of the information society service has to be able to store and reproduce the contract and the general conditions. The service provider has to inform the recipient by means of e-mail, which is deemed to be received when the addressed party is able to access it.

The directive requires Member States to ensure that 'mere conduit' providers (such as internet service providers), caching providers and hosting providers are not liable for the information transmitted. The directive provides definitions for these categories. Member States are not allowed to impose a general obligation to monitor the transmitted information on these categories of service providers.

The miscellaneous provisions include measures by Member States to promote the establishment of codes of conduct and to ensure the possibility of an action by organisations or authorities representing legitimate interest in combating failure of compliance to the directive. Member States also have to promote the setting up or development of adequate and effective out-of-court complaints and redress procedures. Member States must supervise the conduct of service providers, coordinate with other Member States and establish information points on the directive. Additionally, in implementing the directive, Member States have to lay down rules on penalties applicable to infringements of the implemented provisions of the directive.

Position of the European Parliament

In the first reading³⁷ Parliament, having the right of codecision, adopted several minor amendments to the proposal of the Commission. In the second reading, Parliament agreed with the common position of the Council.³⁸ Parliament supported the introduction of the country of origin principle in the directive, but felt that special attention to consumer protection should be given. In the first reading Parliament adopted several amendments, following the debates which focused on the consumer protection in the directive. Successful amendments of the European Parliament were the introduction of an opt-out register for commercial e-mails; the clarification of the relation between the Distance Selling Directive and this directive and some clarification of the terminology. Unsuccessful amendments of the European Parliament include the obligation for hosting providers to keep all information necessary for tracing and identifying providers of illegal content and the requirement that service providers have to include information on data protection in accordance with Directives 95/46/EC and 97/66/EC.

3.1.8. Late Payment Directive

Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions³⁹ is based on Article 95 EC. It is the outcome of a process that started with the resolution of the European Parliament on the integrated programme in favour of SMEs and the craft sector,⁴⁰ in which Parliament urged for a proposal to deal with the problem of late payment. The aim of the directive is to combat late payment of the remunerations for commercial transactions. Late payment is generally a cheap form of credit for the debtor, especially if the statutory interest rate is lower than the commercial interest rate, which places heavy administrative and financial burdens on the creditor. In particular SMEs are negatively affected by this manoeuvre. Due to the protective nature of the directive, Member States are allowed to maintain or adopt provisions that are more favourable for the creditor. Furthermore, the differences between payment rules and practices between Member States constitute an obstacle to the proper functioning of the internal market since this divergence limits the commercial transactions between the Member States. The directive is currently under review by the Commission.

The directive tries to achieve its aim by introducing a (high) statutory interest rate for commercial transactions, by providing the possibility of retention of title and by ensuring a quick recovery procedure for unchallenged claims. The directive applies to commercial transactions in which the debtor obtained goods or services from the creditor for remuneration. Since the directive regulates only commercial transactions, rules on late payment in consumer transactions are not affected.

The directive establishes that interest for late or partial payment becomes due from the day following the date for payment. If the contract does not provide such a date or period, the interest becomes payable thirty days following the date of receipt by the debtor of the invoice or the goods or services, in the case the date of receipt of the invoice is unclear or is before the delivery of the goods or services. In all cases, the receipt of a reminder is not necessary to occur interest, but it is required that the creditor has fulfilled his contractual and legal obligations

³⁷ OJ 1999 C 279/389.

³⁸ OJ 2001 C 41/38.

³⁹ OJ 2000 L 200/35.

⁴⁰ OJ 1994 C 323/19.

and the debtor is responsible for the delay. The level of interest is the sum of the main financing operations interest rate of the European Central Bank plus a 7% margin. This level is set twice a year for the following six months. For example, the statutory interest rate in commercial transactions is 9,5% for the period of January 2009 until July 2009. Member States are allowed to fix the period after which interest becomes payable to a maximum of 60 days for certain categories of contracts as defined by national law, if this period is a mandatory maximum payment period or the fixed mandatory interest rate substantially exceeds the statutory rate of the directive. Contractual agreements extending the payment periods as described above, will be void or will give rise to damages if it is grossly unfair to the creditor.

Member States also have to adopt or maintain the possibility of retention of title, in the case such retention is stipulated in the contract. Retention of title is an effective remedy for sellers of goods, since the ownership of the goods is only transferred after the remuneration has been paid and the seller is thus able to repossess the goods in case of non-payment. Finally, Member States must ensure that creditors are generally able to obtain an enforceable title for undisputed claims within 90 days. This procedure shall be available on the same terms to all creditors within the Community. Moreover, the procedure may not make a distinction on the amount claimed. The 90 days period does not include the period of notice of the lawsuit nor does it include any delay caused by the creditor.

Position of the European Parliament

Two resolutions of Parliament⁴¹ lie at the origin of the proposal of the Commission.⁴² In the former resolution, Parliament stressed the need of coercive proposals in order to regulate the problem of late payments. In the latter resolution it expressed doubt about the appropriateness of a non-binding instrument (as the Commission proposed) and asked for the adoption of a directive. In the first two readings,⁴³ the European Parliament, having the right of codecision, adopted several amendments to the proposal and common position of the Council. The most important successful amendment by Parliament was the introduction of community legislation on the retention of title. Also, due to Parliament's persistence, the marginal rate has been increased from 6% to 7%. Unsuccessful amendments of the European Parliament include the proposed shortening of the maximum length of the unchallenged claims procedure; to introduce different rules for late payment by private parties and public bodies and regulation of debt collection agencies.

3.1.9. Distance Selling of Financial Services Directive

Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC⁴⁴ is based on Articles 47(2), 55 and 95 EC. The recitals also refer to Article 153 EC. The directive aims at strengthening the internal market with respect to the distance selling of financial services by means of approximation of

⁴¹ Resolution on the Commission communication on the implementation of an integrated programme in favour of SMEs and the craft sector (OJ 1994 C 323/19) and Resolution on the Commission recommendation on payment periods in commercial transactions (OJ 1996 C 211/42).

⁴² OJ 1998 C 168/13.

⁴³ OJ 1998 C 313/142 and OJ 2000 296/173.

⁴⁴ OJ 2002 L 271/16.

the laws of the Member States, using a high level of consumer protection. Because of the intangible nature of financial services, they are especially suited to distance selling, giving suppliers of such services the possibility to make most of the internal market. It is also in the interest of consumers that they have access to the widest possible range of financial services available in the Community. To safeguard this freedom of choice, which the directive labels as 'an essential consumer right', a high level of consumer protection is needed to enhance consumer confidence. Since the Distance Selling Directive did not cover the distance selling of financial services, additional measures were required. The directive aims at restoring this hiatus, taking into account the unique features of financial services. Due to the protective nature of the directive, the provisions are mandatory so that a consumer cannot waive or lose his rights. However Member States are not allowed to introduce other provisions than those contained in the directive.⁴⁵ The amendments to other directives relate to making these directives compatible with the Distance Selling of Financial Services Directive.

The directive uses information duties and the right of withdrawal to equalise the position of the consumer vis à vis the supplier. For the proper functioning of the internal market, some miscellaneous provisions are included that deal with distance selling of financial services. Additionally, the directive gives certain options to the Member States to raise the level of consumer protection on certain issues.

The scope of information duties is listed in the directive and concern (i) the supplier, in particular his identity and address and that of his intermediaries and representatives; (ii) the financial service, notably the total price and the costs, the characteristics and the risk of the service; (iii) the distance contract, including information on the right of withdrawal and the main terms of the contract and (iv) the redress of the consumer, such as whether or not there is an out-of-court complaint and redress mechanism. This information has to be given in writing (or other durable means of communication), like the contract itself, and must be provided in a clear and comprehensible manner, taking into account the means of distance communication. In the case of voice telephone communications, the supplier may give a limited amount of this information, provided that it makes clear its purpose of selling financial services and the consumer consents to a limited reading. Community law could stipulate additional information requirements and Member States are allowed to maintain or adopt more stringent provisions on information requirements.

Consumers have a right of withdrawal from the contract of 14 days (a) from the day the contract is concluded or (b) from the day the contract has been received by the consumer in writing, whichever of these events is the latest. The period is extended to 30 days in the case of life insurance and pension contracts. The notice of withdrawal has to be sent by means which can be proved in accordance with national law. The dispatch of the notice before the end of the period is sufficient for the consumer. The right of withdrawal does not apply to financial services whose price depends on fluctuations in the financial market; short-term insurance policies, such as travel insurance and contracts whose performance has been fulfilled by both parties at the consumer's express request. Member States may provide that mortgage-backed financial services and/or financial services relating to real estate are excluded from the right of withdrawal. Although the right of withdrawal contained in this directive has primacy over the rights of withdrawal

⁴⁵ This is also the reason why Article 153 EC could not have been used as additional legal basis, as this article allows for more protective measures by the Member States.

of the Distance Selling Directive,⁴⁶ it does not have primacy over the right of withdrawal based on the Timeshare Directive. When the consumer exercises his right of withdrawal, he may only be required to pay for the service actually provided by the supplier with approval of the consumer.

The miscellaneous provisions include measures by Member States to prevent fraudulent use of the payment card of the consumer in connection with distance contracts; the prevention of unsolicited communication by means of automatic calling machines and fax machines and the possibility of an action by organisations or authorities representing legitimate interest in combating failure of compliance to the directive. Member States also have to promote the setting up or development of adequate and effective out-of-court complaints and redress procedures. Finally Member States are allowed to shift the burden of proof to the supplier with respect to the compliance of the information duties, the consent of the consumer and the performance of the contract.

Position of the European Parliament

Parliament, having the right of codecision, adopted amendments for the directive in two readings.⁴⁷ The most important successful amendments of Parliament are the shift from minimum to maximum harmonisation; the regulation of and protection against fraudulent use of payment cards and the rule that performance of the contract may only begin after consent of the consumer. The proposal of the MEPs to make a summary of the most important contractual terms mandatory has been rejected by the Council, as the proposal to increase the period of the right of withdrawal to 30 days. Although Parliament did not succeed in providing Article 153 EC as an additional legal basis, due to a Parliament's amendment a reference is made to this article in the recitals. The relatively short period of two years for the transposition of the directive has been directed by activism of the Parliament.

3.1.10. Air Passengers' Rights Regulation

Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91⁴⁸ is based on Article 80(2) EC, the article providing a legal basis for Community legislation on air and sea transport. The regulation aims at raising the standard of consumer protection with respect to denied boarding, cancellation or long delay of flights and ensuring that carriers operate under harmonised rules within the internal market. The regulation repeals a former regulation that provided similar rules for scheduled flights. Since the distinction between scheduled and non-scheduled flights is weakening and the former regulation did not sufficiently lower the number of denied and cancelled passengers, a new measure was required. The serious inconvenience caused by denied boarding, cancellation and long delay to the consumer a high level of consumer protection is justified. As a regulation, the rules contained in the regulation are directly applicable in the Member States.

⁴⁶ However, the Distance Selling Directive allowed Member States to include credits for the financing of goods sold on distance within the scope of the directive. In that case, the right of withdrawal of the Distance Selling Directive has precedence over the right of withdrawal from this directive for such credits.

⁴⁷ OJ 1999 C 278/197 and OJ 2003 C 180E/108.

⁴⁸ OJ 2004 L 46/1.

The regulation contains mandatory minimum rights for passengers in air carriage contracts ('flight tickets') for flights departing from or arriving at an airport within the territory of a Member State. In order to exercise their rights, passengers must have a confirmed reservation and present themselves for check-in in due time. The regulation does not apply to free or reduced fare tickets that are not available to the public, unless the tickets are issued under a frequent flyer programme. The rights of the passengers are partially based on the distance of the flight, measured from the airport of denial or cancellation to the final destination of the passenger, using the great circle method. It differentiates between (a) flights of 1,500 km or less; (b) intra-community flights of more than 1,500 km and other flights between 1,500 and 3,500 km and (c) non-intra-community flights of more than 3,500 km.

The regulation uses a set of standard rights. Which rights are applicable depend whether there is a denied boarding, cancellation or delay. When an air carrier seriously expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits as agreed between the passenger and the carrier. If an insufficient number of volunteers come forward, the carrier may deny boarding to passengers against their will, giving rise to compensation to the denied passenger. Being denied, the passenger has a right to monetary compensation; to reimbursement or rerouting and to care. When a carrier cancels a flight, the passenger has the right to reimbursement or rerouting and to care. The right to compensation does not exist if the flight is cancelled more than two weeks before the scheduled departure; more than seven days before the scheduled departure and the carrier offered rerouting, allowing the passenger to depart no more than two hours before the original departure and to arrive no than four hours after the scheduled arrival. The right to compensation does not exist if the carrier can prove that the cancellation is due to extraordinary circumstances which it could not avoid. When there is a delay, passengers have the right to care, provided that the delay is more than two hours for an (a)-flight, more than three hours for a (b)-flight or more than four hours for a (c)-flight.

The amount of compensation depends on the distance of the flight and amounts to € 50 for an (a)-flight; € 400 for a (b)-flight and € 600 for a (c)-flight. If the carrier offers rerouting and the delay is not more than two hours for an (a)-flight, not more than three hours for a (b)-flight or not more than four hours for a (c)-flight, the carrier may reduce the compensation with 50%. This right does shall apply without prejudice to further compensation. The right to reimbursement or rerouting is a right of the passenger to choose between the two options. The right to reimbursement consists of reimbursement of the paid fee and, if applicable, a return flight to the first point of departure. The right of rerouting is the right to be given another flight under similar conditions to the final destination, either at the earliest opportunity, or at a later date at the passenger's convenience, subject to availability of seats. The right to care covers the right to meals and refreshments in a reasonable relation to the waiting time and the opportunity to use a telephone, a fax or e-mail at the expense of the carrier twice. If the waiting time is more than a day, the passenger has the right to hotel accommodation.

In the case of upgrading of the passenger, so that the carrier can comply with the aforementioned rules, the carrier may not require any supplementary payment. If the passenger is downgraded, the carrier has the reimburse 30% of the ticket price in the case of an (a)-flight, 50% for a (b)-flight and 75% for a (c)-flight. The carrier shall give priority to persons with limited mobility and special needs. Carriers have to inform the passengers of their rights. Member States have to appoint a body responsible for supervising the enforcement of the regulation.

Position of the European Parliament

Parliament, having the right of codecision, adopted amendments in two readings⁴⁹ before reaching an agreement with the Council. The amendments are generally the air carrier friendly. The successful amendments include the enlargement of the list of definitions; the extension of the scope of the regulation by removing the clause that limited the scope to packages sold within the Community; the division of three categories of distance, instead of two categories; the lowering of the compensation for delay and cancellation; the increase of check in time if no time has been stipulated by the carrier; and provisions for compensation in case the traveller is placed in a class lower than that for which the ticket has been purchased. Amendments that have not been adopted by the Council include provision that carriers are not required to provide assistance in the case of political unrest or long strikes; inflation correction of the compensation and a more detailed selection method for the passengers that will be denied boarding.

3.1.11. Unfair Commercial Practices Directive

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 Council⁵⁰ is based on Article 95 EC and has as an additional basis Article 153 EC. The recitals also refer to Article 14(2) EC, the article on the internal market without borders in which free movement of goods and services are ensured. The directive aims at the approximation of the laws of the Member States regarding commercial practices, as the laws of the Member States diverge significantly on this issue. Consumers are potential victims of this divergence, since the uncertainty caused by this might undermine their confidence in the internal market. Ensuring a high level of consumer protection, the directive tries to eliminate these uncertainties. Only by using this high standard of consumer protection can the different concepts of fairness between the Member States, on which the protection of consumers against unfair commercial practices is based, be overcome and thus the internal market be strengthened. Additionally, the existing divergence increased the cost of businesses to compete with each other in multiple Member States and barred businesses to make use of the internal market. With the harmonisation of the laws of the Member States these barriers are removed. Since the minimum harmonisation of the Misleading and Comparative Advertising Directive led to substantial divergence between the laws of the Member States, this directive employs maximum harmonisation. As a political compromise with Denmark and Sweden, Member States are allowed to maintain, but not to adopt, a higher level of consumer protection in this respect for six years. The directive also amends several existing directives in order to ensure mutual compatibility.

The directive contains the general prohibition of unfair commercial practices against consumers. Within the scope of private law, an infringement of this prohibition might lead to liability in tort or delict and is without prejudice to contract law. In order to establish whether a commercial practice is unfair, the directive makes use of a system of three different levels of abstraction. On the most abstract level, a commercial practice is deemed unfair if it is both contrary to the requirements of professional diligence and it materially distorts (or is likely to materially distort) the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed. Due to the

⁴⁹ OJ 2003 C 300E/556 and OJ 2004 C74E/806.

⁵⁰ OJ 2005 L 149/22.

average consumer test, vulnerable groups are only protected against their vulnerability insofar as the commercial practice is directed to such vulnerable group. On the second level, the directive sets out that a commercial practice is in particular unfair if it is either misleading or aggressive. Whether this is the case, has to be assessed on the basis of factual circumstances. On the least abstract level the annex of directive contains a list of practices that are misleading or unfair in all circumstances.

With respect to the second level, a commercial practice can be regarded as misleading if it either contains false information or omits material information, if this causes (or is likely to cause) the average consumer to take a transactional decision he would not have taken otherwise. False information can be either untruthful or deceiving for the average consumer in its overall presentation, even if it contains correct information, in relation to circumstances that are listed in the directive. These circumstances include the nature and main characteristics of the product, the price or the need for a service. Moreover, misleading advertisement and non-compliance with a code of conduct by which the trader has publicly undertaken to be bound. Misleading omissions can be divided into the omission of material information and the hiding of information. The omission of material information can only be unfair if the omitted information was required by the average consumer to take an informed decision. Hiding such information or providing it in an unclear, incomprehensible, ambiguous or untimely manner is also deemed to be an omission. If the commercial practice includes an invitation to purchase, a listed amount of information in the directive is considered material. Under any circumstance information, which has to be disclosed as a result of information duties established by Community law, is regarded as material.

A commercial practice is aggressive if by means of harassment, coercion and undue influence it significantly impairs (or is likely to impair) the average consumer's freedom of choice or conduct, which causes (or is likely to cause) him to enter into a transaction he would not have entered into otherwise. The directive lists circumstances that have to be taken into account when determining the aggressive nature of the commercial practice. These circumstances contain inter alia the use of threatening or abusive language or behaviour, the exploitation of specific misfortune of which the trader is aware and any threat to take any illegal action.

The annex contains a detailed list of 23 misleading commercial practices and eight aggressive commercial practices. Every practice on the list is regarded as unfair in all circumstances throughout the European Community. Member States are under the obligation to incorporate the "same single list" (wording of the directive) into their national law and modification may only be done at Community level. The commercial practices on the list vary from displaying a trust or quality mark without having obtained the necessary authorisation and related practices such as false claims on endorsement or approval by a public or private body to falsely claiming that a product is able to cure illness to explicitly informing a consumer that without concluding a contract with the consumer, the trader's job or livelihood will be in jeopardy.

Member States are required to establish an adequate and effective enforcement system, including legal provisions under which persons and organisations with legal interest, including competitors, can take legal action against such unfair commercial practices. Additionally, Member States must enable such persons and organisations to bring such unfair commercial practices before an administrative authority. Finally, in implementing the directive, Member States have to lay down

rules on penalties applicable to infringements of the implemented provisions of the directive.

Position of the European Parliament

Parliament, having the right of codecision, amended the proposals in two readings.⁵¹ Successful amendments of the European Parliament include the specification that the list of commercial practices that are deemed unfair under all circumstances are the same for all Member States; the inclusion of several commercial practices on that list and the provision that the directive is without prejudice to national authorisation schemes. Amendments that have not been adopted by the Council are inter alia the explicit provision that the directive also applies if no contract between the trader and consumer has been concluded; more protective measures for weaker parties and rules on the division of burden of proof. Parliament endorsed the proposal of the Commission to introduce the country of origin principle for traders, so that the law of the Member State of the trader would apply. Council rejected this proposition and Parliament rested with this decision.

3.1.12. Consumer Credit Directive

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC⁵² is based on Article 95 EC. The directive replaces the former Consumer Credit Directive of 1987 and deviates on several points from the old directive. Most notably the directive is based on maximum or full harmonisation, so that Member States are not allowed to adopt or maintain provisions that are more favourable for the consumer. Since the 1987 Directive failed in creating a common credit market, which resulted in diversity in the cost of credit between the Member States, and the financial services market has changed over the past 20 years, the 2008 Directive had been adopted. It has to be implemented before 12 May 2010. The directive aims at creating consumer confidence to enter into credit agreements with financial institutions outside their respective Member State and thus creating a common credit market by means of harmonising the rules regarding consumer credit agreements.

For the creation of consumer confidence the directive employs the tools of information duties and a right of withdrawal. Creditors are under the obligation to assess the creditworthiness of a consumer. However, to strengthen the position of financial institutions, creditors have a right to access to databases used in Member States for assessing the creditworthiness of consumers. The directive also regulates linked contracts, early termination and overrunning. Credit agreements are broadly defined in the directive, but numerous agreements have been excluded from its scope, most notably credit agreements with a value below € 200 and over € 75,000; credit agreements relating to the finance of real property; mortgage backed credits and interest-free credits. For several kinds of credit agreement, including overdraft facilities which have to be repaid within three months, only a part of the directive applies.

The directive imposes several information duties on the creditor at different stages of the contracting process. During every stage, the information has to be given in a clear, concise and prominent way. In advertisements the creditor has to include information inter alia on the borrowing rate; the total amount of credit; the annual

⁵¹ OJ 2004 C 104E/260 and OJ 2005 C 304E/351.

⁵² OJ 2008 L 133/66.

percentage rate of charge (Member States may decide that this information does not have to be provided) and the duration of the credit agreement. In the pre-contractual stage, the creditor has to provide more specific information to the consumer, on the basis of the credit terms and conditions offered to the consumer and the preferences of the consumer, using the Standard European Consumer Credit Information form, set out in Annex II of the directive. This information includes the type of credit; the identity and geographical address of the creditor; the total amount of credit; the annual percentage rate of charge; the duration of the agreement; the amount, number and frequency of instalments and the charges for early and late payment. The contract itself, which shall be drawn up on paper or another durable medium, has to contain at least 22 specified elements, including – among others – the information mentioned above; information on the out-of-court complaint procedure (if available); all terms and conditions of the credit agreement and the name and address of the competent supervisory authority. If the credit agreement is in the form of overdraft facilities, the directive requires less information to be made available. Although the directive compels that the same information be given in multiple stages, it does not contain a provision for the case the substance of the information on the same issue in different stages of the contracting process is dissimilar from each other.

The consumer has a right of withdrawal of 14 days after conclusion of the contract or, if the written contract does not contain the information required by the directive, at the moment of receipt of such information. It is sufficient if the consumer dispatches a written notice before the deadline expires. Additionally, the consumer has to pay the capital and interest occurred thereon from the day the credit was drawn down until the day the capital is repaid. The right of withdrawal regulated in this directive has precedence over the right of withdrawal of the Financial Services Directive and the Doorstep Selling Directive, in case these rights coincide.

Member States have to ensure that creditors assess the creditworthiness of consumers before the conclusion of the contract. This assessment has to be made on the basis of sufficient information, which could be obtained from the consumer, and, if a Member State provides so, on the basis of consultation of a database. If the total amount of credit is increased after the conclusion of the contract, the creditor has to assess the creditworthiness again with updated information. The directive does not regulate the situation if the consumer appears uncreditworthy. Member States shall ensure that foreign creditors can access databases concerning the creditworthiness of consumers on the same basis as national creditors.

Linked contracts occur if a consumer enters into a credit agreement for the financing of his obligations resulting from another contract, e.g. a sales contract. These contracts are linked in the sense that without the other, the consumer would not have concluded either contract. The directive provides that if the consumer exercises his right of withdrawal from a sales or services contract based on another directive, e.g. the Distance Selling Directive or the Doorstep Selling Directive, he is no longer bound to the credit agreement either. In the mirror situation, when a consumer exercises his right of withdrawal based on the Consumer Sales Directive, the directive does not allow for withdrawal from the linked contract. In the case of early termination, i.e. when the consumer repays this debt before it was due, the directive requires that the creditor shall receive a fair and objectively justifiable compensation. Creditors have to inform the consumer in writing if the latter significantly overruns his current account for more than one month. With respect to the calculation of the annual interest rate, the

directive contains provisions ensuring a uniform calculation, thus enabling the consumer to compare different offers made by offerors of credit.

Member States must establish a supervisory authority to oversee the functioning of the financial institutions. With respect to credit intermediaries, Member States have to adopt provisions ensuring the intermediaries disclose their relation with the financial institutions and their fees towards the consumers. In implementing the directive, Member States have to lay down rules on penalties applicable to infringements of the implemented provisions of the directive. Additionally, Member States shall ensure that an adequate and efficient out-of-court dispute resolution procedure is put in place.

Position of the European Parliament

Parliament, having the right of codecision, set out its position during the first reading⁵³ and reached an agreement with the Council during the second reading,⁵⁴ so that it adopted the final text of the directive during the second reading. The most important amendments of the European Parliament that have been adopted by the Council are the introduction of rules on linked contracts; the limitation of the scope of the directive, most notably excluding credits under and over a certain value; the rule that access to databases on creditworthiness for creditors from other Member States are governed by the same conditions as creditors from the Member State and the different information duties for overdraft facilities. Council did not include 43 amendments (of the 153) in the directive, including several proposed rules on the calculation of the annual percentage rate and the provisions that Member States are allowed to adopt or maintain more far-reaching rules for the best possible consumer protection. The Council rejected the mutual recognition clause that had been introduced by the Commission and endorsed by Parliament.

3.1.13. Timeshare Directive

Directive 2008/122/EC of the European Parliament and the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts⁵⁵ is based on Article 95 EC and repeals Directive 94/47/EC.⁵⁶ The directive aims at enhancing legal certainty and fully achieving the benefits of the internal market for consumers and businesses with respect to timeshare contracts and related contracts by means of full harmonisation of the laws of the Member States. The 1994 Timeshare Directive did not succeed in this aim as it did not regulate products similar to timesharing and allowed for circumvention of the directive. Since tourism plays an increasingly important role in the economies of the Member States and is due to its nature a typical cross-border activity, the development of timeshare and long-term tourism products should be encouraged by adopting certain common rules. The directive has to be transposed before 23 February 2011.

The directive does not only regulate timeshare contracts, but also long-term holiday product contracts, contracts for the resale of one of the former two contracts and contracts in which temporary access to the rights of a timeshare

⁵³ OJ 2004 C 104E/233.

⁵⁴ T6-0011/2008.

⁵⁵ OJ 2009 L 33/10.

⁵⁶ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ 1994 L 280/83).

contract are exchanged. With respect to contract law, the directive provides regulation of the pre-contractual information, the timeshare contract itself and provides a right of withdrawal for the consumer. Additionally, it contains rules on advertising of times share products, on advance payment and on judicial and administrative redress.

In good time before the consumer is bound by any contract or offer, the trader has to provide the consumer with certain information. What information has to be given depends on the type of contract and is listed in the annexes to the directive. It concerns inter alia information on the identity of the trader, the characteristics of the product, the existence of the right of withdrawal, the price of the product and the termination of the contract. This information has to be provided free of charge by the trader on paper (or another durable medium).

The directive requires that a timeshare, long-term holiday, resale or exchange contract is in writing (on paper or other durable medium), drawn up in one of the languages of the Member State in which the consumer is resident or national (at his choice). The information given in the pre-contractual stage forms an integral part of the contract. This information shall not be altered unless parties expressly agree otherwise and the changes result from unusual, unforeseeable and unavoidable circumstances beyond the trader's control. In addition to the pre-contractual information, the contract must include the identity, place of residence and signature of each party and the date and place of conclusion of the contract. Before conclusion of the contract, the trader must draw the consumer's attention in writing to the rights existing under the directive and the consumer has to sign separately for these provisions.

In addition to the remedies available under national law for breach of the information duties under the directive, consumers have a right to withdraw from the contract within 14 calendar days. The withdrawal period starts from the day of conclusion of the contract or the day the consumer receives the contract, if this is later than the conclusion of the contract. In the case a filled standard withdrawal form, as introduced by the directive, has not been given by the trader, the period of right of withdrawal will not start, but shall expire after one year and 14 calendar days. If the pre-contractual information has not been provided, the right of withdrawal shall expire after three months and 14 calendar days. Withdrawal by the consumer will terminate any obligations under the contract, without costs or liability for the consumer. The deadline is met if the consumer dispatches the withdrawal before the end of the period. With the withdrawal of the consumer from the timeshare (or other) contract, ancillary contracts and credit agreements for the financing of the timeshare contract will be terminated as well.

Consumers cannot lose their rights under the directive by means of a choice of law for the law of a third country. In advertising, the traders have to comply with certain rules on their conduct. This includes the disclosure of their purpose, the availability of the pre-contractual information and the prohibition of selling and marketing the product as an investment. Member States have to certify that adequate and effective means exists to ensure compliance with the directive, inform consumers of their rights under the directive and encourage the setting up of adequate and effective out-of-court complaints and redress procedures. They also have to provide for effective, proportionate and dissuasive penalties in the event of a trader's failure to comply with the national legislation adopted pursuant to the directive.

Position of the European Parliament

Parliament, having the right to codecision, amended the proposal by the Commission in the first and final reading.⁵⁷ The important successful amendments include the introduction of an expiry period of one year and fourteen calendar days if the trader provides a filled standard withdrawal form as provided in the directive; the right of the consumer that the contract shall be drawn up in the language of his Member State; the protection of consumers with respect of a choice of law and the inclusion of specific provisions relating to long-term holiday product contracts. The Council did not reject any amendment proposed by the European Parliament.

3.2. Other related Secondary Legislation

3.2.1. Product Liability Directive

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products⁵⁸ (amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC)⁵⁹ is based on Article 100 EEC Treaty (currently Article 94 EC). The directive aims at strengthening the internal market by means of approximation of the laws of the Member States concerning producer liability for damage caused by the defectiveness of his products. The necessity is caused by (then) existing divergences that distorted competition and affected the freedom of the movement of goods. The directive provides mandatory rules for the liability of producers for industrialised movable goods and applies equally to imports of such goods in the Community. Member States may not introduce more stringent provisions for the protection of consumers, unless such provision is allowed by the directive. The directive sets out non-contractual liability rules and does not affect existing contractual and non-contractual liability.

The directive imposes a strict liability on the producers of industrialised moveable goods. If more than one person is liable under the directive, all persons are jointly and severally liable. The consumer has the burden of proof for the damage, the defect and the causal relationship between these two. The producer only has a limited set of defences to escape liability. The directive contains a limitation period of three years from the day on which the consumer became aware of the damage, defect and identity of the producer and an expiration period of 10 years from the day the producer brought the good into circulation. Member States may deviate from the directive on some issues, including the possibility to limit the total liability of the producer to not less than € 70 million resulting from death and personal injury and caused by identical products with the same defect.

Position of the European Parliament

Parliament, having the right of consultation, passed a resolution in which it set out its amendments.⁶⁰ Successful amendments include the exclusion of liability in case the producer could not have discovered the defect with the state of the scientific and technological knowledge at the time the article was put into circulation; the possibility for the producer to raise the defence of contributory

⁵⁷ T6-0511/2008.

⁵⁸ OJ 1985 L 210/29.

⁵⁹ OJ 1999 L 141/20.

⁶⁰ OJ 1979 C 127/61.

negligence (so that the liability is mitigated in the case the damage is partially caused by the fault of the injured person) and the possibility to claim non-material damage according to national law.

3.2.2. Price Indication Directive

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers⁶¹ is based on Article 129a(2) EC Treaty (currently 153 EC).⁶² The directive aims at improving the position of consumers in the internal market by the approximation of the laws of the Member States regarding the indication of prices. By requiring the indication of both the selling price and the unit price, using uniform indication and calculation methods, consumers can more easily compare prices. Member States are required to adopt administrative or punitive measures against infringement and may lay down rules that are more favourable for consumers. The directive regulates the pre-contractual stage and is without prejudice to contract law.

The directive requires that all prices are indicated including the VAT and all other taxes. A trader has to indicate both the selling price of a unit or a given quantity of the produce and the unit price, which is the final price for one kilogram, one litre, one metre, etc. of the product. Several exceptions to this rule exist, including the situation where both prices are equal and for goods in bulk. The selling price and the unit price must be unambiguous, easily identifiable and clearly legible. Member States are responsible of enforcing the rules of the directive by means of penalties for infringements and may waive the obligation to indicate unit price for a transitional period for certain small businesses and in cases the indication of unit prices might create confusion.

Position of the European Parliament

The amendments of Parliament,⁶³ having the right of codecision, mainly dealt with the scope of the directive and the introduction of the euro. Parliament felt that certain products, such as food and beverages sold in restaurants and cafés and products sold during an auction, should be excluded from the scope. Council agreed with the narrowing of the scope with respect to auctions and products supplied in the course of the provision of services.

3.2.3. Injunctions Directive

Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests⁶⁴ is based on Article 100a EC Treaty (currently Article 95 EC). The directive aims at ensuring a smooth functioning of the internal market with respect to rules concerning the collective enforcement of consumers' rights. Several EC directives lay down rules with regard to the protection of consumers' interest, but (then) existing mechanisms did not always allow infringements harmful to the collective interest of consumers to be terminated in good time. The difficulties that are caused distort the smooth functioning of the internal market and negatively affect consumer confidence in the internal market. Using minimum harmonisation, so that Member States are allowed to grant institutions more extensive rights, this directive provides that

⁶¹ OJ 1998 L 80/27.

⁶² Before the Nice Treaty, Article 129a could be used as exclusive legal basis for these measures.

⁶³ OJ 1996 C 141/191, OJ 1997 C 85/26 and OJ 1998 C 14/26.

⁶⁴ OJ 1998 L 116/55.

entities appointed by a Member State have the right to start an action for an injunction against infringement of consumer rights. Therefore, this directive does not affect the law of contract of the Member States and is without prejudice to the rules of private international law.

The directive provides that 'qualified entities' are allowed to bring an action before a competent court or administrative body seeking an injunction against infringement of EC directives on consumer law (that are listed in the annex of the directive), including publication of the decision and, insofar the legal system of the Member State concerned so permits, an order of punitive payments in event of failure to comply. Member States have to appoint independent public body and/or private organisations whose purpose is to protect the interest of consumers. In addition Member States have to take measures to ensure that qualified entities of other Member States are able to bring these actions before their courts. Member States are allowed to require prior consultation of the infringing party.

Position of the European Parliament

During the two readings⁶⁵ Parliament made amendments to the proposals. The most important successful amendment was the extension of the scope of the directive. The proposal of the Commission only concerned the coordination of injunctions in intra-Community infringements. Parliament successfully included the harmonisation of access to the injunction procedures. Other successful amendments were the provisions on qualified entities and on prior consultation.

3.2.4. Conditional Access Directive

Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access⁶⁶ is based on Articles 57(2), 66 and 100a of the EEC Treaty (currently Articles 47, 55 and 95 EC). The directive aims at improvement of the internal market by means of approximation of the laws of the Member States concerning measures against illicit devices which give unauthorised access to protected services. The directive protects information society services, including television and radio broadcasting, that use conditional access by means of equipment or software designed to protect such service. Illicit devices are used to gain unauthorised access to such service, which causes losses to the service providers, while the producers and sellers have financial gain from these activities. These activities are also detrimental to consumers, as they are generally unaware of the illicit origin of the device. These detrimental effects may harm the smooth functioning of the internal market. This directive aims at eliminating this harm. The directive requires Member States to enact administrative and punitive provisions and does not affect the contract law of the Member States.

The directive requires Member States to prohibit the manufacture, import, sale, possession, installation, maintenance or replacement for commercial purposes of an illicit device and the use of commercial communications to promote illicit devices. They have to provide for effective, dissuasive and proportionate sanctions for infringements of this prohibition. Within the scope of the directive, Member States are not allowed to restrict the provision of such conditional access services or the free movement of conditional access devices.

⁶⁵ OJ 1996 C 362/236 and OJ 1998 C 104/205.

⁶⁶ OJ 1998 L 320/54.

Position of the European Parliament

Parliament, having the right of codecision and amending the proposed directive during the first reading,⁶⁷ proposed a widening of the scope of the directive by including commercial promotional communication. This amendment has been adopted by the Council. Parliament's amendment that Member States should take the necessary measures, in accordance with their legislation, to ensure that service-providers damaged by unauthorized activity can bring legal proceedings for damages and, if appropriate, apply for seizure of unauthorized devices, has not been followed.

3.2.5. Electronic Signatures Directive

Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures⁶⁸ is based on Articles 47(2), 55 and 95 EC. The directive aims at improving the functioning of the internal market by establishing a legal framework for electronic signatures and certain certification-services. Advanced electronic signatures that use qualified certificates and are created by a secure-signature-device, have the same level of certainty concerning the identity of the person as a handwritten signature. Since electronic signatures are especially well suited for intra-Community trade, a common legal framework for electronic signatures will improve the internal market. With regard to contract law, the directive relates to the conclusion and formation of contracts, but the provisions concerning the legal effects of electronic signatures are without prejudice to national rules regarding the formation of contract.

Member States are required to give the same legal effect to advanced electronic signatures that use qualified certificates and are created by a secure-signature-device (which are uniquely linked to the signatory, are capable of identifying the signatory, are created under the signatory's sole control and are uniquely linked to the data) as handwritten signatures. Such advanced electronic signatures are admissible as evidence in legal proceedings. Electronic signatures in general may not be denied legal effect on grounds of their form or lack of a certain certificate. Member States must recognise and may not restrict certificate-services originating from other Member States. As a minimum, Member States shall ensure that a certification-service-provider is liable for damage caused for unjustified reliance on the validity of a certificate caused by assurance by the provider. Furthermore, the directive contains regulation on accreditation and supervision of certification-service-providers; international aspects of certification of electronic signatures and data protection.

Position of the European Parliament

Parliament, having the right of codecision, proposes several amendments for the directive.⁶⁹ Successful amendments include modification of the liability of the issuer related to the issuing of qualified certificates to the public, and the provision that the Member States have to give legal effect to all electronic signatures issued in conformity with the laws of another Member State.

3.2.6. Consumer Protection Cooperation Regulation

Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the

⁶⁷ OJ 1998 C 152/64.

⁶⁸ OJ 2000 L 13/12.

⁶⁹ OJ 1999 C 104/56 and OJ 2000 C 154/51.

enforcement of consumer protection laws⁷⁰ is based on Article 95 EC. The regulation aims at improving the internal market with regard to the enforcement of consumer law in cross-border cases by means of uniform rules on the cooperation of national consumer authorities. Although the internal market aims at stimulating businesses to engage in cross-border activities, consumer protection is enforced on a national level. This leaves a regulatory gap which affects the confidence of consumers in the internal market and distorts competition. The regulation restores this gap by providing uniform rules on cooperation by national consumer authorities for the enforcement of EC consumer law. Since this regulation only provides administrative provisions, it does not affect the contract law of the Member States.

Each Member State shall set up or appoint a public authority responsible for investigating and enforcing consumer law, especially EC consumer law. On the issue of the exchange of information on request, the Regulation states that a requested authority shall, on request from an applicant authority, supply without delay any relevant information required to establish whether an intra-Community infringement has occurred or to establish whether there is a reasonable suspicion that it may occur. The requested authority shall undertake the appropriate investigations in order to gather the required information. On request from the applicant authority, the requested authority may permit an official of the applicant authority to accompany the officials of the requested authority in the course of their investigations. When an authority becomes aware of an intra-Community infringement, or reasonably suspects such infringement, it shall notify the authorities of other Member States and the Commission, supplying all necessary information, without delay. When an authority takes further enforcement measures or receives requests for mutual assistance in relation to the intra-Community infringement, it shall notify the authorities of other Member States and the Commission. As far as the request for mutual assistance and information exchange procedures is concerned, the applicant authority shall ensure that all requests for mutual assistance contain sufficient information to enable a requested authority to fulfil the request, including any necessary evidence obtainable only in the territory of the applicant authority.

Position of the European Parliament

Parliament, having the right of codecision, adopted several amendments in its first and single reading.⁷¹ The European Parliament asked for a two-year transitional period in order to give Member States the opportunity to set up consumer authorities. The Council incorporated this request, together with the amendment on the cancellation of the establishment of a Standing Committee on Consumer Protection Cooperation. The amendment to increase the responsibilities of the consumer authority to “coordination and cooperation between the competent authorities” instead of “application of the regulation” failed.

3.2.7. Misleading and Comparative Advertising Directive

Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising (codified version)⁷² is based on Article 95 EC and codifies three directives on misleading and comparative advertising⁷³ into one version. The directive itself does not create

⁷⁰ OJ 2004 L 364/1.

⁷¹ OJ 2004 C 104E/218.

⁷² OJ 2006 L 376/21.

⁷³ Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising (OJ 1984 L 250/7; Directive 97/55/EC of the European Parliament and of the Council 28/04/2009

or alter Community legislation. The aim of the directive is to strengthen the internal market by means of the approximation of the laws of the Member States with regard to misleading and comparative advertising. Since the laws of the Member States differed widely and advertising reaches beyond the frontiers of a Member State, it has a direct effect on the smooth functioning of the internal market. Misleading and unlawful comparative advertising can lead to a disruption of competition and might be to the detriment of the welfare of the consumer. The directive is based on minimum harmonisation. Member States are therefore free to maintain or adopt more stringent provisions and to ban or limit comparative advertising for regulated professional services. The directive does not affect contract law, since the provisions are applicable irrespective of whether a contract has been concluded.

The directive forbids misleading advertising and requires the Member States to combat such advertising. To ensure uniform application of this prohibition, the directive gives objective criteria for determination. The directive permits comparative advertising provided that certain conditions are met. These conditions include the prohibition to discredit competitors and the requirement that the comparison involve goods or services meeting the same needs or intended for the same purpose. Member States are under the obligation to combat unlawful comparative advertising. This includes at least the possibility for collective legal or administrative action. If Member States confer the power to an administrative (public) body, this body has to be impartial, has to have adequate powers and should normally give reasons for their decisions. The directive places the burden of proof for the accuracy of factual claims on the advertiser.

Position of the European Parliament

Since the directive did not alter the existing Community legislation on misleading and comparative advertising, Parliament approved the proposal without amendments.⁷⁴

3.2.8. Rome I Regulation

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations⁷⁵ is based on Articles 61(c) and 67(5) EC, with special reference to Article 65 EC. The regulation aims at providing uniform rules for the applicable law to contractual obligations in civil and commercial matters. In cross-border contracts, the question arises which legal system is applicable. Rome I provides uniform rules for identifying the applicable law within the Community. The regulation applies whether or not the law of a Member State is applicable. Rome I applies to contracts concluded after 17 December 2009.

Rome I respects the choice of law made by the parties. The regulation primarily gives rules for the situation parties did not choose an applicable law. For such situation, Rome I contains general rules and rules for specific contracts. The specific rules override the general rules. Rome I gives special provisions for consumer contracts, insurance contracts, carriage contracts and individual employment contracts. For example, with respect to consumer contracts, the regulation determines that a choice of law may not deprive a consumer from the

of 6 October 1997 (OJ 1997 L 290/18) and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 (OJ 2005 L 149/22).

⁷⁴ T6-0403/2006.

⁷⁵ OJ 2008 L 117/6.

legal protection of his Member State. In absence of a choice, the law of the country of the consumer applies, if the consumer contract is concluded with a trader who pursues or directs his trade to the country of the consumer and the contract falls under the scope of these activities. In other cases the general rules apply to a consumer contract.

The general provisions determine the applicable law on the basis of the closest connection to the contract. The regulation contains a list of eight specific situations. For example, the applicable law to sales contracts is the law of the country where the seller has his habitual residence. In other cases, the regulation provides that the law of the country where the party who performs the characteristic performance of the contract applies. If, contrary to the latter two tests, it is clear from the circumstances that the contract is more closely connected to another country, the law of that country applies. In addition, Rome I gives rules on the scope of the law applicable to a contract by virtue of the regulation.

Position of the European Parliament

Parliament, having the right of codecision, amended the regulation in the first and single reading, since an agreement between the institutions had been reached during this first reading.⁷⁶ Successful amendments include the inclusion of (new) specific rules for the contracts of carriage; better consumer protection in the case of a choice of law and the same provisions for choice of law in the case of individual employment contracts. Another adopted amendment is the provision that the law of the consumer only applies insofar the trader directs his activities to the country of the consumer.

3.2.9. Brussels I Regulation

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters⁷⁷ is based on Articles 61(c) and 67(5) EC, with special reference to Article 65 EC. The regulation aims at providing uniform rules for the jurisdiction and recognition and enforcement of judgements in contractual obligations in civil and commercial matters. In cross-border contracts, the question arises in which country the courts are competent to hear cases of disputes arising out of the contract and under what circumstances a foreign judgement can be recognised and enforced. Brussels I provides uniform rules for these questions.

On the issue of jurisdiction, the regulation provides that residents of Member States have the right to be sued only before a court of his residence, unless Brussels I appoints other competent courts. In the case of disputes relating to *rights in rem* in immovable property, exclusive jurisdiction is conferred to courts of the Member State where the property is situated. For insurance contracts, consumer contracts and individual employment contracts, specific jurisdiction rules are established. For example, in consumer contracts a consumer may – under certain circumstances – also bring proceedings against the professional before the courts of the Member State where the consumer is domiciled. For contract disputes this is the court of the place of performance of the contract, and in tort cases the place where the harmful event occurred.

With regard to the recognition and enforcement of judgements by courts of other Member States, such judgements are recognised without any special procedure. If

⁷⁶ T6-0560/2007.

⁷⁷ OJ 2001 L 12/1.

the validity of such judgement is challenged, Member States are only allowed to deny recognition in limited circumstances (e.g. if recognition would be against the *ordre public*). For the enforcement of such judgements, an interested party may apply for enforcement in a Member State before a court. The judgement shall be declared enforceable immediately after application without any review or hearing. Afterwards the party against whom enforcement is sought, may challenge the declaration under the same grounds on which recognition may be denied. Under no circumstance a court may (re)consider the merits of the case.

Position of the European Parliament

Parliament, having the right of consultation, made various amendments to the proposal of the Commission.⁷⁸ Parliament's proposal to include the possibility of a jurisdiction clause in consumer distance contracts – seeing that such clause would normally be problematic, but the absence of this possibility places a heavy burden on internet sellers – has not been adopted by the Council. The amendment to recognise and enforce settlements made pursuant to an alternative dispute resolution system has not been adopted either.

For further and more detailed information on Brussels I regulation, please see the chapter on **judicial cooperation in civil matters** included in this handbook.

4. Recent developments

4.1. European Contract Law Project Since 2001

In 2001 the European Commission published its Communication *On European Contract Law*,⁷⁹ which was the starting point of the Commission's contract law project that is still ongoing. In that Communication the Commission asked stakeholders whether the state of the existing EC measures in the area of contract law (the contract *acquis*) or the differences between the national contract laws of the Member States created any obstacles to the proper functioning of the internal market and, if so, whether any Community action was required. The Commission suggested four possible courses of action: not to undertake any EC action and leave everything to the market (option I); to promote the development of common contract law principles leading to more convergence of national laws (option II); to improve the quality of the *acquis* (option III); to adopt new comprehensive legislation at EC level, e.g. an (optional) European code (option IV).

The 2001 communication was followed up, in 2003, by a new Communication, *A More Coherent European Contract Law, an Action Plan*.⁸⁰ In the Action Plan the Commission announced the following measures: (1) to increase the coherence of the EC *acquis* in the area of contract law; (2) to promote the elaboration of EU-wide general contract terms, and (3) to examine further whether problems in the European contract law area may require nonsector-specific solutions such as an optional instrument. The second measure (promoting pan-European standard terms through a Commission website) was soon abandoned as impracticable. With a view to both the first (the review of the *acquis*) and the third measures (the

⁷⁸ OJ 2001 C 146/94.

⁷⁹ Communication from the Commission to the Council and the European Parliament, *On European Contract Law*, 11 July 2001, COM(2001) 398.

⁸⁰ Communication from the Commission to the Council and the European Parliament, *A More Coherent European Contract Law, an Action Plan*, Brussels, 12.2.2003, COM(2003) 68. See also: Communication from the Commission to the Council and the European Parliament, *European Contract Law and the Revision of the Acquis: the Way Forward*, 11.10.2004, COM(2004) 651.

optional instrument) the Commission announced that it envisaged adopting a 'common frame of reference' (CFR). This common frame of reference should provide for best solutions in terms of common terminology and rules, i.e. the definition of fundamental concepts and abstract terms like "contract" or "damage" and of the rules that apply for example in the case of non-performance of contracts. A network of academics was entrusted by the Commission with the task of elaborating a first draft (academic CFR) to be followed, after appropriate modifications, by a final, political CFR. In its next Communication, *European Contract Law and the Revision of the Acquis: the Way Forward*,⁸¹ the Commission provided further details concerning the revision of the *acquis* and the nature of the CFR. In particular, the Commission underlined that it was not the Commission's intention to propose a "European civil code" which would harmonise contract laws of Member States. This communication contained, in the Annex, a detailed 'possible structure of the CFR' which looked very similar to a table of a contract code.

In the Commission's 2001, 2003 and 2004 communications the scope of the revision and of the CFR were very broad, i.e. contract law which explicitly included not only consumer (b2c) but also commercial (b2b) contract law. However, with the arrival of the new Commissioner Kyprianou the Commission radically changed its direction. The Commission's *First Annual Progress Report on The Common Frame of Reference*⁸² announced a much more narrow focus on the revision of the consumer *acquis*. The Commission's *Second Progress Report on The Common Frame of Reference*⁸³ confirmed this prioritisation of the consumer *acquis*. And in 2007 – while the drafting of the CFR was still ongoing – the Commission published its *Green Paper on the Review of the Consumer Acquis*.⁸⁴

In early 2008 the network of academics published their *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Interim Outline Edition*.⁸⁵ Later that year the Commission published its *Proposal for a Directive of the European Parliament and of the Council on consumer rights*⁸⁶. And at the beginning of 2009 the academics submitted the 'Outline Edition' of their final DCFR to the European Commission.⁸⁷

4.2. Consumer Rights Directive

The Commission's *Proposal for a Directive of the European Parliament and of the Council on consumer rights* was published in 2008.⁸⁸ The objective of the proposal is to contribute to the better functioning of the business-to-consumer internal market by enhancing consumer confidence in the internal market and reducing

⁸¹ n 80 above.

⁸² Report from the Commission, *First Annual Progress Report on The Common Frame of Reference*, 23.09.2005, COM(2005) 456.

⁸³ Report from the Commission, *Second Progress Report on The Common Frame of Reference*, 25.07.2007, COM(2007) 447.

⁸⁴ *Paper on the Review of the Consumer Acquis* (presented by the European Commission), Brussels, 08.02.2007, COM(2007) 744.

⁸⁵ Christian von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Interim Outline Edition* (Sellier 2008).

⁸⁶ *Proposal for a Directive of the European Parliament and of the Council on consumer rights*, Brussels, 08.10.2008 COM(2008) 614/3.

⁸⁷ Christian von Bar et al (eds), *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Outline Edition* (Sellier 2009).

⁸⁸ n 86 above.

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

The proposed directive is meant to replace four existing directives: Directive 85/577/EEC on contracts negotiated away from business premises, Directive 93/13/EEC on unfair terms in consumer contracts, Directive 97/7/EC on distance contracts, Directive 1999/44/EC on consumer sales and guarantees. The proposal merges these four Directives into a single horizontal instrument regulating the common aspects in a systematic fashion, simplifying and updating the existing rules, removing inconsistencies and closing gaps. The proposal moves away from the minimum harmonisation approach followed in the four existing Directives (i.e. Member States may maintain or adopt stricter national rules than those laid down in the Directive) to embrace a full harmonisation approach (i.e. Member States cannot maintain or adopt provisions diverging from those laid down in the Directive).

So far, the proposal has met with mixed reactions. The most controversial characteristics of the directive include: its unclear scope (in particular its unclear impact on national general contract law); the level of consumer protection in combination with the full harmonisation approach; its lack of ambition, in particular the limited number of directives ultimately included in the review; its lack of co-ordination with the (draft) CFR. In response, at an *IMCO Committee Hearing on the Consumer Rights Directive*, on 2 March 2009, Commissioner Kuneva has announced that time is needed to address these concerns.

4.3. Draft Common Frame of Reference

The *Principles, Definitions and Model Rules of European Private Law; Draft Common Frame of Reference (DCFR) Outline Edition*⁸⁹ as they were published in 2009 contain principles, definitions and model rules. The four principles that underlie the whole of the DCFR are, according to the drafters, freedom, security, justice and efficiency, while the 'overriding principles' are the protection of human rights, the promotion of solidarity and social responsibility, the preservation of cultural and linguistic diversity, the protection and promotion of welfare and the promotion of the internal market. The set of model rules consists of ten books: Book I – General provisions; Book II – Contracts and other juridical acts; Book III – Obligations and corresponding rights; Book IV – Specific contracts and the rights and obligations arising from them; Book V – Benevolent intervention in another's affairs; Book VI – Non-contractual liability arising out of damage cause to another; Book VII – Unjustified enrichment; Book VIII – Acquisition and loss of ownership of goods; Book IX – Proprietary security rights in movable assets and Book X – Trust. The Annex contains definitions of all relevant terms.

The Legal Affairs Committee of the European Parliament commissioned several external contributions on the Draft Common Frame of Reference. While one study analyses the values underlying the draft Common Frame of Reference in order to assess the role of fairness and social justice in contract law, one short study has been provided on the different options for a future instrument on a Common Frame of Reference (CFR) in EU contract law, in particular the legal form and the legal basis for any future optional instrument. Recently, a note has been published on

⁸⁹ n 87 above.

"the Consumer Rights Directive and the CFR: two worlds apart". The executive summaries and the link to the publication of these contributions are available in the "*More information*" section.

5. Own-initiative resolutions of the European Parliament

During the last two decades the European Parliament has played a very active role in the further Europeanisation of contract law. In particular, since 1989 it has called for Community action in the field of contract law. The most important European Parliament resolutions on European contract law include the resolutions of 26 May 1989 on action to bring into line the private law of the Member States,⁹⁰ of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member State,⁹¹ of 15 November 2001 on the approximation of the civil and commercial law of the Member States,⁹² of 2 September 2003 on a more coherent European contract law: an Action Plan,⁹³ of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward,⁹⁴ of 7 September 2006 on European contract law,⁹⁵ of 12 December 2007 on European contract law⁹⁶ and of 3 September 2008 on the common frame of reference for European contract law.⁹⁷

5.1. The common frame of reference for European contract law

This resolution of 3 September 2008⁹⁸ is a response to the presentation of the interim outline edition of the DCFR. Parliament points out that the possible selection of what parts of the DCFR are to be integrated into the forthcoming Commission document is a highly political exercise. Members call on the Commission to present a precise and transparent plan as to how the selection process leading to the Commission document will be organised and coordinated, in particular with regard to all DGs involved. The DCFR must be made available in the greatest number of relevant languages in order to make certain its accessibility for all interested stakeholders. The Commission should consider assigning the project to DG Justice, Freedom and Security with the full involvement of all other relevant DGs, since the CFR goes well beyond consumer contract law. The Commission document will be the basis for the decision of the European Institutions and all interested stakeholders on the future purpose of the CFR, its content and legal effect. The latter may range from a non-binding legislative tool to the foundation for an optional instrument in European contract law. The Commission needs to bear in mind the Council's recent statement that the CFR

⁹⁰ European Parliament resolution of 26 May 1989 on action to bring into line the private law of the Member States (OJ 1989 C 158/400).

⁹¹ European Parliament resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member State (OJ 1994 C 205/518).

⁹² European Parliament resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member States (OJ 2002 C 140E/538) (2001/2187(COS)).

⁹³ European Parliament resolution of 2 September 2003 on a more coherent European contract law: an Action Plan (OJ 2004 C 76E/95) (2003/2093(INI)).

⁹⁴ European Parliament resolution of 23 March 2006 on European contract law and the revision of the *acquis*: the way forward (OJ 2006 C 292E/109) (2005/2022(INI)).

⁹⁵ European Parliament resolution of 7 September 2006 on European contract law (OJ 2006 C 305E/247) (2006/2603(RSP)).

⁹⁶ European Parliament resolution of 12 December 2007 on European contract law (P6_TA(2007)0615) (2007/2675(RSP)).

⁹⁷ European Parliament resolution of 3 September 2008 on the common frame of reference for European contract law (P6_TA(2008)0397) (2008/2615(RSP)).

⁹⁸ 2008/2615(RSP).

should be a tool for better lawmaking forming a set of non-binding guidelines to be used at Community level. If this is the case, Parliament suggests that the CFR should be as wide as possible and that there may be no need to exclude any content or materials at this stage.

If used as a **non-binding legislative tool**, Members suggest that the relevant parts of the CFR should be appended to any future legislative proposal or communication made by the Commission which touches on contract law, so as to ensure that this is considered by the Community legislator.

If, however, the future format of the CFR is likely to be that of an **optional instrument**, it should confine itself to those areas where the Community legislator has been active or is likely to be active in the near future, or which are closely linked to contract law. Parliament suggests that any optional instrument should be based on the DCFR, with the possible exclusion of Chapters 3 to 6 of Part C of Book IV on Specific contracts and the rights and obligations arising from them, Book V on Benevolent intervention in another's affairs, and, Book X on Trusts. In all instances, care should be taken to ensure that the overall coherence of the optional instrument is not jeopardised by the selection process.

Lastly, Parliament insists that it should be fully consulted and involved in any selection process leading to the Commission's forthcoming document on the CFR.

5.2. *European contract law*

The own-initiative resolution of 12 December 2007⁹⁹ called on the Commission to submit a clear plan for the CFR process – to start after the research draft CFR has been provided – of selecting those parts of the research CFR which are to form part of the final Commission CFR. The Commission was urged to involve Parliament in this process before any procedural steps are taken. Parliament urged the Commission to decide on the scope of the final CFR only after a broad discussion process with all the relevant groups, researchers and stakeholders, and also with the participation of Parliament. When deciding on the scope of the CFR, the Commission must take into account the position of Parliament, already set out in several resolutions. The latter reiterated its strong support for an approach based on a wider CFR on general contract-law issues going beyond the field of consumer protection. It underlined its conviction that a better-regulation approach to the CFR means that the CFR cannot be limited to merely consumer-contract-law-related issues and has to focus on general contract-law-related issues, for which a consistent approach to the review of the consumer acquis, and in particular a possible horizontal instrument in this area, must be ensured. It also reiterates its request to the Commission that all the various possible options regarding the purpose and legal form of a future CFR instrument, including an optional instrument, should be kept open.

5.3. *European contract law*

The European Parliament adopted a joint resolution on European contract law on 7 September 2006¹⁰⁰, reiterating its conviction that a uniform internal market could not be fully functional without further steps towards the harmonisation of civil law, and the initiative on European contract law was the most important initiative under way in the field of civil law. The Commission was asked continuously to involve Parliament in the work on the CFR. Parliament supported an approach for a wider

⁹⁹ 2007/2675(RSP).

¹⁰⁰ 2006/2603(RSP).

CFR on general contract law issues going beyond the consumer protection field. It underlined that, besides the work on revision of the consumer *acquis*, the work on a wider CFR should go on, and asked the Commission to proceed with the project for a wider CFR. Parliament emphasised that even though the final purpose and legal form of the CFR was not yet clear, the work on the project should be done well, taking into account the fact that the final long-term outcome could be a binding instrument. Hence, all the various possible options for the purpose and legal form of a future instrument should be kept open. Finally, Parliament called on the Commission to take into account the long-term perspective of a CFR when presenting new legislative proposals.

5.4. European contract law and the revision of the *acquis*: the way forward

The European Parliament adopted a resolution on European contract law and the revision of the *acquis* on 23 March 2006¹⁰¹. Parliament stated that, even though the Commission denied that this is its objective, it was clear that many of the researchers and stakeholders working on the project believe that the ultimate long-term outcome will be a European code of obligations or even a full-blown European Civil Code. In any event, the project is by far the most important initiative under way in the civil law field. Even if the initiative in its present form were limited to rationalising and tidying up the *acquis* in the field of consumer protection and to producing optional standard contract terms and conditions, it was essential that the political authorities had a proper input into the process.

Concerning underlying principles and objectives, Parliament repeated its conviction that a uniform internal market cannot be fully functional without further steps towards the harmonisation of civil law. It called on the Commission to exploit straightaway the ongoing work with a view to using the results firstly towards the revision of the *acquis* in the field of civil law, and subsequently towards developing a system of Community civil law.

Concerning substantive law issues, the Commission is asked to distinguish between legal provisions applicable to the business-to-business sector and those applicable to the business-to-consumer sector, and to separate the two systematically. Parliament highlighted the importance of taking into account the fundamental principle of freedom to conclude a contract, particularly in the business-to-business sector, and also highlighted the importance of taking into account the European social model when harmonising contract law.

Parliament noted that with over-detailed legal provisions on individual aspects of contract law there is a danger of being unable to react flexibly to altered legal circumstances. It favoured the adoption of general regulations including legal concepts which are not precisely defined, thus giving the courts the necessary margin of discretion in arriving at their judgments.

Concerning procedural issues, Parliament called on the Commission to submit without delay a clear legislative plan setting out the future legal instruments by which it aimed to bring the results of the work of the research groups and the CFR-Net into use in legal transactions. The Commission should keep Parliament continually informed, at least in quarterly reports, of the results obtained and progress of the work of the research groups and of the Network. The resolution stressed the importance of Parliament's need for information and consultation.

¹⁰¹ 2005/2022(INI).

5.5. *A more coherent European contract law: an Action Plan*

The European Parliament adopted a resolution on a more coherent European contract law: an Action Plan on 2 September 2003¹⁰². It welcomed the fact that, in its 'common frame of reference', the Action Plan initiates a common terminology for particular fundamental concepts and typical problems. The Commission was asked to encourage the development of the 'common frame of reference' as a priority and to tighten up the provisional timetable to 2008-9. The Commission should complete the 'common frame of reference' by the end of 2006. Parliament expressed its regret that the Commission did not act on Parliament's call to set up, by 2004, a data bank of national legal provisions and case law in the field of contract law. Such a data bank is necessary in order to begin work on the 'common frame of reference.' The launching of a website is not an appropriate tool for this. An additional point made was that users of the law such as judges, lawyers, notaries, undertakings and consumers should be involved in the process of elaborating the 'common frame of reference'. The Commission's earlier efforts to consult civil society, in particular the users of law and interested sectors, had been inadequate, particularly since the contributions submitted in the context of this consultation were not representative of all Member States. Parliament also regretted the fact that the development of e-commerce had not been sufficiently reflected in the Action Plan. On the question of optional instruments, Parliament stated that there must be early action in certain sectors, such as consumer transactions and insurance. Substantial benefits could accrue to the internal market as well as increase intra-Community transactions. There should be, therefore, a body of rules based on the 'common frame of reference'. Parties would initially have the option of using it voluntarily, and it could later become binding. Finally, Parliament called for the practical application of the 'common frame of reference' in conciliation proceedings, either through the existing 'European Extra-Judicial Network' or through a new European conciliation system in which only the 'common frame of reference' would be used.

5.6. *The approximation of the civil and commercial law of the Member States*

By approving the resolution on the approximation of the civil and commercial law of the Member States on 15 November 2001¹⁰³, the European Parliament adopts the Commission's communication on the approximation of the civil and commercial law of the Member States (COM(2001)398) and urges the Commission to submit a detailed action plan in order to achieve this goal as soon as possible. Parliament says that the approximation of the civil and commercial law of the Member States, which was given a new boost after the Tampere Council of 1999, is needed in order to ensure better coordination of existing Community legislation in that area and keep pace with the substantial increase in the number of cross-border economic and legal relationships which will inevitably result from the introduction of the euro in twelve Member States and the constant expansion of electronic commerce.

According to Parliament, the Commission should take the following steps under this action plan:

- by the end of **2004**: compile a database in all Community languages of national legislation and case-law in the field of contract law, while at the same time promoting comparative law research in order to find common legal concepts and solutions;

¹⁰² 2003/2093(INI).

¹⁰³ 2001/2187(COS).

- from **2005**: promote the dissemination of the results of comparative analysis and common legal concepts and solutions in academic training and the legal professions, and guarantee the consistent application of these results by all EU institutions professions involved in the legislative drafting;
- from **2006**: submit proposals for European legislation implementing these results in the areas of both cross-border and national contractual obligations;
- from **2010**: to establish and adopt a body of rules on contract law in the EU that takes account of the common legal concepts and solutions established under previous initiatives.

The Parliament advocates setting up by the end of 2002 a 'European Legal Institute' in which legal policy-makers, the administrative authorities, the judiciary and those responsible for applying the law cooperate on a scientific basis in the drawing-up of the principles of the abovementioned reforms. Moreover, Parliament calls on the Commission to base its proposals on Article 95 of the EC Treaty, thereby ensuring the application of the codecision procedure, and to examine whether it might be more effective to use the instrument of the regulation for future single market legislation in order to achieve genuine unification. At the same time, however, it takes the view that directives which are not aimed at complete harmonisation of but pursue specific objectives such as consumer protection, product safety or product liability should continue to be drafted as directives.

5.7. *The harmonisation of certain sectors of the private law of the Member State*

The resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member State,¹⁰⁴ is the follow-up of Parliament's resolution of 26 May 1989. Since the Commission had not undertaken the necessary preparatory work for the drawing up of a Common European Code of Private Law, as asked for by the 1989 resolution, Parliament affirmed its wish for such a code and called on the Commission to commence with this work. In addition, the MEPs considered that support should be given to the Commission on European Contract Law and its work on harmonisation of contract law and that a committee of experts should be set up to propose priorities for partial harmonisation in the short term and more general harmonization in the long term.

5.8. *Action to bring into line the private law of the Member States*

On 26 May 1989 Parliament adopted its first resolution on the future of European contract law, (an action to bring into line the private law of the Member States)¹⁰⁵ in which it held that unification of (major branches of) private law would be highly important for the development of the internal market. Parliament asked the Commission to undertake the necessary preparatory work for the drawing up of a Common European Code of Private Law. Member States are invited to state whether they wish to participate in this project. The MEPs envisaged that, after consultation of the Member States, a group of experts from the participating Member States would be set up to define the priorities and to organise the undertaking. Furthermore, Parliament asked for aid for centres for comparative legal studies and for earmarking of sums in order to carry out this project. Parliament believed that the Treaty, as amended by the Single European Act, would offer a comprehensive legal basis for this objective.

¹⁰⁴ European Parliament resolution of 6 May 1994 on the harmonisation of certain sectors of the private law of the Member State (OJ 1994 C 205/518).

¹⁰⁵ European Parliament resolution of 26 May 1989 on action to bring into line the private law of the Member States (OJ 1989 C 158/400).