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# **REVIEW OF THE CONSUMER ACQUIS**

**(IP/A/IMCO/FWC/2006-168/C4/SC1)**

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## EXECUTIVE SUMMARY

As part of the ‘Consumer Law Compendium’ project, the European Commission commissioned a comparative analysis on how the eight directives affected by the Review of the Consumer Acquis<sup>1</sup> have been transposed by the Member States, including case-law and administrative practice. This analysis was published on the European Commission’s website in December 2006<sup>2</sup>.

The analysis highlights the inconsistency between the eight directives and the fact that they have been transposed in very different ways in the 25 Member States studied. The main results of the analysis, which have been summarised and appear in the table below, are in line with the programme adopted by the Green Paper on the Review of the Consumer Acquis<sup>3</sup>.

Because Bulgaria and Romania only joined the EU on 1 January 2007, the analysis of these Member States has not yet been completed. However, Bulgaria has to date transposed the Directives 85/577, 93/13, 94/47, 97/7, 98/6, 98/27 and 99/44 into its Consumer Code of 9 December 2005. Directive 90/314 has been transposed by a specific act. Romania has for its part transposed these eight directives with the adoption of specific laws, using the ‘copy and paste’ method.

The results of the comparative analysis strongly confirm the need to take legislative steps both to improve the consumer acquis and to establish the internal market. In order to do this, and as the conclusions demonstrate, the best method appears to be that adopted by the European Commission in its Green Paper. This involves selecting the option of a horizontal instrument, together with the amendment, if appropriate, of directives already in existence. These are certainly only the first steps in a more comprehensive legislative approach which, if it is to be completely successful, will have to follow the directions of the rules on the conflict of laws (Rome I) and European Contract Law (Common Frame of Reference).

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<sup>1</sup> Directives 85/577, 90/314, 93/13, 94/47, 97/7, 98/6, 98/27 and 99/44.

<sup>2</sup> [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf)

<sup>3</sup> COM(2007) 744 final.

## 1. SYNOPSIS

The table below shows the items dealt with in Annex I of the Green Paper<sup>4</sup> and, in the last column, the results of the comparative analysis of national laws<sup>5</sup>. The study contains an analysis of the laws of 25 Member States, with the exception of the Bulgarian and Romanian laws, the study of which is now nearing completion. Some information already available on these laws has already been inserted.

No <sup>6</sup>	Content	Situation in the Member States	
1.	General legislative approach	Different methods have been used by the Member States, for example:	Incorporation into Civil Codes (e.g. CZ, DE, NL, LT)
			Incorporation into the Consumer Code: (e.g. BG, FR, FI, IT, LV, LT, SL)
			Adoption of specific laws (e.g. CY, IE, PL, PT, RO, SE, UK)
			Mixed approach (e.g. AT, BE, EE, EL, LU, MT, SK, ES)
2.	Scope of a horizontal instrument	Unlike the <b>CISG</b> (Vienna Convention of 1980), national laws do not make a distinction between cross-border transactions and those of a purely national nature. The issue of the application of the law comes under the rules of private international law (conflict of laws).	
3.	Degree of harmonisation	The Member States have overwhelmingly resorted to minimum harmonisation clauses, cf. Annex 3.	
4.1.	Definition of ‘consumer’ and ‘professional’ (better: ‘business’)	Consumer	Uniform definition <sup>7</sup> : e.g. AT, CZ, DE, FI, IT, LV, LT, SL, ES
			Non-uniform definitions: e.g. CY, HU, IE, LU, UK
			Extension of the scope of application by expanding the concept of ‘consumer’, e.g.:

<sup>4</sup> COM(2006)744 final, p. 13 et seq.

<sup>5</sup> For further details, please see the annex, p. 10 et seq.

<sup>6</sup> Green Paper annex number, p. 13 et seq.

<sup>7</sup> Applicable to several fields.

			Inclusion of natural persons: e.g. AT, BE, CZ, DK, EL, ES, FR, HU, SK
			Inclusion of final addressee: ES, EL, HU, LU
			Inclusion of employees: DE
			Different solutions to cover transactions for mixed purposes
		Business	Uniform definition: AT, CZ, FI, DE, IT, LT, LV, SL, SK
4.2.	Consumers acting through an intermediary	In several Member States the tendency is to protect the consumer if the other party is represented by an intermediary: e.g. in DK, IT, and PT in the event of the resale of the right to use immovable properties on a timeshare basis.	
4.3.	General clause of good faith and fair dealing	Different traditions coexist within the Member States. Many continental legal systems include a general clause of good faith ('Treu und Glauben', 'buona fede', 'buena fe'), whereas there is no such clause in 'Common Law'; cf. Reinhard Zimmermann and Simon Whittaker's analysis <i>Good Faith in European Contract Law</i> .	
4.4.1.	Extension of the scope of the unfairness test to negotiated terms	Excluded	AT, BG, CY, EE, EL, DE, HU, IE, IT, LT, NL, PL, PT, SK, ES, UK (16)
		Not excluded	BE, CZ, DK, FI, FR, LU, LV, MT, SL, SE (10)
4.5.	The legal effects of the list of unfair terms	Black list (term is always unfair)	AT, BE, BG, CZ, EE, EL, LV, LT, LU, MT, SL, ES (12)
		Grey list (rebuttable presumption of unfairness)	CY, FR, IE, PL, RO, SK, UK (7)
		Combination of black and grey lists	DE, HU, IT, NL, PT (5)
		List not transposed	DK, FI, SE (3)
4.6.	Scope of the unfairness test: price and subject matter of the contract	Price and subject matter of the contract mentioned	AT, DK, EL, LV, LU, SL, ES, SE (8)
		Price and subject matter of the contract not mentioned	BE, BG, CY, CZ, EE, FI, FR, DE, HU, IE, IT; LT, MT, NL, PL, PT, SK, UK (18)
4.7.	Contractual effects of the failure to provide information	Different traditions coexist in the Member States: invalidity and other general remedies, penalties or administrative sanctions, injunctions, contract is not	

		enforceable against the consumer.
4.8.1.	Length of the cooling-off periods	<p>Directive 85/577 (7 days):</p> <p>There are significant divergences in the Member States in relation to the length of the cooling-off period [10 different periods] and their calculation [in calendar or working days] from 7 days to 10 working days or even 15 days.</p> <p>In detail, for periods calculated in days: 7 days (BG, CZ, IE, FR, ES), 8 days (NL), one week (AT), 10 days (PL), 14 days (CY, DK, EE, FI, LV, PT, SE), two weeks (DE) and 15 days (MT, SL); for periods calculated in working days: 7 working days (BE, LT, LU, RO, SK, UK), 8 working days (HU) and 10 working days (EL, IT).</p>
		<p>Directive 94/47 (10 days):</p> <p>There are significant divergences in the Member States in relation to the length of the cooling-off period [6 different periods] and their calculation [in calendar or working days] from 10 days to 15 working days or even 15 days.</p> <p>In detail, for periods calculated in days: 10 days (DK, EE, FI, FR, EL, IE, LT, LU, MT, NL, PL, RO, SK, ES, SE), 14 days (AT, LV, UK), two weeks (DE) and 15 days (CY, CZ, HU, SL); for periods calculated in working days: 10 working days (BG, IT, PT) and 15 working days (BE).</p>
		<p>Directive 97/7 (7 working days):</p> <p>There are significant divergences in the Member States in relation to the length of the cooling-off period [8 different periods] and their calculation [in calendar or working days] from 7 to 15 working days.</p> <p>In detail, for periods calculated in days: 7 days (FR), 10 days (PL), 14 days (CY, CZ, DK, EE, FI, LV, PT, SE), two weeks (DE) and 15 days (MT, SL); for periods calculated in working days: 7 working days (AT, BE, BG, ES, IE, LT, LU, NL, SK, UK), 8 working days (HU), 10 working days (EL, IT, RO).</p>
4.8.2.	Modalities of exercising the right of withdrawal	<b>Directive 85/577</b>
		Written: AT, BG, CY, CZ, IE, LV, LT, PL, SL, SK, UK (11)
		Text form: DE <sup>8</sup> (1)

<sup>8</sup> 'Text form' § 126b BGB, which also authorises texts written on any other durable medium.

		Registered letter with return receipt: BE, FR, EL, IT, LU, RO (6)
		Return of goods <sup>9</sup> : DE, FI, ES (3)
		No modalities: DK, EE, FI, HU, NL, MT, PT, ES, SE (9)
		<b>Directive 94/47</b>
		Written: AT, BG, CY, FI, EL, HU, LT, LV, PL, RO, SL, SK, UK (13)
		Text form: DE <sup>10</sup> (1)
		Registered mail: BE, LU, MT (3)
		Registered letter with return receipt: IT, FR, PT (3)
		No modalities: CZ, DK, EE, IE, NL, ES (6)
		<b>Directive 97/7</b>
		Written: CY, EL, LT, PL, SK, UK (6)
		Text form: DE <sup>11</sup> (1)
		Registered mail: IT (1)
		Return of goods <sup>12</sup> : DE, FI, SL (3)
		No modalities: AT, BE, BG, CZ, DK, EE, ES, FI, FR, HU, IE, LU, LV, MT, NL, PT, RO, SL, SE (19)
4.8.3.	Cost imposed on consumers in the event of withdrawal	<b>Directive 85/577</b>
		<u>Cost</u> : direct cost of returning goods: e.g. DK, IT, DE (if the product costs less than €40)
		<u>Time limit for reimbursement</u> : only a few Member States have adopted a definite time limit: e.g. 14 days: PL; 15 days: SK; 30 days: PT, IT, EE, SE
		<b>Directive 94/47</b>
		<u>Cost</u> : many and varied provisions in the Member States, e.g.:
		No cost: BE, CY, DK, LT, NL, PT, ES, UK (8)
		As in the directive <sup>13</sup> : BG, CZ, LU, RO, SE, EL (6)

<sup>9</sup> Furthermore, in the following Member States, withdrawal is possible by returning the goods.

<sup>10</sup> 'Text form' § 126b BGB, which also authorises texts written on any other durable medium.

<sup>11</sup> 'Text form' § 126b BGB, which also authorises texts written on any other durable medium.

<sup>12</sup> Furthermore, in the following Member States, withdrawal is possible by returning the goods.

<sup>13</sup> Article 5(3): '... expenses which, in accordance with national law, are incurred as a result of the conclusion of and withdrawal from the contract and which correspond to legal formalities which must be completed before the end of the period referred to in the first indent of paragraph 1.'



		Only the expenses incurred as a result of the conclusion of the contract: HU, IT, PL, SL (4)	
		Only the expenses incurred as a result of withdrawal: SK, LV (2)	
		<b>Directive 97/7</b>	
		<u>Cost</u> : the majority of Member States have transposed the directive correctly; not transposed in Lithuania	
		<u>Time limit for reimbursement</u> : the majority of Member States have transposed the directive correctly; several Member States have decided on a shorter time limit: e.g. CY (no time limit), LT, SK, SL (15 days).	
4.9.	Introduction of general contractual remedies	Only Directive 90/314 (entitlement to damages) and Directive 99/44 (conformity of goods, price reduction, rescission of the contract, but <u>no</u> damages) lay down penalties for non-performance of the contract. In the other directives general contractual remedies originating from national general principles of law are intended to protect consumers.	
4.10.	Introduction of entitlement to damages	At Community level, only Directive 90/314 provides for entitlement to damages in the event of non-performance of a contract. In the case of the other directives, the Member States apply their general law provisions to damages; cf. Aubert de Vincelles/Rochfeld, <i>Les sanctions de l'inexécution du contrat</i> , p. 37 et seq.	
5.1.	Extension of the scope of application to other types of contracts	Several Member States have extended the scope to additional types of contract:	
		Extension to the contract covering provision of services: HU, SL	
		Extension to contracts of barter: NL	
		Extension to immovable property: AT, NL	
		Extension of the scope to contracts for downloading on-line music is a political issue.	
5.2.	Second-hand goods sold at public auctions	Second-hand goods excluded	BG, FI, FR, DE, HU, EL, ES, RO, SE, UK (10)
		Second-hand goods not excluded	AT, BE, CY, CZ, DK, EE, IE, IT, LV, LT, LU, MT, NL, PL, PT, SK, SL (17)
5.3.	Definition of delivery	No definition in the directives. Some Member States have provided an explicit definition: e.g. France and Belgium. (According to Article 604 of the Belgian	

		Civil Code, delivery takes place when the buyer acquires physical possession of the goods sold.) In other Member States the definition is case law.		
5.4.	Passing of risk	This issue is linked to the definition of delivery. There is no definition in the directives. The Member States have different solutions: - at the time the contract is concluded - at the time of delivery, e.g. in Germany §§ 434, 446, 447, 474 al. 2 BGB		
5.5.2	Time limits for lack of conformity	Several Member States have chosen to incorporate specific provisions. In many Member States this result is obtained by resorting to general principles of law. - the time limit has been expressly suspended: e.g. CZ, HU, MT, SK, ES		
5.5.3.	Specific rule on recurring defects	There is no specific rule on recurring defects. In some Member States this issue has caused problems which had to be resolved before the courts, e.g. in Germany, Bundesgerichtshof, Decree of 5 October 2005 – VIII ZR 16/05.		
5.5.4.	Specific rules on second-hand goods	Yes	AT, BE, CZ, CY, DE, IT, HU, LU, PL, PT, SK, SL, ES, RO, SE (15)	
		No	BG, DK, EE, FI, FR, EL, IE, LV, LT, MT, NL, UK (12)	
5.6.	Burden of proof	Option 1 (status quo)	Option 2	No transposition
		AT, BE, BG, CZ, CY, DK, EE, DE, FI, FR, EL, HU, IE, IT, LV, LU, MT, NL, PL, SK, SL, ES, RO, SE, UK (25)	PT (1)	LT (1)
5.7.	Order in which remedies may be invoked	Status quo (initial choice between repair and replacement)	AT, BE, BG, CZ, CY, DK, EE, FI, FR, DE, HU, IE, IT, LU, MT, NL, PL, RO, SK, ES, SE, UK (22)	
		Free choice	EL, LT, PT (3)	
		Limited choice	LV, SL (2)	
5.8.	Notification of lack of conformity	Yes	CY, DK, EE, FI, HU, IT, LT, MT, NL, PL, PT, SK, SL, ES, RO, SE (16)	
		No	AT, BE, CZ, FR, DE, EL, IE, LV, LU, UK (10)	
5.9.	Direct producers' liability for non-conformity	Direct liability	BE, FR, PT, LV, LT (5)	
		The other Member States have not provided for direct liability of the producer for non-conformity.		

5.10.1	Default rules on the content of the commercial guarantee	Penalties laid down in Directive 98/27 on injunctions must as a general principle of law be exercised by the Member States.
5.10.2	Transferability of the commercial guarantee	The commercial guarantee can generally be transferred under general rules of the applicable national law. The Compendium has not examined this matter in detail.
5.10.3	Commercial guarantees for specific parts	It is likely that consumer protection will be guaranteed by national provisions on unfair terms. These terms shall be expressed in plain intelligible language. If a guarantee does not indicate which parts are covered, such terms are not plain and intelligible and this results in the above-mentioned penalties being applied.

## 2. CONCLUSIONS

The comparative analysis and results of the synopsis clearly show that a common minimum level has been established for protecting consumers through the transposition of directives adopted on this subject. The options and the minimum clauses offered by the directives have, however, been widely used in the Member States. As a result, the harmonisation of national legal systems for creating an internal market, which is the other aim of the aforementioned directives, has been achieved only in part. For example, the differences in the definition of 'consumer' and 'business', the content of information requirements, the various time limits for withdrawal, formal requirements and the rules governing the legal effects of withdrawal may all be cited. Therefore, despite translation of the information into several languages, it is still not possible at present for traders using a single website (e-shop) to market their goods or services and comply with all the national mandatory rules on information about the right of withdrawal. The differences between national legal systems are likely to impede cross-border trade and therefore constitute an obstacle to trade.

As regards improving the single market, action is required in three areas in the short, medium and long term, depending on the objectives:

(1) Review of directives already in existence, as announced by the Green Paper on the review of the eight directives studied and the consumer acquis;

(2) Review of the rules on the conflict of laws (ROME I Regulation on the law applicable to contractual obligations as a priority) and the rules on the conflict of laws contained in the pre-existing directives (for example, in Article 12(2) of Directive 97/7);

(3) Continued in the harmonisation of contract law and/or the establishment of an optional legal system that would be possible in particular for contract law through the work of the Common Frame of Reference.

As regards the first area of action, that is, the review of the pre-existing consumer protection directives, it would seem possible to adopt the Green Paper's proposal and therefore to create a horizontal instrument containing common definitions and general rules applicable to individual consumer contracts. Under the general rules and in addition to the definitions of 'consumer' and 'business', several technical definitions could be put forward (for example, 'in writing' or 'durable medium'), as well as general rules covering information requirements and withdrawal rights (cooling-off period, exercising of the right of withdrawal, contractual effects of withdrawal). The results of this study, as well as the work of the Common Frame of Reference already underway, could be used as a basis for producing this horizontal instrument.

As for the thorny issue of the degree of harmonisation, this analysis pinpoints the areas in which maximum harmonisation could be decided on without substantially endangering the level of consumer protection.

This study shows in particular that there is nothing to be feared from a shift to maximum harmonisation for pre-contractual information requirements for distance selling and the right of withdrawal.

On the other hand, the question still remains as to whether it is wise, as the Green Paper suggests, to introduce a general rule of good faith or a general right to damages for consumers when businesses breach their contractual obligations. Following the example of the work of the Common Frame of Reference currently underway, it seems that subsequent studies should be carried out in order to make comparisons, but also to assess the effects of maximum harmonisation. As a result, it seems preferable to include these issues in the third area of action mentioned above. In the long term the establishment of an optional legal system would be most likely to achieve the joint objectives of completing the internal market and maintaining a high level of consumer protection. When consumers make on-line purchases (e-shop), they could, for example, choose to apply this optional system by clicking on a blue icon representing the EU flag ('blue button').

### **3. ANNEX**

#### **1.<sup>14</sup> General legislative approach**

For further details, please see Part 2 of the Consumer Law Compendium study, ‘Overview of the Member States’ Legislative Techniques’.

#### **2. Scope of a horizontal instrument**

Please see Part 5 of the Consumer Law Compendium study, ‘Recommendations’.

#### **3. Degree of harmonisation**

Most Member States made use of minimum harmonisation clauses. The list below includes some examples taken from the analysis of a few individual directives:

##### Directive 90/314:

- Article 3(2): additional requirements concerning the brochure (e.g. additional information to be included, compulsory provision of a brochure).
- Article 4(1)(a): additional information obligations before conclusion of the contract (e.g. optional insurance, price of the package, security for money paid over in the event of insolvency).
- Article 4(1)(b): increase of information obligations before start of the journey
  - additional information requirements (e.g. details of the package).
  - fixation of a time limit, when this information must be given at the latest (e.g. 7 calendar days before departure).
- Article 4(2): additional elements to be included in the contract (e.g. conditions for cancellation by the traveller or organiser and/or retailer, maximum amounts of possible claims of the agency); stricter formal requirements for the contract (e.g. only “in writing” instead of also “such other form as is comprehensible and accessible to the consumer”).
- Article 4(3): extension of right to transfer the package (no limitation to any obstacle in the performance).
- Art. 5: liability (e.g. extension of the compulsory coverage of the organiser/retailer, direct insurance claim of the consumer against the insurer because of failure in the performance or non-performance despite lacking insolvency of the organiser/retailer).
- Art. 5(4): no transposition of consumer duty to communicate any failure in the performance.
- Art. 7: additional refund (e.g. other needs arising out of non-performance).

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<sup>14</sup> Green Paper annex number, p. 13 et seq.

## Directive 93/13:

The Directive 93/13 is essentially concerned with the establishment of a very pronounced system of control of the content of contractual clauses and of a principle of transparency. The Directive does not prescribe requirements for the incorporation of clauses into the contract (apart from recital 20, according to which the consumer must have the opportunity of becoming acquainted with all the terms of the contract). A number of member states do in contrast provide for a review of incorporation of the term into the contract, which in some circumstances can bring about a more advantageous position for the consumer (e.g. by way of establishing a duty to bring the terms to the consumers' attention or even a duty to handout the terms).

- Article 3(1):
  - Whereas according to the Directive, unfairness only exists if a term causes an imbalance and this imbalance is furthermore contrary to the principle of good faith, seven countries make direct reference to "significant imbalance" without mentioning the additional criterion "good faith". This tends to lead to a lowering of the burden of proof for consumers.
- Article 3(3) in conjunction with the annex:
  - Many member states have blacklisted the Annex No. 1 of the Directive and therefore provide a higher level of consumer protection. Moreover, the blacklist in some member states such as those of Belgium, Estonia, Malta, Portugal and Spain, contains more clauses than the Annex of the Directive 93/13.
  - While Annex No. 2 of the Directive 93/13 establishes certain exceptions with regard to clauses used by suppliers of financial services; many member states provide a higher level of consumer protection by having not transposed Annex No. 2
- Article 4(1):
  - In some member states, while assessing the fairness of contractual terms regard is to be paid not only to the circumstances prevailing at the time of conclusion of the contract (as the Directive provides), but also to conditions following conclusion of the contract.
- Article 4(2):
  - In many member states the review of terms also encompasses the subject matter of the contract and the adequacy of price.
- Article 6(1):
  - If a clause is unfair, then the Directive 93/13 basically only requires removal or amendment of the offending term and the contract as such remains in force. However, in some member states the contractual rights and obligations generally can be adjusted, not only concentrating on the specific unfair term. In some member states public bodies can furthermore require the incorporation of new terms in order to prevent a significant imbalance between the rights and obligations.
- Some member states (esp. Poland, Portugal and Spain) provide for a Standard Terms Register, whose aim is to increase the protection of consumers by publicising standard terms and judgments on unfair terms, with some effects towards Notaries, Registrars and judges.

#### Directive 97/7:

- Article 4: additional pre-contractual information duties (e.g. supplier's address, telephone number; non-existence of withdrawal right).
- Article 5(1):
  - additional information to be confirmed in good time during the performance of the contract
  - fixing an earlier point of time when this confirmation is due
  - additional formal requirements: not transposing the term 'another durable medium available and accessible to [the consumer]' and thereby obliging the supplier to always provide the confirmation of the information in written form
  - duties to use a certain wording or a form to inform the consumer (in particular a standard notice on the right of withdrawal)
  - language requirements.
- Article 6(1):
  - prolongation of withdrawal period
  - introduction of formal requirements for the exercise of the withdrawal right by the consumer
  - not transposing exceptions provided in Article 6(3).

#### Directive 99/44:

- A number of Member States have given the consumer free choice between the four remedies.
- In some countries, there are longer time periods applicable (Finland, Ireland, United Kingdom).
- A number of legislators took no steps to implement Article 2(4), which could also be explicable on the basis of minimum harmonisation (Czech Republic, Latvia, Lithuania, Portugal and Slovenia); others have only transposed some of the exclusions (Luxembourg, France, Greece). In Italy, the consumer must be aware of the correction.
- No transposition of Article 3(6) (no rescission for minor lack of conformity) in the Czech Republic, Estonia, Portugal, Slovenia and the United Kingdom.
- Some of the new Member States have retained their system of mandatory guarantees (Hungary, Slovenia), or have more extensive rules in place (Austria, Estonia, Finland, Latvia, Malta). Note inadvertent impact in the United Kingdom.

#### **4.1. Definition of 'consumer' and 'professional'**

For further details, please see Part 4.A. of the Consumer Law Compendium study, 'The notion of consumer', and Part 4.B., 'The notion of business'.

#### **4.2. Consumers acting through an intermediary**

Please consult Part 3.D.II.1.b. of the Consumer Law Compendium study, 'Vendor'.



### 4.3. Introduction of a general clause of good faith and fair dealing

Different traditions coexist within the Member States as regards a general clause of good faith. Transposition of the general clause provided for in Article 3 of Directive 93/13 makes provision for the fact that there will be differences on this matter.

Deliberate use of the term 'good faith'	BG, CY, CZ, DE, HU; IE, IT, LV, MT, PL; PT, RO, SL, ES, UK
Reference to a 'significant imbalance'	BE, BG, CY, DK; EE, EL, FR, HU, IE, IT, LT, LU, MT, PL, PT, RO, SK, SL, EL, ES, UK; no deliberate use of the notion of 'good faith': BE; DK, FR, EL, LT, LU, SK

For further details, please consult Reinhard Zimmermann and Simon Whittaker's analysis *Good Faith in European Contract Law*.

#### 4.4.1. Extension of the scope of the unfairness test to negotiated terms

Article 3 of Directive 93/13 excludes contractual terms that have been individually negotiated by the consumer. A total of 15 Member States have opted for this exclusion. The other 10 Member States that have not transposed this provision authorise their courts/authorities to monitor terms that have been individually negotiated. The Belgian Liberal Professions Act (LPA) has chosen a middle way as proposed in option 3 of the Green Paper. The unfair contractual terms that appear in Annex 1 of the directive have been attacked for being relatively useless, even when individually negotiated (Article 7(4) of the LPA). The rule in Article 3 of Directive 93/13 (Article 7(2) of the LPA) applies to other contractual clauses.

Article 3 of Directive 93/13	Member States
As laid down in Directive 93/13	AT, BG, CY, EE, DE, HU, IE, IT, IE, LT, NL, PL, PT, SK, ES, UK (16)
Exclusion not transposed	CZ, DK, FR, FI, LV, LU, MT, SE, SL (9)
Other solution	BE (1)

#### 4.5. The legal effects of the list of unfair terms

A term corresponding to the annex of the directive is not automatically unfair. The annex is of indicative and illustrative value for the Member States<sup>15</sup>. The Member States have opted for different solutions concerning the legal effects of the list of unfair terms. In 11 Member States the terms transposing the annex are considered unfair in all circumstances. Seven Member States presume the terms to be unfair and five have opted to combine a mandatory list and an indicative list.

<sup>15</sup> Judgment of the ECJ of 7 May 2002, C-478/99 - *Commission of the European Communities v Kingdom of Sweden* [2002] ECR I-04147, paragraph 22.

The different references by Member States during assessment of the contractual terms is an obvious barrier to the internal market. This is why the Compendium suggests specifying the legal value of the annex.

Black list (term is unfair in all circumstances)	AT, BE, BG, CZ, EE, EL, LV, LT, LU, MT, SL, ES (12)
Grey list (rebuttable presumption of unfairness)	CY, FR, IE, PL, RO, SK, UK (7)
Combination of black and grey lists	DE, HU, IT ; NL, PT (5)
List not transposed	DK, FI, SE (3)

#### 4.6. Scope of the unfairness test: price and subject matter of the contract

According to Article 4(2) of Directive 93/13, assessment of the unfair nature of the terms relates neither to the definition of the main subject matter of the contract nor to the adequacy of price and remuneration. Even so, assessment of the terms in some Member States may also cover the subject matter of the contract and the adequacy of price. In Austria, Denmark, Greece, Latvia, Luxembourg, Slovenia, Spain and Sweden, Article 4(2) (first alternative) has not been transposed, so that in principle the monitoring of the main subject matter of the contract and the adequacy of price is possible.

Article 4(2) transposed	BE, BG, CY, CZ, EE, FI, FR, DE, HU, IE, IT; LT, MT, NL, PL, PT, SK, UK (18)
Article 4(2) not transposed	AT, DK, EL, LV, LU, SL, ES, SE (8)

#### 4.7. Providing for contractual effects of the failure to provide information

While the directives list the information requirements<sup>16</sup>, they virtually never match them to a penalty. In the directives that impose a right of withdrawal, the effect of the lack of information about this right is to extend the period during which the consumer is able to withdraw from the contract<sup>17</sup>. With regard to doorstep selling, the CJEC has pronounced that the withdrawal period of seven days may not begin until after the consumer has been fully informed of its existence. Apart from this example, the consumer acquis does not contain any clarification about the penalties adopted and leaves it to the Member States to regulate this issue.

The Member States have decided to impose penalties in accordance with their national traditions. According to several laws, therefore, the lack of any information requirement causes the contract to be invalidated, without prejudice to criminal or administrative penalties. In the United Kingdom, on the other hand, it is clarified that the effect of the lack of this requirement would be to make the contract not-enforceable, but only for the benefit of the consumer vis-à-vis the business, who would therefore not be able to cite a precedent himself. Whatever the situation, the mechanisms set up by Directive 98/27 mean that the qualified entities are able to bring the necessary actions for injunction.

The intention of the Compendium is therefore to clarify the applicable rules on penalties. When an information requirement is breached, the authors put forward a penalty, either by

<sup>16</sup> Article 4 of the Directive.

<sup>17</sup> Article 5 of Directive 94/47; Article 6 of Directive 97/7.

making the contract not enforceable for the exclusive benefit of the consumer (as is the case in many Member States), or by offering the consumer action for damages.

#### 4.8.1. Harmonisation of the length of the cooling-off periods

The tables below show the different cooling-off periods decided on by the Member States when transposing Directives 85/577, 94/47 and 97/7.

##### Directive 85/577:

Cooling-off Periods	Member States
7 days	BG, CZ, IE, FR, ES (5)
7 working days	BE <sup>18</sup> , LT, LU, RO, SK, UK (6)
8 days	NL (1)
8 working days	HU (1)
One week	AT (1)
10 days	PL (1)
10 working days	EL, IT (2)
Two weeks	DE [one month if the information on the right of withdrawal is provided after conclusion of the contract] (1)
14 days	CY, DK, EE, FI, LV, PT, SE (7)
15 days	MT, SL (2)

##### Directive 94/47:

Cooling-off Periods	Member States
10 days	DK, EE, FI, FR, EL, IE, LT, LU, MT, NL, PL, RO, SK, ES, SE (15)
10 working days	BG, IT, PT (3)
14 days	AT, LV, UK (3)
Two weeks	DE [one month if the information on the right of withdrawal is provided after conclusion of the contract] (1)
15 days	CY, CZ, HU, SL (4)
15 working days	BE (1)

<sup>18</sup> Article 1 No 9 of the Act of 14 July 1991 on trade practices and consumer information and protection defines working days as: 'all days other than Sundays and public holidays. If a period expressed in working days ends on a Saturday, the period is extended till the next working day'.

#### Directive 97/7:

Cooling-off Period	Member States
7 days	FR <sup>19</sup> (1)
7 working days	AT <sup>20</sup> , BE, BG, ES <sup>21</sup> , IE, LT, LU, NL, SK, UK (10)
8 working days	HU (1)
10 working days	EL, IT, RO (3)
10 days	PL (1)
14 days	CY, CZ, DK, EE, FI, LV, PT, SE (8)
Two weeks	DE (1) [one month if the information on the right of withdrawal is provided after conclusion of the contract]
15 days	MT, SL (2)

#### 4.8.2. Modalities of exercising the right of withdrawal

For further details, please consult Part 3 A.III.2.d., D.III.3.c. and E.III.2.b. of the Consumer Law Compendium study.

#### 4.8.3. Harmonisation of the cost imposed on consumers in the event of withdrawal

For further details on the cost imposed on consumers in the event of withdrawal, please consult Part 3 A.III.3., D.III.3.e. and E.III.2.d. of the Consumer Law Compendium study.

#### 4.9. Introduction of general contractual remedies

This issue has not been systematically examined in the Compendium.

#### 4.10. Introduction of entitlement to damages

This issue has not been systematically examined in the Compendium.

#### 5.1. Extension of the scope of application to other types of contract

This issue has not been systematically examined in the Compendium. For details on the scope of application of the Directive on certain aspects of the sale of consumer goods and associated guarantees, please consult Part 3 H.II. of the Consumer Law Compendium study.

#### 5.2. Second-hand goods sold at public auctions

The option granted in Article 1(3) of Directive 99/44 to exclude second-hand goods sold at public auctions was exercised by nine Member States, with 17 not doing so.

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<sup>19</sup> 7 'jours francs' according to Article L121-20 of the Consumer Code.

<sup>20</sup> Saturday is not a working day.

<sup>21</sup> Spanish law states that 'the law of the place where the good has been delivered will determine which days are deemed as working days' – Article 44(1) of Act 7/1996 of 15 January on the retail trade.

For further details, please consult Part 3 H.II.4.a. of the Consumer Law Compendium study, 'Exclusion of goods sold at public auction from the meaning of "consumer goods"'.

### **5.3. Definition of delivery**

This issue has not been systematically examined in the Compendium. For details concerning the time at which conformity is to be assessed, please consult Part 3 H.III.1.a.dd. of the Consumer Law Compendium study.

### **5.4. Passing of risk**

This issue has not been systematically examined in the Compendium. For details concerning the time at which conformity is to be assessed, please consult Part 3 H.III.1.a.dd. of the Consumer Law Compendium study.

#### **5.5.2. Time limits for lack of conformity**

For further details, please consult Part 3 H.III.2.d.dd. of the Consumer Law Compendium study, 'Recital option: suspension of two-year period'.

#### **5.5.3. Specific rule on recurring defects**

This issue has not been systematically examined in the Compendium. For further details concerning consumers' rights in cases of non-conformity, please consult Part 3 H.III.2. of the Consumer Law Compendium study.

#### **5.5.4 Specific rules on second-hand goods**

For further details, please consult Part 3 H.III.2.d.bb. of the Consumer Law Compendium study, 'Option: reduced period for second-hand goods'.

### **5.6. Burden of proof**

For further details, please consult Part 3 H.III.2.d.ee. of the Consumer Law Compendium study, 'Presumption of non-conformity during first 6 months'.

### **5.7. Modification of the order in which remedies may be invoked**

For further details, please consult Part 3 H.III.2.a.bb. of the Consumer Law Compendium study, 'Consumer choice between remedies'.

### **5.8. Notification of lack of conformity**

For further details, please consult Part 3 H.III.2.d.cc. of the Consumer Law Compendium study, 'Option: duty to notify lack of conformity within 2 months'.

## **5.9. Direct producers' liability for non-conformity**

For further details, please consult Part 3 H.IV.1.a.aa. of the Consumer Law Compendium study, 'Liability of the Producer'.

### **5.10.1. Introduction of default rules on the content of the commercial guarantee**

This issue has not been systematically examined in the Compendium. For further details concerning guarantees, please consult Part 3 H.III.3. of the Consumer Law Compendium study, 'Guarantees'.

### **5.10.2. Transferability of the commercial guarantee**

This issue has not been systematically examined in the Compendium. For further details concerning guarantees, please consult Part 3 H.III.3. of the Consumer Law Compendium study, 'Guarantees'.

### **5.10.3 Commercial guarantees for specific parts**

This issue has not been systematically examined in the Compendium. For further details concerning guarantees, please consult Part 3 H.III.3. of the Consumer Law Compendium study, 'Guarantees'.

## **BIBLIOGRAPHY**

Carole Aubert de Vincelles and Judith Rochfeld, *L'acquis communautaire – Les sanctions de l'inexécution du contrat*, Economica 2006

Hans Schulte-Nölke, Christian Twigg-Flesner and Martin Ebers (Eds.), *EC Consumer Law Compendium – Comparative Analysis*, 2006, published on the European Commission's website [http://ec.europa.eu/consumers/cons\\_int/safe\\_shop/acquis/comp\\_analysis\\_en.pdf](http://ec.europa.eu/consumers/cons_int/safe_shop/acquis/comp_analysis_en.pdf)

Reinhard Zimmermann and Simon Whittaker, *Good Faith in European Contract Law*, Cambridge University Press, 2000

## LIST OF ABBREVIATIONS

Member States	Abbreviation
Austria	AT
Belgium	BE
Bulgaria	BG
Cyprus	CY
Czech Republic	CZ
Denmark	DK
Estonia	EE
Finland	FI
France	FR
Germany	DE
Greece	EL
Hungary	HU
Ireland	IE
Italy	IT
Latvia	LV
Lithuania	LT
Luxembourg	LU
Malta	MT
Netherlands	NL
Poland	PL
Portugal	PT
Romania	RO
Slovakia	SK
Slovenia	SL
Spain	ES
Sweden	SE
United Kingdom	UK