

THE DISTANCE SELLING DIRECTIVES – A TIME FOR REVIEW

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Introduction

European consumer law is characterised by its fragmented nature.¹ In recent years, it has developed different rules for different types of “product or service” (such as consumer credit² and consumer goods³) and different methods of “distribution” (such as doorstep selling⁴ and electronic commerce⁵). Directive 2002/65 concerning the distance marketing of consumer financial services and its sister Directive, Directive 97/7 on the protection of consumers in respect of distance contracts both follow this pattern. Both Directives (hereinafter, the Directives) deal with the method of distribution known as “distance selling” and hence share many common features. Most notably, both Directives seek to protect consumers using the same four mechanisms: through the provision of information to consumers; by giving consumers a right of withdrawal; by offering protection against the fraudulent use of payment cards; and by prohibiting certain activities by suppliers, namely, inertia selling and cold-calling. At the same time, the Directives address different products or services – Directive 2002/65 covers financial services, whereas Directive 97/7 covers the supply of goods and services, other than financial services. In this regard there are significant differences between the two Directives, in particular in relation to the provision of information and the right of withdrawal.

Both Directives were adopted in the context of the aims of the single market and the attainment of a high level of consumer protection. Directive 97/7 was implemented in the UK and Ireland in 2000 and 2001, respectively.⁶ Directive 2002/65 was implemented in the UK in 2004⁷ and in Ireland in

¹ The more recent use of “maximum harmonization” clauses and “framework directives” can be seen as a move away from this pattern as a means of producing a more coherent legislative framework: see, *e.g.* proposed Directive on unfair business-to-consumer commercial practices: COM (2003) 356 final.

² Directives 87/102 and 90/88 concerning consumer credit, [1987] OJ L42/48 and [1990] OJ L61/14.

³ Directive 99/44 on consumer sales and associated guarantees, [1999] OJ L171/12.

⁴ Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises, [1985] OJ L372/31.

⁵ Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market, [2000] OJ L178/1.

⁶ See the UK Consumer Protection (Distance Selling) Regulations 2000, S.I. 2000 No 2334; and the Irish EC (Protection of Consumer in Respect of Contracts made by means of Distance Communication) Regulations 2001, S.I. 2001 No 207, as amended by S.I. 2005 No 71.

⁷ The Financial Services (Distance Marketing) Regulations 2004, S.I. 2004 No. 2095. See further text to n.42.

early 2005.⁸ In this article we examine the key protections afforded to consumers by the Directives and, where relevant, the national implementing measures in the United Kingdom and Ireland and we question the extent to which these Directives are successful in achieving a high level of consumer protection. As well as suggesting that the Directives need to be reviewed in the context of greater harmonization *inter se*,⁹ we also query the basic philosophy which underlies the Directives: that well-informed consumers can protect themselves.

The article is divided into four main parts. In the first part we consider the application of the Directives. In the second part of this article we analyse the information obligations placed on suppliers. In the third part we examine how the Directives go beyond the standard contractual framework to protect consumers by placing default performance obligations on certain suppliers and by providing consumers with a right of withdrawal from the contract. In the fourth part we consider the issue of security of payment and how the Directives and the national implementing measures have responded to this issue.¹⁰ As a preliminary to this analysis, the Directives are set in their commercial and legal context.

The Commercial and Legal Context

Distance selling differs from more traditional face-to-face selling that takes place in a shop or other commercial premises. With distance selling the supplier and purchaser are “at a distance” from each other and communication between the parties is via the post, the telephone or increasingly, the Internet. Distance selling has many advantages when compared to face-to-face selling. From the supplier’s perspective, the marketplace is greatly expanded beyond the local market. In addition, the supplier has reduced costs associated with establishing and maintaining a business.¹¹ Equally, from the buyer’s perspective, distance selling offers a number of advantages including the convenience of being able to “shop from home” for a wide range of goods and services.¹² Moreover, there is evidence that prices are more competitive.¹³ There are however inherent risks in

⁸ The European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004, S.I. 2004 No. 853.

⁹ At the time of writing, the Commission was in the process of reviewing eight consumer directives, including Directive 97/7 but not Directive 2002/65, as part of the wider project in European Contract Law.

¹⁰ Other aspects of the Directives prohibiting inertia selling and cold-calling are not considered in this article.

¹¹ Some well known businesses operate exclusively at a distance, *e.g.* <www.amazon.com>, while others operate both at a distance and in the traditional face-to-face environment.

¹² In a Eurobarometer survey published in 2004, 48% of those surveyed who bought something over the Internet indicated that convenience was the main reason: European Commission, *European Union Public Opinion on issues relating to business to consumer e-commerce* (2004) at <www.europa.eu.int/comm/consumers/topics/facts_en.htm>.

¹³ The 2004 Eurobarometer survey found that 47% of those who purchased something over the Internet indicated that cost was the main reason: *ibid.* See further details of European Consumer Centre online price comparison survey

distance selling. For the supplier, the main risk is non-payment or fraud. Hence, the supplier usually requires the buyer to pay in advance. For the buyer, the risks are numerous. First, a buyer of goods at a distance has no opportunity to examine the goods before deciding to buy or not.¹⁴ Secondly, the buyer is usually required to pay in advance and thereby runs the risk of non-performance due to supplier fraud or insolvency. While this risk is not unique to distance selling, it may be increased because of the physical distance between supplier and buyer. Thirdly, where problems arise, the supplier may be located out of jurisdiction and therefore the enforcement of any buyers' rights may be impractical.¹⁵ Finally, and more generally, where contracts are concluded at a distance, payment is usually also at a distance, thus the potential for fraud is increased.

Despite these inherent risks, developments in ICT (information and communications technology), especially the increased usage of the Internet by consumers¹⁶ and the easy availability of payment mechanisms such as credit and debit cards, has led to the popularisation of distance selling.¹⁷ Indeed, such was the initial popularity of the Internet that it was predicted that it would cause a dramatic change to the retail process. However, as noted in the Foreword to the European Consumer Centre's study on *Realities of the European Online Marketplace*,¹⁸ "many of the initial e-business projects failed, as they did not manage to attract sufficient consumer interest".¹⁹ Consumers were more sceptical than expected about buying online and, without consumer trust, the market could not expand at the rate predicted. More recently, however, there appears to be a renewed interest in e-commerce.²⁰ To enable twenty first century e-commerce to realise early market predictions, consumer trust in the process is essential.²¹ This in turn

reported in their Newsletter 'Consumer Watch', Winter 2003 at <www.eccdublin.ie/resources/publications/heading2>.

¹⁴ The 2004 Eurobarometer survey found that about two-thirds (68%) of people who do not use the Internet for shopping gave as their reason that they needed to see and touch the products: *ibid.* In practice, many sellers of goods operate a 'free refund policy' to counter this problem.

¹⁵ See Caplin, "Resolving consumer disputes online: a review of consumer ODR" [2003] *Commercial Law Practitioner* 207; Hornle, "Online Dispute Resolution in Business to Consumer E-commerce Transactions", (2002) 2 *JILT* at <<http://elj.warwick.ac.uk/jilt/02-2/hornle.html>>.

¹⁶ By the end of 1999, 34% of inhabitants in the EU owned a Personal Computer (PC). This had increased to 47.4% by the end of 2000. By the end of 1999, the total number of Internet users in the EU was estimated at 72.2 million (of approximately 19% of inhabitants). This figure represented an increase of 51% since the previous year. See further Hobley, *Just Numbers: Numbers on Internet Use, Electronic Commerce, IT and Related Figures for the European Community* (European Commission's Electronic Commerce Team, 2001).

¹⁷ According to Hobley, the European e-commerce market was estimated to be valued at more than €14 billion in 1999. On-line purchases were estimated to reach a total value of US\$1.5 trillion by 2004: *ibid.*, p.9.

¹⁸ (ECC, 2003) at <www.ecic.ie/resources/publications/>.

¹⁹ *ibid.*, p.4.

²⁰ *ibid.*, p.4.

²¹ There is clearly some way to go. In January 2002, Consumer Webwatch reported that only three out of 10 consumers trusted websites that sold goods or services:

lends an urgency to the question of regulation of the e-commerce environment as the means whereby consumer trust in the process can be regained.

A feature of distance selling of all kinds, and especially of Internet selling, is the extent to which national boundaries become irrelevant.²² A purchaser sitting at a PC in Dublin or Belfast can order goods or services from anywhere in the world. From a legal perspective, this created the impetus for the development of a harmonised approach guaranteeing global as well as local protection for consumers. In 1996, UNCITRAL adopted a *Model Law on Electronic Commerce*²³ and in 1999, the OECD agreed *Guidelines for Consumer Protection in the Context of Electronic Commerce*.²⁴ While the UNCITRAL Model Law is concerned solely with e-commerce in a commercial rather than consumer context,²⁵ the OECD Guidelines set out in general terms the protections that should arise in the business-to-consumer context. The Guidelines specify basic information that should be provided to consumers, require the provision of “easy-to-use, secure payment mechanisms” and require the adoption of adequate dispute resolution mechanisms. While indicative of policy goals in this area, neither of these global harmonising attempts is legally binding.²⁶ Instead, the first move in this direction came at EU level with the introduction of Directives 97/7 and 2002/65. These Directives constitute an important first attempt to introduce legally enforceable cross-border protections for consumers with regard to distance selling.

Introducing the Directives

Five years after it was originally proposed²⁷, Directive 97/7/EC on the protection of consumers in respect of distance contracts (hereinafter, the

see Princeton Survey Research Associates, *A Matter of Trust: What Users Want from Websites* (2002) at <www.consumerwebwatch.org>.

²² According to an OECD Report, in 2003, consumer mistrust of Internet retail is exacerbated in a cross-border context. The Report noted a recent Eurobarometer study which indicated that only 32% of European consumers felt well-protected in a cross-border dispute as opposed to 56% where the dispute was domestic: Committee on Consumer Policy *Consumers in the Online Marketplace: The OECD Guidelines Three Years Later* (DSTI/CP (2002)/4/Final) p.4 at <www.oecd.org>.

²³ At <www.uncitral.org>.

²⁴ At <www.oecd.org>.

²⁵ Article 1 of the Model Law provides that the law applies to “any kind of information in the form of a data message used in the context of commercial activities” (although the Model Law does provide that it does not override any rule of law intended for the protection of consumers).

²⁶ This does not mean that they are without practical effect. In their report, *Consumers in the Online Marketplace: The OECD Guidelines Three Years Later*, the Committee on Consumer Policy sets out the attempts made to extend the application of the OECD Guidelines. These included public education and information initiatives and the facilitation of bilateral and multilateral co-operation agreements among jurisdictions: n.22 above pp.15-21.

²⁷ See original proposal at [1992] OJ C156/14. The original proposal was accompanied by Recommendation 92/295 on codes of practice for the protection of consumers in respect of contracts negotiated at a distance: [1992] OJ L156/21.

Distance Selling Directive) was adopted in May 1997.²⁸ The policy goals of the Directive are evident in the Preamble, which presents the Directive as part of the “attainment of the aims of the internal market”.²⁹ Noting that the possibility of cross-border commerce is one of the most tangible results for consumers of the completion of the internal market, the Directive sets out to introduce a minimum set of common rules to apply across the member states. As such, the Directive constitutes a minimum harmonisation measure and permits member states to introduce or maintain more stringent protective measures for consumers in this regard.³⁰ Member states were given three years to implement the Directive,³¹ which was implemented in the United Kingdom by the Consumer Protection (Distance Selling) Regulations 2000³² and in Ireland by the EC (Protection of Consumer in Respect of Contracts made by means of Distance Communication) Regulations 2001.³³ In the UK, the Directive is enforced through the Office of Fair Trading and the Northern Ireland Department of Enterprise, Trade and Investment. In Ireland, enforcement is achieved primarily through the Office of the Director of Consumer Affairs.

Although the intangible and high-value nature of services such as insurance, banking and credit provision makes these services extremely suitable for distance selling, contracts relating to financial services were excluded from the application of the Distance Selling Directive.³⁴ This omission was justified by the Council because of the “specific nature” of financial services and because financial services were already covered by Community legislation “in many respects”.³⁵ However, the exemption was the subject of considerable criticism at European Parliament level and the Commission took the relatively unusual step of appending a Statement to the Directive to the effect that it would “examine ways of incorporating consumer protection into the policy on financial services” and “if need be” submit legislative proposals.³⁶ In 1998, the Commission brought forward proposals for a

²⁸ [1997] OJ L144/19; see further Bradgate, “The EU Directive on Distance Selling”, (1997) 4 Web JCLI <http://www.webjcli.ac.uk/1997/issue4/bradgate_4.html>; Cremona, “The Distance Selling Directive”, [1998] JBL 613; Brownsword & Howells, “When surfers start to shop: Internet commerce and contract law”, [1999] LS 287; Hornle, Sutter & Walden, “Directive 97/7/EC on the protection of consumers in respect of distance contracts” Ch.2 in Lodder & Kaspersen ed., *eDirective: Guide to the European Union Law on e-Commerce* (The Hague: Kluwer Law International, 2002).

²⁹ Recital 4.

³⁰ Art.14. Note also that art.12 provides that a consumer cannot waive the rights conferred on him by the national transposition of the Directive.

³¹ Art.15.

³² S.I. 2000 No. 2334. These Regulations extend to Northern Ireland: Reg 1(2).

³³ S.I. 2001 No. 207. This was subject to minor amendment by the EC (Protection of Consumers in Respect of Contracts made by means of Distance Communication) (Amendment) Regulations 2005, S.I. 2005 No. 71 (the 2005 Regulations).

³⁴ Art.3. A non-exhaustive list of financial services is contained in Annex II to Directive 97/7 and includes investment services, insurance and reinsurance operations, banking services and operations relating to dealings in futures and options.

³⁵ Common Position adopted by the Council, June 28, 1995: [1995] OJ C288/1.

³⁶ [1997] OJ L144/19.

Financial Services Directive.³⁷ Following an extensive debate and a significant number of amendments, Directive 2002/65 concerning the distance marketing of consumer financial services (hereinafter the Financial Services Directive) was adopted in September 2002.³⁸ Reflecting the Commission's shift to a more hands-on approach to consumer protection,³⁹ this Directive sets out, in absolute terms,⁴⁰ the standards that must be met by all member states in relation to the distance marketing of "financial services" to consumers. "Financial services" are broadly defined to include "any service of a banking, credit, insurance, personal pension, investment or payment nature".⁴¹

Member states were given until 9 October, 2004 to implement the Directive.⁴² The process of implementation was complicated by the nature of the services regulated. Financial services are already subject to extensive European and domestic regulation and member states had to decide how the Financial Services Directive should interact with existing regulatory frameworks. In the UK, HM Treasury chose to incorporate the provisions of the Directive into the existing regulatory framework where possible.⁴³ Accordingly, the Financial Services Authority (FSA) integrated the provisions of the Directive directly into its rules (for services already regulated by the FSA).⁴⁴ In order to cover those financial services which are not regulated by the FSA ("gap services"), the Financial Services (Distance Marketing) Regulations 2004⁴⁵ came into force on October 31, 2004. These Regulations also cover distance contracts for consumer credit (although this aspect of the Regulations becomes effective from May 31, 2005). The UK approach minimizes the amount of new legislation with which suppliers must comply. This is intended to reduce the likelihood of ambiguity and ensure a measured enforcement by the most appropriate and familiar regulator.

In Ireland, the Department of Finance preferred to adopt a single overarching implementing measure that would apply to all financial services. The measure in question, the European Communities (Distance Marketing of

³⁷ See Commission Green Paper, *Financial Services: Meeting Consumers' Expectations*, COM(96) 209, which led to the proposal for a Financial Services Directive in October 1998, COM(98) 468 final.

³⁸ [2002] OJ L271/16.

³⁹ See the Consumer Policy Strategy 2002-2006, COM(2002) 208.

⁴⁰ See justifications for the adoption of this approach in Recital 13.

⁴¹ Art.2(b).

⁴² Art.21.

⁴³ For the policy considerations leading to this decision, see HM Treasury Summary of Consultation Feedback and Government Response, *Implementation of the Distance Marketing of Consumer Financial Services Directive* (August 2004) at <www.hm-treasury.gov.uk/media/4/3283/Implementation_dmd.pdf>; and HM Treasury Consultation Document *Implementation of the Distance Marketing of Consumer Financial Services Directive* (July 2003) at <www.hm-treasury.gov.uk/consultations_and_legislation/consult_fullindex.cfm#live>.

⁴⁴ Implementation was by means of the Distance Marketing Directive Instrument 2004 and the Distance Marketing Directive (Amendment) Instrument 2004 (together the DMDI) which amended a number of modules dealing with Conduct of Business in the FSA Handbook (available at <<http://fsahandbook.info/FSA/>>).

⁴⁵ S.I. 2004 No. 2095.

Consumer Financial Services) Regulations 2004,⁴⁶ became effective on February 15, 2005.⁴⁷ The main “competent authority” for the purposes of enforcement is the Central Bank and Financial Services Regulatory Authority of Ireland (IFSRA) although the Director of Consumer Affairs also has a limited role.⁴⁸

The Application of the Directives

Once it is decided that consumers who purchase goods or services under distance contracts need protection, over and above that already afforded to consumers of goods and services, the issue becomes one of application. In addressing this preliminary issue a number of factors should be considered and balanced. There is, of course, the obvious tension between the need to protect vulnerable consumers and the cost of compliance that any protectionist legislation places on businesses. In this context suppliers and consumers are seen as operating on opposing sides. At the same time, the participation of consumers in e-commerce is seen as a major driver in the development of the e-commerce market and the wider information society agenda.⁴⁹ Therefore legislation that has the effect of enhancing consumer confidence in the market is seen as an important component in the development of the market. Less contentious factors relate to the nature of the distance contract and the practicalities of applying and enforcing such legislation in particular circumstances.

There are four pre-conditions to the application of the Directives.⁵⁰ First, the contract must be between a supplier and a consumer, as defined.⁵¹ Secondly, the contract must concern the sale of goods or the supply of services, including financial services. Thirdly, the goods or services must be supplied under an “organised distance sales or service provision scheme run by the supplier”.⁵² And fourthly, the supplier must make exclusive use of one or

⁴⁶ S.I. 2004 No. 853. For a detailed analysis of these Regulations, see Donnelly and White, “The European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004: Business Compliance and Consumer Rights” (2005) 12 *Commercial Law Practitioner* 41.

⁴⁷ The Department of Finance introduced amending Regulations shortly before the 2004 Regulations came into force. The EC (Distance Marketing of Consumer Financial Services) (Amendment) Regulations 2005, S.I. 2005 No. 63 make a number of minor amendments to the 2004 Regulations and came into operation at the same time as the 2004 Regulations. See further Donnelly and White, “An Update on the Distance Marketing of Consumer Financial Services: The EC (Distance Marketing of Consumer Financial Services) (Amendment) Regulations 2005” (2005) 12 *Commercial Law Practitioner* 83.

⁴⁸ The Director’s role is only in relation to suppliers to whom Part XI of the Consumer Credit Act 1995 applies (*i.e.* credit intermediaries).

⁴⁹ See European Commission, *eEurope 2005: An Information Society for all* COM(2002) 263 final.

⁵⁰ Directive 97/7, Art.2; Directive 65/2002, Art.2.

⁵¹ “Consumer” means any natural person who is acting for purposes which are outside his trade, business or profession; “supplier” means any natural or legal person acting in his commercial or professional capacity: see Directive 97/7, art.2(2) & (3); Directive 65/2002, art.2(c) & (d).

⁵² This pre-condition ensures that once-off transactions are not caught by the legislation.

more means of distance communication up to and including the moment of contract conclusion. “Means of distance communication” is further defined as any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for conclusion of the contract or the marketing of a financial service between those parties, such as the telephone or the Internet.⁵³

These pre-conditions are largely straightforward. However, in one respect, there is uncertainty as to the application of the legislation. As noted above, Directive 97/7 applies to two classes of distance contract: *sale of goods contracts* and *supply of services contracts*. These terms are not defined in the Directive, or the implementing Regulations, though the term “consumer goods” has been defined in a more recent European consumer protection Directive as “any tangible moveable item ...”.⁵⁴ This lack of definition may raise difficulties where “digital content”, such as computer software, music or games, is supplied on-line.⁵⁵ The classification of contracts for the supply of computer software has been addressed in a number of common law jurisdictions but the decisions would seem to raise more questions than answers.⁵⁶ It is clear that software may be supplied pursuant to a contract for the supply of services, as where there is a contract to write a new programme for a customer.⁵⁷ Moreover, where software is supplied on a disk or CD, or

⁵³ Directive 97/7, art. 2(4); Directive 65/2002, art.2(e). Annex 1 of Directive 97/7 contains an indicative list of means of distance communications which comprises: addressed and unaddressed printed matter; standard letter; press advertising with order form; catalogue; telephone with and without human intervention; radio; videophone; videotex with keyboard or touch screen; electronic mail; fax; and television. Recital 9 of Directive 97/7 rightly notes that the constant development of means of communication does not allow an exhaustive list to be compiled. In fact, this list is unchanged from the Commission’s list originally proposed in 1992 and is notable for its omission of the Internet, which in 1992 was not widely recognised as the new shopping environment.

⁵⁴ Art.1(2) of Council Directive 1999/44 on certain aspects of the sale of consumer goods and associated guarantees, [1999] OJ L171/12.

⁵⁵ This is an area where huge growth is predicted. For example, In-stat/MDR predicts that the total on-line gaming (OLG) market will grow from just over a billion in 2003 to nearly \$4 billion by the end of 2008: at <www.instat.com>. Forrester states that online music business is expected to grow from a projected \$308 million in 2004 to \$4.4 billion in 2008: at <www.itfacts.biz/index.php?id=C0_10_1>.

⁵⁶ In the US, because of uncertainty about the application of Art.2 (on sale of goods) of the Uniform Commercial Code (UCC) to computer software the Uniform Computer Information Transaction Act (UCITA, at <www.law.uh.edu/ucc2b/>) was enacted in 1999. UCITA provides substantive contract law rules for computer information transactions similar to UCC art.2. This issue has also arisen in relation to the UN Convention for the International Sale of Goods (the Vienna Convention) 1980. Two decisions from the German courts support the view that ‘goods’ under the Vienna Convention includes computer software. See Appellate Court Koblenz (Oberlandesgericht Koblenz, Case 2U 1230/91, September 17, 1993), case abstract at <www.cisg.law.pace.edu/cisg/wais/db/cases2/930917g1.html>. See also District Court of Munich (LG München, Case 8 HKO 24667/93, February 8, 1995, summary at <http://cisgw3.law.pace.edu/cases/950208g4.html>.

⁵⁷ *Salvage Association v CAP Financial Services Ltd* [1995] FSR 654. In *Saphena Computing Ltd v Allied Collection Agencies Ltd* [1995] FSR 616 the Court of

where hardware and software are supplied together, as where a PC is bought with pre-installed software, it has been held that if the software is defective, the supplier may be in breach of the statutory implied terms as to quality, under sale of goods legislation.⁵⁸ The difficulty, as noted by Sir Ian Gildewell in the Court of Appeal in *St Albans City and District Council v International Computers Ltd*⁵⁹ is that while a disk, CD or PC is clearly goods, software “being instructions or commands telling the computer hardware what to do”, of itself is not. In the *St. Albans* case, the defective software was not sold or hired, it was simply copied from a disk onto the plaintiff’s computer without delivery of the disk. The property in the disk remained with the supplier, while the plaintiff was licensed to use the software. In these circumstances, it was held that the software was not “goods” so there were no statutory implied terms as to quality under the UK Sale of Goods Act 1979.⁶⁰ Similar difficulties exist where software is purchased and then downloaded under a licence agreement. In these circumstances, there is no disk or CD to point to to identify the transaction as a sale of goods, and where the software purchased is “off-the peg” and not custom-made it would be difficult to argue that its supply constitutes a supply of services. The issue is whether the supply of software under a licence agreement alone comes within the protection of Directive 97/7.⁶¹ As has been noted elsewhere⁶², it makes no sense to have the buyer’s rights dependent on the relatively insignificant manner of delivery, that is, on whether the software is delivered on a disk or via the Internet. Should this issue come before the European Court of Justice⁶³, a choice will have to be made between the application of strict legal definitions and the protection of consumers.⁶⁴ As already noted, these terms are not defined in the Directive and hence the policy of enhancing consumer protection in the EU could be pursued without such restrictions. Moreover, the potential exclusion of contracts for the supply of digital content would appear to be more an accident of timing (in 1992 when the Directive was proposed, and in 1997

Appeal avoided classifying a supply of software which was adapted to the customer’s needs because it was common ground that the law was the same whether it was a supply of services or a sale of goods.

⁵⁸ In a New South Wales case *Toby Construction Products Pty Ltd v Computa Bar (Sales) Pty Ltd* [1983] 2 NSWLR 48, the Supreme Court held that the transfer of property in hardware and software together was a sale of goods. But this case failed to address the issue of the supply of software alone.

⁵⁹ [1996] 4 All ER 481.

⁶⁰ In the absence of any express terms, his Lordship held that there would be a term implied at common law that the program should be reasonably fit for its intended purpose.

⁶¹ Note, *e.g.* under the VAT on E-Commerce Directive (2002/38/EC) downloaded digital content (such as software, music and games) supplied by non-EU suppliers to consumers in the EU is treated as a supply of services.

⁶² Hedley, “Quality of Goods, Information, and the Death of Contract”, [2001] JBL 114 at 119-120.

⁶³ See art.234 of the EC Treaty on the preliminary reference procedure.

⁶⁴ In *The London Borough of Newham v Khatun, Zeb and Iqbal* [2004] EWCA Civ 55 a purposive approach, rather than a literal approach, was taken with regard to the application of the unfair contract terms legislation, thereby broadly protecting consumer interests.

when it was adopted, no one foresaw the potential of ICT) than based on some policy imperative, further strengthening the case for their inclusion.

Further to the four pre-conditions identified above, the Directives specify a number of exemptions from their application. Under Directive 97/7 there are three classes of exemption: complete exemptions from the whole Directive; partial exemptions from the core provisions of the Directive (*i.e.* those relating to rights to information, to withdraw and to supplier's performance)⁶⁵ and further partial exemptions from the consumer's right to withdraw only.⁶⁶ Directive 2002/65 is less complicated in this regard with only one class of exemption relating to the right of withdrawal.⁶⁷ These exemptions reflect the basic tension between the need to protect vulnerable consumers and the cost of compliance that any protectionist legislation places on business. While many of these exemptions are reasonable, others are problematic either because their stated rationale is not convincing or because of uncertainty about their operation in practice. Again, it should be recognized that some of this uncertainty has been caused by the rapid developments in ICT that were not foreseeable in the 1990s when Directive 97/7 was being formulated.

Some contracts, because of their immediate nature, do not give rise to the standard problems of distance contracts and hence are exempted. Examples of completely exempted contracts under Directive 97/7 include contracts concluded by means of automated vending machines or automated commercial premises; and contracts concluded with telecommunications operators through the use of public payphones (*i.e.* a telephone call). These exemptions appear reasonable though the term "automated commercial premises" is not defined in the Directive. It would seem to include automated car parks and automated photo booths, for instance, but when applied to the Internet environment, this lack of definition may give rise to problems. As noted elsewhere⁶⁸, it is arguable that an automated website would fall within the definition of automated commercial premises.⁶⁹ Another rationale for the exemptions is that the provisions of the Directive would be unworkable. For example, contracts for the construction and sale of immovable property or relating to other immovable property are completely exempted from Directive 97/7 because the availability of a right to withdraw from such contracts would give rise to problems.⁷⁰ However, rental agreements of such property are covered by the Directive.

⁶⁵ Art.3.

⁶⁶ Art.6(3); see further below.

⁶⁷ Art.6(2) & (3); see further below.

⁶⁸ Hornle, Sutter & Walden, n.28 above p.13.

⁶⁹ The Irish Regulations would appear to take a narrow view of this point by defining "premises" in concrete terms as "*including* any building, dwelling, temporary construction, vehicle, ship or aircraft" and thus excluding a virtual premises, such as a web-site: Reg 2. However, the Irish definition is not exhaustive and it is unclear whether a narrow definition if adopted would be in compliance with the Directive.

⁷⁰ This category may also be exempted by member states as regards the validity of electronic contracts under art.9(2) of Directive 2000/31/EC on electronic commerce: see above n.5.

Interestingly, auctions are also completely exempted from Directive 97/7 because, it would seem, of their special nature. Given the huge growth in on-line auctions⁷¹, it might be thought that this exemption is another example of Directive 97/7 showing its age.⁷² However, the term “auction” is not defined in the Directive and it is unclear whether what are widely known as “on-line auctions” would in fact come within the definition of auction under the Directive.⁷³ Rather than a seller or buyer engaging the services of an auctioneer to act as an intermediary on their behalf, most on-line auction sites operate not as an “auctioneer” in the traditional sense but as a facility whereby buyers and sellers can meet and ultimately transact directly. Indeed, some of the most popular on-line auction sites emphasise this point in their express terms and conditions of trade.⁷⁴ But, where the transaction between the seller and the buyer is once-off or where it is between two consumers, it would fall outside the application of the Directive in any case. However, where a business regularly uses an on-line auction web site to supply goods to consumers it is arguable that such a transaction would come within the scope of the Directive. This appears to be the finding of a recent decision from the German Federal Supreme Court concerning the sale of a diamond bracelet sold by a jeweller on eBay, the popular auction web site.⁷⁵

Two classes of contract are partially exempt from Directive 97/7, in that the core provisions of the Directive relating to rights to information, to withdraw and to supplier’s performance do not apply to contracts:

- for the supply of foodstuffs, beverages or other goods intended for everyday consumption supplied to the home, residence or workplace of the consumer by regular roundsmen; and
- for the provision of accommodation, transport, catering or leisure services where the supplier undertakes, when the contract is made, to provide those service on a specific date or within a specific period.⁷⁶

The exemptions in the first bullet-point were designed to cover the traditional milk, and related, deliveries to home. However the advent of supermarket shopping on-line leads to questions as to whether the Directive applies in this

⁷¹ eBay was the first online auction site for the sale of goods and services, and is currently the most widely known and used. It was started in 1995, to provide a central location to buy and sell unique items and to meet other people with similar interests. Currently, there are over 1,000 retail auction sites in operation, with eBay dominating the market with 42.4 million registered users. eMarketer, a leading provider of Internet statistics, predicts that revenue from online auctions will reach \$16.3 billion dollars by 2004.

⁷² See above regarding supply of ‘digital content’.

⁷³ See further Ramberg, *Internet Marketplace: the law of auctions and exchanges on-line* (Oxford: Oxford University Press, 2002).

⁷⁴ See, e.g. Clause 3 of eBay’s User Agreement at <www.ebay.com>; and Clause 3 of uBid’s User Agreement at <www.uBid.com>.

⁷⁵ Reported at <http://www.heise.de/english/newsticker/news/52867>.

⁷⁶ The remaining substantive provisions of Directive 97/7 as regards fraudulent use of payments cards; inertia selling; and cold-calling continue to apply to these contracts. These contracts were completely exempted in the original draft of Directive 97/7.

new context.⁷⁷ It could be argued that the reference to “regular roundsmen” would exclude home deliveries by supermarkets which usually are made following a specific order placed on-line each time and hence are not delivered on a “regular” or routine basis. Moreover, the application of the Directive to supermarket shopping on-line would be limited, in that, there is a specific exception to the right to withdraw in relation to contracts for the supply of perishable goods, thereby protecting the supplier’s interest.⁷⁸

The thinking behind the exemptions in the second bullet-point, which would include hotel and airplane bookings, is that the consumer decision to contract generally “represents a considered decision by the consumer” and therefore further protection, in the form of the main provisions of the Directive, is not required.⁷⁹ This reason is not particularly convincing and it is more likely that these exemptions are an example of suppliers’ interests taking precedence over consumer protection interests. In particular, to perform such contracts the supplier may have to make advance arrangements, or, having committed to provide the service to a customer, the supplier may have to refuse the service to other prospective customers given the limited availability of the service at a specific date or within a specific period. The underlying assumption is that it would be unfair on the supplier to allow the first consumer to withdraw from the contract in these circumstances because to do so would involve imposing the financial cost of the cancellation on the supplier who because of the time restrictions has no realistic way of recouping that financial cost. While this may justify the exclusion of this class of contracts from the right of withdrawal, it does not explain why such contracts are excluded from the other main protections of the Directives, and in particular, the right to information.

With regard to both exemptions uncertainty about their exact meaning, and hence application, exists. To date, this uncertainty has given rise to one preliminary reference ruling from the ECJ regarding the meaning of the term “transport services” in the second bullet-point above.⁸⁰ The case involved easyCar, a car-hire business established by Stelios Haji-Ioannou, the founder of easyJet. The Office of Fair Trading (OFT) in the UK had complained of easyCar’s refusal to allow customers to cancel car-hire contracts and obtain a refund, under the relevant Distance Selling Regulations. In their defence, easyCar claimed that the Regulations did not apply to it because its car hire business is a “transport service”, which is exempt from the cancellation provisions of the Regulations. The commercial reality that underlay this case was that easyCar is a low cost supplier of car hire facilities and the application of Directive 97/7 to this type of activity would clearly have an impact on its competitiveness. The OFT disputed this interpretation. The OFT accepted that the exemption for transport services covered services provided by train operators, bus companies and airlines, for example. But the OFT view was that self-drive car hire was not in law a “transport

⁷⁷ Tesco Direct claims to be the largest on-line grocery retailer in the world with annual on-line sales in 2003 of £500 million: <www.tesco.com/corporateinfo/>.

⁷⁸ Directive 97/7, Art.6(3). See further below.

⁷⁹ See Explanatory Memorandum to draft Directive.

⁸⁰ Following a joint application to the High Court, the matter was referred to the ECJ on 21 July 2003. The ECJ gave its ruling on 10 March 2005: see Case 336/03 at <<http://curia.eu.int/en/content/juris/index.htm>>.

service". Again, the uncertainty arose because "transport service" is not defined in the Directive. The ECJ first noted that it is settled case law that the meaning and scope of an undefined term must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purpose of the rules of which it is a part.⁸¹ Moreover, where a term appears in a provision that derogates from the rules for the protection of consumers, it must be interpreted strictly.⁸² However, the ECJ then proceeded to interpret "transport services" broadly. It noted that the Directive, rather than use the more common term "contracts of carriage" which relates to the carriage of passengers and goods performed by a carrier, used the term contracts for the provision of ... transport ... services. The latter phrase was held to cover all contracts governing services in the transport field, including those contracts that enabled the consumer to perform the carriage. Therefore, easyCar's car hire business is a "transport service", which is exempt from the cancellation provisions of the relevant Regulations. Interestingly, in support of this interpretation, and with reference to the context of the legislation, the ECJ made reference to the Advocate General's opinion that the intention of the legislature was to institute protection for consumers and also protection for the interests of suppliers of certain services, in order that the latter should not suffer the disproportionate consequences arising from cancellations at no expense. The case clearly illustrates the tension, which underlies this Directive, between the need to protect vulnerable consumers and the cost of compliance that any protectionist legislation places on businesses.

One final issue concerns the Directives' application to severable or successive contracts. Recital 10 of Directive 97/7 addresses the situation where the same transaction comprises successive operations or a series of separate operations over a period of time. It recognises that this type of arrangement may give rise to different legal consequences depending on the law of the member state. For example, it could be interpreted as one severable contract or several separate contracts. To ensure uniform application in this regard Recital 10 provides that there must at least be compliance with the Directive at the time of the first of a series of successive operations or the first of a series of successive operations over a period of time which may be considered as forming a whole, whether that operation or series of operations are the subject of a single contract or successive, separate contracts. Recital 10 is problematic for two reasons. First, and as noted elsewhere, Recital 10 causes particular problems if applied to book and music clubs or other similar arrangements.⁸³ Usually, when a person joins such a club they agree that, in return for being allowed to purchase a number of items (such as books) at a reduced price, they will purchase a minimum number of other items at full price over a period of time. In legal terms, when a person "joins" the club he probably enters into an initial contract which includes the club's rules of membership and thereafter each time a member buys a book a separate contract for the sale of goods is concluded.

⁸¹ Case C-128/94 *Hönig* [1995] ECR I-3389, para.9.

⁸² Case C83/99 *Commission v Spain* [2001] ECR I-445, para.19.

⁸³ See further Bradgate, "Distance Selling in the UK and the proposed EC Directive", [1993] CLJ 19; Bradgate, "The EU Directive on Distance Selling", [1997] 4 *Web JCLI* <www.webjcli.ac.uk/1997/issue4/bradgate4.html>.

If applied to the book club scenario Directive 97/7 would only apply to the initial contract when the member joins the club and not to successive contracts under which the consumer purchases goods. This approach is misguided. It seems to be designed to alleviate the repeated burden that would be placed on suppliers if the Directive were to apply to all transactions but in doing so it ignores the position of consumers. While notification of the terms of the contract may be sufficient when the member “joins” the club, other aspects of the Directive’s protection, such as the right to withdraw, cancellation of disputed card payments and prohibitions on inertia selling only make sense when applied to individual sales transactions. The second problem with Recital 12 is that Directive 97/7 itself is silent on this issue thereby raising questions as to the legal effect of this provision. Article 253 EC requires that directives must state the reasons on which they are based and must refer to any proposals or opinions that were required by the Treaty. This requirement is satisfied in the recitals of the preamble of a directive. These obligatory recitals in the preamble to legislation are commonly used as aids to interpretation of the legislation but they are not legally binding in themselves. Thus, because this provision is not repeated in the text of Directive 97/7, it is arguable that suppliers must comply with Directive 97/7 in relation to all successive operation and not just the first of a series. Such an interpretation would clearly favour the position of consumers and thereby be in keeping with a teleological interpretation of the Directive. However, it would be in direct conflict with Recital 12.

Moreover, developments in relation to this issue in Directive 2002/65 may undermine such an argument. In addressing this issue Directive 2002/65 makes two important changes. First, the issue is dealt with in Article 1(2) of the Directive removing any doubts as to its legal effect in Directive 2002/65. While questions about the legal effect of Recital 12 in Directive 97/7 remain, the inclusion of the provision in the text of Directive 2002/65 may indicate an intention that this provision, which is essentially the same in both Directives, was intended to have legal consequences in both Directives.⁸⁴ Secondly, although following a similar approach by requiring that the Directive apply only to the initial agreement or operation, Directive 2002/65 provides that where there is no operation for more than one year, the next operation is deemed to be the first operation and the information requirements (only) of the Directive apply again. While Directive 2002/65 can be viewed as an improvement on Directive 97/7 in that it offers legal certainty as to legal effect of the provision, it is in substance another example of suppliers’ interests taking precedence over consumers’ interests. Furthermore, the fundamental objection to the operation of this type of provision, as highlighted above in relation to book clubs, remains.

Information Deficit or Information Overload?

Once a distance contract fits within the Directives’ application, the first of the protections afforded to consumers involves the placing of a number of

⁸⁴ The contrary argument can also be made that because the provision is expressly included in the text of Directive 2002/65 and expressly excluded in the text of Directive 97/7 the provision in Recital 10 of Directive 97/7 is not legally binding.

information obligations on suppliers.⁸⁵ Close analysis of these information obligations placed on suppliers show that they are voluminous and complicated. They can be divided into two categories. First, both Directives require that the consumer be provided with specified information, in advance of contract formation, in a clear manner (“the prior information”).⁸⁶ In effect, this seeks to ensure that the consumer is notified in advance of the main terms of the contract and hence is in a position to make a well informed choice to enter the contract or not. Secondly, both Directives require that some further confirmation or communication of the prior information (plus some additional information) be made available to the consumer in written/paper form or in another durable medium. Directive 97/7 requires that the confirmation be provided during the performance of the contract and at the latest at the time of delivery of goods (“post-contractual confirmation”).⁸⁷ In contrast, Directive 2002/65 provides that the supplier communicate the relevant information before the consumer is bound by any distance contract or offer (“pre-contractual communication”).⁸⁸

Essentially, these obligations are intended to be confidence-building measures in the distance sales market designed to ensure that the consumer’s informed consent to the distance contract is obtained.⁸⁹ They address the different environment that surrounds distance sales when compared with face-to-face transactions. Where goods or services are sold face-to-face, the buyer through his physical presence alone has a certain knowledge of the supplier. In the distance sales environment this information may not be as readily available. For example, where goods or services are bought at a distance, the identity and location of the supplier may be unclear. Goods, rather than being physically examined, must be described by the supplier: orally where the telephone is used; or in writing and visually where print media and the Internet is used. To meet this information deficit the Directives require that *specific information* be provided *at particular times* and *in a particular manner*.

Specific information

Both Directives identify the specific information to be provided.⁹⁰ But Directive 2002/65 sets out a much longer and more detailed list of

⁸⁵ Directive 97/78 arts 4 & 5; Directive 2002/65, arts.3–5.

⁸⁶ Directive 97/78 art.4; Directive 2002/65, arts.3 & 4.

⁸⁷ Art.5.

⁸⁸ Art.5.

⁸⁹ See further Directive 97/7, Recital 11; and Directive 2002/65, Recitals 5, 21–23.

⁹⁰ For example, Directive 97/7 identifies the follow prior information in art.4(1): (a) the identity of the supplier and, in the case of a contract requiring payment in advance, his address; (b) the main characteristics of the goods or services; (c) the price, including all taxes; (d) any delivery costs; (e) arrangement for payment, delivery or performance; (f) the existence of a right of withdrawal; (g) the cost of communication, where other than at a basic rate; (h) the period for which the offer or the price remains valid; (i) the minimum duration of the contract where the contract is to be performed permanently or recurrently. Additional post-contractual information is identified in art.5(1): written information on the conditions and procedures for exercising the right of withdrawal; the geographical address of the supplier; any information on after-sales services and guarantees; the

information that must be provided when compared with Directive 97/7.⁹¹ This difference is not surprising given that financial services products are generally recognized as more complicated than the average goods or services. However, some differences cannot be explained for this reason. For example, as part of the prior information, Directive 2002/65 requires that the consumer be informed of the supplier's "geographical address", while Directive 97/7 only requires disclosure of the supplier's "address" and then only where the contract requires payment in advance.⁹² Similarly, Directive 2002/65 states that the consumer shall be provided with details of the total price to be paid by the consumer for the service via the supplier and otherwise, including all related fees, charges and expenses as well as taxes. Again, this is an improvement on Directive 97/7, which specifies only the inclusion of taxes in addition to the price of the goods.⁹³ Arguably, this leaves the consumer of goods and services (other than financial services) less well informed than the consumer of financial services and for no good reason.

It is also important to note that the information requirements of the Directives are in addition to any other information requirements found in existing legislation whether it is general in nature (such as the information requirements for contracts concluded by electronic means found in Articles 5, 10 and 11 of the E-Commerce Directive⁹⁴) or specific to the type of contract (e.g. contracts for the supply of credit).⁹⁵ While there is some overlap between these various information requirements⁹⁶, there are also

conditions for cancelling the contract where it is of unspecified duration or duration exceeding one year.

⁹¹ Art.3 of Directive 2002/65 provides that the consumer must be provided with information relating to the supplier, the financial service, the distance contract and his rights of redress. In particular, regarding the supplier, the consumer must be informed of the identity and main business of the supplier, as well as the supplier's geographical address; the identity of the supplier's representative in the state where the consumer resides; the identity and details of any professional with whom the consumer may interact; the supplier's business registration details, if any; details of any relevant supervisory authority to which the supplier is subject. Secondly, in relation to the financial service the consumer must receive information describing the financial service; the total price to be paid by the consumer for the service, including all related fees, charges and expenses as well as taxes; where relevant, whether the financial service is linked to an instrument involving special risks or if the price of the service depends on fluctuations in the financial markets; other taxes or costs that are not paid via the supplier; any limitation period for which the information is valid; the arrangements for payment and performance; and any additional cost for using a means of distance communication. Lastly, the consumer must be informed of details relating to the contract itself including his right of withdrawal or its absence and practical details involving its exercise, the right of termination, minimum duration of the contract; and whether out-of-court redress mechanisms exist.

⁹² Directive 97/7 does require details of the supplier's geographical address as part of the post-contractual confirmation.

⁹³ While simple sales of goods may not incur fees and charges to the same extent as the sale of financial services, these can be an issue in more complex sales.

⁹⁴ Directive 2000/31/EC, [2000] OJ L178/1.

⁹⁵ See, e.g. Recital 14 & art.4 of Directive 2002/65.

⁹⁶ The information requirements of Directive 2002/65 mirror in large part the provisions of the consumer credit Directives: see Directives 87/102 and 90/88.

important differences.⁹⁷ The result is that suppliers are obliged to provide significance amounts of information which consumers are expected to digest.

At Particular Times

As noted above, Directive 2002/65 provides that all the specified information⁹⁸ must be provided “in good time”⁹⁹ before the consumer is bound by the contract.¹⁰⁰ In contrast, Directive 97/7 requires that the prior information be provided in good time before the conclusion of any contract but the confirmation of the relevant information¹⁰¹ need not be provided until during the performance of the contract and at the latest at the time of delivery of goods and hence after the contract is concluded.¹⁰² Interestingly, this information, which is required to be provided at the latest during performance or at the time of delivery of goods, is not of a different nature to the specific information under Directive 2002/65. Thus, it would appear again that the consumer of goods and services (other than financial services) is less well informed in advance of entering a contract than the consumer of financial services and for no good reason.

In a Particular Manner

The Directives state that the “commercial purpose” of the prior information must be “made clear”. Moreover, the prior information must be

provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable ... to give their consent, such as minors.¹⁰³

The guiding principle here is transparency however a number of questions about the operation of this provision remain to be addressed. The

⁹⁷ While Directive 97/7 merely requires information about “the identity of the supplier”, the E-Commerce Directive requires the name of information service provider (ISP); the ISP’s VAT number; details of any regulated body to which the ISP belongs and applicable rules/code; any trade/public registration details; and any authorization scheme details.

⁹⁸ *i.e.* all the terms and conditions and the information specified in art.3(1) and art.4.

⁹⁹ This phrase is not defined in the Directives. A court might interpret it with reference to a “reasonable period of time” in advance of contract conclusion that would enable the consumer to be fully informed of the nature of the transaction. Clearly, this period of time would vary depending on the circumstances of the case.

¹⁰⁰ Exceptionally, this obligation may be fulfilled after the contract is concluded if the contract has been concluded at the consumer’s request using a means of distance communication which does not enable providing the relevant information: art.5(2).

¹⁰¹ *i.e.* the prior information plus some additional information: see Art.5 of Directive 97/7.

¹⁰² This requirement of post-contractual confirmation does not apply in two circumstances: (i) where the information has already been provided; and (ii) where goods are delivered to third parties: art.6(1).

¹⁰³ Directive 97/7, art.4(2) and Directive 2002/65, art.3(2). Art.4(3) of Directive 97/7 and art.3(4) of Directive 2002/65 contain further requirements in the case of telephone communications.

requirement of a “clear and comprehensible manner” is reminiscent of the “plain, intelligible language” requirement in the Unfair Terms in Consumer Contracts Directive.¹⁰⁴ However, as with the unfair terms legislation, it is not clear whether the requirement is subjective or objective. Secondly, the information must be provided in a way appropriate to the means of distance communication used. While this requirement is not defined further, it would seem to mean that where communication is via the Internet, the information should be provided via the Internet, for instance. Thirdly, the information must be provided with due regard to the principles of good faith in commercial transactions and the principles governing the protection of those who are unable to consent. This reference to principles, in particular, good faith in commercial transactions, causes problems for common law systems where such principles are not generally recognised.¹⁰⁵ Principles of good faith have been adopted into our domestic legal systems following the transposition of the Directive on unfair terms in consumers contracts¹⁰⁶ and the Directive on commercial agents¹⁰⁷ but the exact meaning and scope of these principles remain unexplored in a common law context. It could be argued that the principles of good faith would be breached, for instance, where a supplier provides information in a language that he knows the consumer does not understand. Whether as a result the supplier is obliged to translate the information into the language of an order remains to be seen.¹⁰⁸ And, whether there is a difference between principles of good faith in *commercial* transactions, as opposed to *consumer* transactions, remains to be seen.

Written Confirmation

One area of uncertainty in relation to Directive 97/7 concerns the requirement that the post-contractual information must be confirmed in written form or in other durable medium available and accessible to the consumer. The term “durable medium” is not defined in Directive 97/7 and accordingly this requirement has been criticised for being unclear.¹⁰⁹ Recital 13 states that “information disseminated by certain electronic technologies is

¹⁰⁴ Art.5 of the EC Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, [1993] OJ L95/29.

¹⁰⁵ See further Beatson & Friedmann ed., *Good Faith and Fault in Contract Law* (1997); Harrison, *Good Faith in Sales*, (1997); and Brownsword, Hird and Howells ed., *Good Faith in Contract: Concept and Context*, (1999).

¹⁰⁶ See art.3 of the EC Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, [1993] OJ L95/29.

¹⁰⁷ See arts.3 & 4 of the EC Directive on self-employed commercial agents, 86/653/EEC, [1986] OJ L382/17.

¹⁰⁸ Directive 97/7 avoided the political/national issue of language by stating in Recital 8 that the languages used for distance contracts are a matter for the member states. This represented a step back from the position proposed in the draft Directive, which required that the contract information be provided in the same language as the contract solicitation. Arguably, this change undermines the usefulness of the information requirements. Interestingly, under Directive 2002/65 the supplier must provide information concerning the language(s) in which the prior information is supplied and, with the agreement of the consumer, the languages in which the supplier undertakes to communicate during the duration of the contract: art.3(1)(3)(g).

¹⁰⁹ See, e.g. Hornle, Sutter & Walden, n.26 above, pp.15-16.

often ephemeral in nature insofar as it is not received on a permanent medium; whereas the consumer must therefore receive written notice ...” Some have argued that this requirement means that paper and other physical media are required even where contracts were made via the telephone or Internet.¹¹⁰ Others have argued that “durable medium” means any permanent medium, which would include any medium that can be stored or printed out. Hence, confirmation by fax or e-mail would suffice.¹¹¹ Clearly, the latter view is preferable in terms of promoting electronic communications and commerce generally but the lack of definition in the Directive left the matter unclear. The implementing Regulations are also silent on the meaning of “durable medium”. But even accepting this broader view, questions remain. For example, is a supplier required to send an e-mail containing the relevant information to the consumer or would providing the relevant information on a website, which would require the consumer to actively seek and download/save the information, suffice? Fortunately this lack of definition has been addressed in Directive 2002/65 where “durable medium” has been defined as meaning

Any instrument which enables the consumer to store information addressed personally to him in a way accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.¹¹²

Moreover, Recital 20 provides that durable mediums include in particular floppy discs, CD-ROMs, DVDs, and the hard drive of a consumer’s computer on which electronic mail is stored, but they do not include Internet websites unless they fulfill the criteria contained in the definition of a durable medium. This definition, which can be applied by analogy to Directive 97/7, clearly includes the use of e-mail for confirmation purposes but excludes websites unless they comply with the definition. To satisfy this definition the website would need to address the specific information to the consumer and maintain the information, unchanged, for a sufficient period of time. Given the possibility of changing the contents of a website without reference to its users, it is difficult to see how Internet websites could conform to this definition.

Two points arise following the above analysis. First, the analysis illustrates a number of circumstances where there are irrational inconsistencies between the two Directives which result in the consumer of goods and services (other than financial services) being less well informed than the consumer of financial services. We believe that Directive 97/7 should be reviewed in

¹¹⁰ See, e.g. Madden, “A Safe Distance?” [2002] LSG 14; Bradgate, “The EU Directive on Distance Selling”, [1997] 4 Web JCLI <<http://www.webjcli.ac.uk/1997/issue4/bradgate4.html>>. However, it was noted that in most cases this would cause few problems because the requirement could be satisfied by including the information on a delivery note with the goods. Interestingly, Directive 2002/65 contains a provision which states that at any time during the contractual relationship the consumer is entitled, at his request, to receive the contractual terms and condition on paper: art.5(3).

¹¹¹ See, e.g. the UK’s DTI, *New Regulations for Business to Consumer Distance Selling - A Guide for Business*, (2000) p.17: <www.dti.gov.uk/ccp/topics1/pdf1/bus_guide.pdf>; see also Hornle, Sutter & Walden, n.26 above, pp.15-16.

¹¹² Art.2(f).

light of these differences with a view to harmonizing the provisions where appropriate.

Secondly, information provision is a cornerstone of the Directives. In this respect, the Directives adopt a “light-handed” approach, based on the concept of the consumer as an autonomous actor in a free market.¹¹³ Rather than blacklisting terms, for example, consumers are provided with information and allowed to make their own decisions. This approach characterises the United States response to consumer protection where self-protection (i.e. well-informed consumers who can protect themselves) and self-regulation (i.e. business regulating itself) go hand-in-hand.¹¹⁴ This approach is increasingly representative of EU consumer protection policy.¹¹⁵ However, a question arises regarding whether in fact the best way to protect consumers is to provide them with large amounts of information and expect them to then protect themselves. Ironically, while designed to meet the “information deficit” associated with distance contracts when compared with face-to-face transactions, the operation of these information provisions means that consumers who buy at distance are frequently provided with more information than their face-to-face counterparts. We would suggest that the problem may be one of “information over-load” rather than “information deficit”. Moreover, the impact of a potential information over-load needs to be considered, both from a supplier’s perspective and a consumer’s perspective. Clearly, as more and more information requirements are placed on suppliers the cost of compliance increases and this may, in turn, have a negative impact on compliance levels. At the same time, it is questionable whether the provision of information leads to better-informed customers. In simple terms, how many consumers go to the trouble of seeking out this information in order to read it before making a decision to purchase? On many websites this information is not easy to access because it is not located in any single place but in a variety of places including in any standard terms of sale, any statements about delivery and returns, and, as part of the ordering process. And, if in fact consumers do not go to such trouble, can the imposition of extensive informational obligations on suppliers be said to constitute an effective consumer protection measure? Even where a consumer goes to the trouble of accessing the information it does not follow that the information is fully understood. Research from the USA shows that this type of information based consumer protection tends to operate more to the advantage of those in high-income groups, and those from lower income-groups in society benefit less.¹¹⁶ In our view, further research on the effect of this type of information based consumer protection, on suppliers and consumers, is needed.

¹¹³ Stuyck, “European consumer law after the Treaty of Amsterdam: consumer policy in or beyond the internal market?” (2000) 37 *CMLRev* 367.

¹¹⁴ Howells & Wilhelmsson, “EC and US approaches to consumer protection: should the gap be bridged?” (1997) 17 *YEL* 207.

¹¹⁵ Howells & Wilhelmsson, “EC consumer law: has it come of age?” (2003) 28 *EL Rev* 370.

¹¹⁶ Whitford, “The Functions of Disclosure Regulation in consumer transactions”, (1973) 2 *Wisconsin Law Review* 400 at 414.

Extra-Contractual Obligations and Rights – The Supplier’s Duty to Perform and The Consumer’s Right of Withdrawal

The second of the protections afforded to consumers by the Directives involves placing extra-contractual obligations on suppliers and giving consumers extra-contractual rights. Generally, parties’ obligations are defined by the terms of the contract of supply and once the contract is properly formed parties are obliged to perform their obligations in accordance with those terms.¹¹⁷ The Directives alter this general position in two ways. First, as regards the supply of goods and services (other than financial services) Directive 97/7 places default performance obligations on suppliers. Secondly, both Directives allow consumers to withdraw from an otherwise legally binding contract.

Performance obligations

Under any contract each party is obliged to perform his side of the bargain. The time for such performance varies. For example, under general sale of goods legislation where the parties have agreed a time for delivery of the goods, the seller is contractually obliged to deliver at that time. Where no time has been agreed, the seller is required to deliver the goods within a reasonable time of the conclusion of the contract.¹¹⁸ Moreover, generally, stipulations as to time are regarded as conditions of the contract (it is said that time is *of the essence*) such that where a seller fails to deliver at the specified time, the buyer can terminate the contract and sue for damages.¹¹⁹

Article 7 of the Directive 97/7 contains specific provisions on the supplier’s duty to perform the contract within a specified time.¹²⁰ These provisions are particularly important where the consumer pays in advance, as is frequently the case with distance sales. Accordingly, unless agreed otherwise¹²¹, a supplier must execute a consumer’s order within 30 days from the date following that on which the consumer *forwarded his order* to the supplier.¹²² This requirement may cause problems from a common law perspective

¹¹⁷ Performance may of course be excused under the doctrine of frustration.

¹¹⁸ See Irish Sale of Goods Act 1893, s.29(2), and UK Sale of Goods Act 1979, s.29(3).

¹¹⁹ *Hartley v Hymans* [1920] KB 475; *Charles Rickards v Oppenheim* [1950] 1 KB 616. In contrast, sale of goods legislation states that the time for payment of the price is generally not of the essence: see Irish Sale of Goods Act 1893, s. 10(1); and UK Sale of Goods Act 1979, s.10(1).

¹²⁰ See also Recital 15. As a counter balance, art.7(3) permits member states to allow suppliers to provide substitute goods and services in certain circumstances. There is no equivalent to art.7 in Directive 2002/65.

¹²¹ Suppliers often forecast or promise shorter performance periods. An extended performance period would probably be subject to the test of fairness under the unfair terms legislation. Excessively long delivery periods or a provision that would leave the time for performance completely at the supplier’s discretion may be unfair and therefore unenforceable.

¹²² Similar requirements can be found in various codes of practice in this area: see e.g. Art.16 of the International Chamber of Commerce’s International Code of Direct Marketing, 2001 at <www.iccwbo.org/home/statements_rules/rules/2001/code_of_direct_marketing.asp>; and art.2.3.2 of the Federation of European Direct Marketing (FEDMA) Code on e-Commerce and Interactive Marketing (2000) at <www.fedma.org>.

however. In Irish and English law, an order from a consumer may be classified as an offer to buy¹²³ (the advertisement in a supplier's catalogue or on a website being classified as an invitation to treat¹²⁴). When an offer to buy is received by the supplier he is under no legal obligation to accept that offer. An acknowledgement of the offer may constitute acceptance¹²⁵, or at the latest, the dispatch of the goods would probably constitute acceptance. But, importantly, only at the point of acceptance is the supplier legally obliged to deliver. Therefore the Article 7 requirement to execute the order is out of line with our common law approach to contract formation where the order is merely an offer to buy. Unfortunately, the relevant implementing measures do not resolve this issue because they follow closely the wording of Article 7 in this regard.¹²⁶ Does the requirement to "execute the order" or perform the contract mean that a supplier must accept all orders? Or, does the Article 7 requirement only apply where the consumer's order constitutes an acceptance? The position remains unclear.

Moreover, Article 7(2) provides that where a supplier fails to perform his side of the contract because the goods or services ordered are unavailable¹²⁷, the consumer must be informed of this situation and must be able to obtain a refund of any sums paid as soon as possible and within 30 days, at the latest.¹²⁸ This provision, like Article 7(1), is based on an understanding (that once an order is placed the supplier is obliged to deliver) which does not always fit with our rules on contract formation. Again, the implementing regulations follow the approach of the Directive and so this mis-fit remains unaddressed.

A Right of Withdrawal

As noted above, once a contract is concluded the parties are bound by its terms. There are however a number of ways to escape contractual obligations. Clearly before any contract is concluded a buyer can withdraw from the negotiations. Where a supplier advertises goods or services in a catalogue or on a website, such advertisements are usually classified as invitations to treat. The buyer's order is therefore an offer to buy that can be

¹²³ *PSGB v Boots Cash Chemists* [1953] 1 All ER 482; *Minister for Industry & Commerce v Pim* [1966] IR 154.

¹²⁴ *Partridge v Crittenden* [1968] 2 All ER 421. Where the advertisement is considered an offer (*e.g. Carlill v Carbolic Smoke Ball Co.*, [1893] 1 QB 256; *Kennedy v London Express Newspapers* [1931] IR 532) and the consumer's order an acceptance, the same problem does not arise.

¹²⁵ Under Directive 2000/31/EC (the E-Commerce Directive) where an order is placed by electronic means the service provider must acknowledge receipt of the order without undue delay and by electronic means: art.11.

¹²⁶ Re Ireland see Reg 9 of the EC (Protection of Consumers in Respect of Distance Contracts) Regulations 2001, S.I. 27/2001; re the UK see Reg. 19 of the Consumer Protection (Distance Selling) Regulations 2000, S.I. 2334/2000.

¹²⁷ This provision does not apply where failure to supply is for any reason other than non-availability.

¹²⁸ Earlier drafts of Directive 2002/65 included similar provisions on the unavailability of the services but these were deleted from the final version of the Directive.

accepted or rejected by the supplier.¹²⁹ A standard term in suppliers' terms of trade may provide that no contract is concluded until the goods are dispatched to the buyer.¹³⁰ Therefore, in such circumstances, up to the time of dispatch the buyer can withdraw by communicating to the supplier his intention to revoke his offer.¹³¹ Moreover, where a buyer is induced to enter a contract following a misrepresentation by the seller the buyer may have a right to rescind the contract. Further, where an important term of the contract is breached the buyer may have a right to terminate the contract. Over and above these opportunities for a buyer to escape the contract the Directives give consumers a right to withdraw from an otherwise legally binding contract, without penalty and without giving any reason.¹³²

The withdrawal period differs under the two Directives. Under Directive 97/7 the right of withdrawal is exercisable for seven working days though this period may be extended up to three months where the supplier has failed to comply with the post-contractual information requirements.¹³³ Under Directive 2002/65 the consumer is given more time to withdraw - 14 days, and 30 days for contracts for life insurance and personal pensions operations.¹³⁴ Moreover, the three-month withdrawal limit that operates in relation to other services does not apply to financial services. If the supplier of financial services does not comply with the informational requirements, the right of withdrawal continues to exist indefinitely.

When looking at the application of the Directives we noted that there are exemptions from the right of withdrawal. Accordingly, the right to withdraw is not be available in certain circumstances, such as where the price fluctuates beyond the control of the supplier and where goods are made to the consumer's specification or clearly personalised. These and other similar exemptions¹³⁵ are designed to represent a balance between the interests of suppliers and consumers. One exemption under Directive 97/7 that is worthy of further mention covers the provision of services where performance has begun with the consumer's consent before the end of the 7 days withdrawal period. It is argued that, unlike goods, which can be identified and returned easily, services cannot be returned and hence the right of withdrawal is not appropriate in these circumstances. But this argument is flawed. In contrast, under the Directive 2002/65 a consumer has a right to withdraw from financial service contracts but is required to pay for any benefit received.¹³⁶ This appears a more balanced approach, particularly as regards contracts for

¹²⁹ *PSGB v Boots Cash Chemists* [1953] 1 All ER 482; *Minister for Industry & Commerce v Pim* [1966] IR 154.

¹³⁰ See, e.g. Clause 13 of Amazon's Conditions of Use and Sale at <www.amazon.co.uk>.

¹³¹ *Byrne & Co v Leon Van Tienhoven* (1880) 5 CPD 344.

¹³² Directive 97/7, art.6; Directive 2002/65, arts 6 & 7.

¹³³ Art.6(1). In general, the seven-day period start to run: (i) in relation to goods, from the day of receipt of the goods; and (ii) in relation to services, from the day of conclusion of the contract.

¹³⁴ Art.6(1). In general, the period for withdrawal begins from the date of conclusion of the contract, or for life insurance, the date the consumer is informed that the contract has been concluded.

¹³⁵ See Directive 97/7 art.6(3) and Directive 2002/65 art.6(2) & (3).

¹³⁶ Art.7.

the provision of a continuing service, such as Internet access or mobile phone services, where a consumer can only assess the quality of the service once performance has commenced. As with suppliers' information obligations, there are irrational differences between the two Directives, and again we would argue that the Directives should be reviewed in light of these differences with a view to harmonizing the treatment of all distance contracts, where appropriate.

Security of Payment

The last of the main protections contained in the Directives relates to security of payment. Consumer concern in this regard has been shown to be significant.¹³⁷ Addressing this mistrust is therefore one of the most important ways of guaranteeing the smooth expansion of the market in business to consumer e-commerce.

Ensuring security of payment is, in fact, a two-fold problem. One problem relates to third party fraud, as for example, where a third party gains access to a consumer's payment card details and uses those details to purchase goods or services at a distance. A second problem arises where a consumer is required to pay for goods or services in advance. In these circumstances the buyer is at risk of the supplier failing to perform the contract, either as a result of the supplier's fraud (as where a rogue supplier establishes a fictitious website to sell goods or services) or insolvency. While the risk of supplier fraud or insolvency is inherent in every transaction involving advance payment, it is augmented in distance sales where the consumer may know little of the nature and creditworthiness of the supplier. The legislative response to these two problems is found in Article 8 of each Directive. The approach in each Directive is identical and, unfortunately, it is also completely inadequate. The Directives address the problem of protection from third party fraud in a perfunctory way and do not address in any way the problem of supplier fraud or insolvency. As will be seen below, in some situations, this deficiency is addressed in part either by member states at implementation level or through protections afforded to specific payment mechanisms. However, these steps (insofar as they exist) do not fully address the limitations in the Directives, which ultimately can only be addressed by a substantial increase in the protections afforded to consumers in this area.

Before examining security of payment problems in detail, it is useful to note that, in the modern e-commerce environment, the most commonly used payment method is payment by card, with credit card payments being the

¹³⁷ A Eurobarometer survey published in 2004 indicated that 48% of those surveyed has concerns about security of payment when buying on the Internet: European Commission, *European Union Public Opinion on issues relating to business to consumer e-commerce* (2004) at <www.europa.eu.int/comm/consumers/topics/facts_en.htm>. In an earlier survey in 1999, 57% of the EU population surveyed indicated that they would not transmit their credit cards details to make an internet purchase; 41% said that they would not use internet currency: Hobley, n.16 above p.10.

most popular form in this regard.¹³⁸ Indeed, card based payments have been described as “virtually monopolis[ing] Internet payments”.¹³⁹ Although efforts are being made to increase the availability of Internet-specific payment methods, these developments appear to have had a fairly limited take-up in practice, not least because they all involve prepayment on the part of the payor.¹⁴⁰ Credit card payments also dominate in the telesales environment with consumers giving credit card details over the phone without ever physically presenting the payment card or providing any form of electronic identification. Even if other methods of payment gain more widespread acceptance, they are unlikely to present a significant challenge to the popularity of credit cards not least because credit cards are the only payment method to combine a convenient method of payment with a period of credit.¹⁴¹

Protecting Against Fraud

Although almost any means of distance payment raises the potential for fraud¹⁴², the risks are especially acute in card-not-present transactions, such as telesales and sales over the Internet, where it is not possible to get the traditional signature-based authentication from the card-holder. Clearly, the first imperative in building consumer confidence is to increase the security of websites to ensure safer transmission and storage of customers’ payment details. Technological advances have made this increasingly possible¹⁴³ and

¹³⁸ The *Realities of the European Online Marketplace* survey found that 24% of the websites surveyed offered only one method of payment and, of these websites, 47% offered only the option of payment by credit card: n.18 above pp.21-22.

¹³⁹ Hornle, Sutter & Walden, n.28 above p.26.

¹⁴⁰ In *E-Payments in Europe – the Eurosystem’s perspective*, Issues Paper of the European Central Bank (ECB, 2002) at <www.ecb.int> pp.12-16, the ECB set out the range of “innovative” e-payments. These include e-money schemes which can be card-based or software-based (both involve loading monetary value onto the payor’s card or digital wallet); personal online payment services (the customer opens an account with the service provider and instructs it to make payments typically communicating with the provider via email); and prepaid cards (monies are paid into the payor’s account through the purchase of cards which can then be used to make payments).

¹⁴¹ As noted above, new forms of e-payments require pre-payment. EFTPOS or debit cards involve payment at the time the card is presented, while charge cards (such as American Express) require payment immediately when the bill is received. Although there is in effect a form of “credit” for the time between card usage and forwarding of the bill, charge cards do not offer credit in a real sense and do not come within the ambit of consumer credit legislation: see further text to n.164.

¹⁴² The opportunities for fraud with the most traditional means of distance payment, the cheque, are well known: see Donnelly, “Cheque Fraud: Modern Treatment and Future Trends” (1997) 4 *Commercial Law Practitioner* 216.

¹⁴³ Commonly used methods of securing websites involves the utilisation of a Secure Sockets Layer (SSL) which establishes a secure connection between the client and the server which only lasts for the length of the session and the utilisation of a Secure Electronic Transaction (SET) which provides a means of encrypting numbers as they cross the Internet and hides certain card details from merchants. Secure websites are usually marked by a locked padlock symbol. Some credit card providers also provide protection for their customers: see Visa 3-D Secure

a significant number of websites now offer secure online payment guarantees.¹⁴⁴ However, a recent study found that 39% of websites surveyed did not convince the researchers that they were secure for online payment.¹⁴⁵ In these circumstances, the sources of legal redress for consumers become important both in a practical sense and in terms of developing consumer confidence in this area.

Article 8 of both Directives requires member states to ensure that appropriate means exist to allow the consumer to request cancellation of a payment where fraudulent use has been made of his payment card and in the event of fraudulent use to be re-credited with the sum paid. In all respects, the Directives are very short on detail in this provision. First, there is no stipulation regarding when and how the request for cancellation should be granted. Secondly, while the consumer is entitled to a return of any sums paid as a result of fraudulent use, the Directives are silent regarding standards of proof in relation to the establishment of fraud.¹⁴⁶ As is revealed by the extensive debate in relation to the allocation of the burden of proof of fraud in relation to payment methods in general¹⁴⁷, the meaningfulness of consumer protection in this regard will depend upon who is required to establish fraudulent use of the payment card. If the burden is placed on the consumer to establish that the card was used fraudulently, this can constitute an almost impossible hurdle. Thirdly, the Directives do not indicate who should bear the cost of re-crediting the consumer. This is especially important in the event of supplier insolvency or dishonesty. If it is the responsibility of an insolvent supplier to re-credit the consumer, the right to re-credit will have little meaning. Finally, both Directives refer to “payment card” payments only¹⁴⁸ and do not take account of newer payment

and MasterCard Secure Payment Application. See further *E-Payments in Europe* n.139 above pp.29-30.

¹⁴⁴ See for example <www.amazon.com> which offers a “safe shopping guarantee” where the retailer guarantees not to charge for any unauthorised charges made while shopping at its website. See also art.4 of the Federation of European Direct Marketing (FEDMA) Code on e-Commerce and Interactive Marketing (2000) which provides that marketers should ensure that appropriate and trustworthy security systems are established to safeguard the security, integrity and confidentiality of financial transactions and payments made by consumers: at <<http://www.fedma.org>>.

¹⁴⁵ European Consumer Centre’s study on *Realities of the European Online Marketplace*, n.16 above.

¹⁴⁶ Art.15 of both Directives states that any contractual term that places the burden of proof on the consumer in relation to the supplier’s compliance with his or her obligations pursuant to the Directive shall be an unfair term within the meaning of Council Directive 93/13/EEC. However, this has no application in relation to the question of payment cards where the contract in question is not between the supplier and the consumer but between the consumer and the card issuer.

¹⁴⁷ See the *Banking Services: Law and Practice Report 1989* (The Jack Report) Cm 622 (London: HMSO, 1989) pp.91-92. See further Donnelly, *The Law of Banks and Credit Institutions* (2000) pp.335-337.

¹⁴⁸ The term payment card is undefined in the Directives – presumably it extends to credit and debit cards and to other forms of prepaid cards.

methods.¹⁴⁹ While card based payments are still predominant, this limit is completely arbitrary and could lead to unfair distinctions when and if newer payment methods become more widely used.

As noted above, the lack of detail in the Directives may be addressed by the methods of implementation chosen at member state level. In the UK, the Consumer Protection (Distance Selling) Regulations 2000¹⁵⁰ and the Financial Services (Distance Marketing) Regulations 2004¹⁵¹ expand considerably upon the limited protections offered by the Directive, although, like the Directive, the Regulations are limited to payment cards only.¹⁵² The Regulations place the responsibility for re-crediting on the card issuer.¹⁵³ However, there is nothing in the Regulations to stop the card issuer from ultimately placing liability back on the supplier through the use of a charge-back provision in its contract with the supplier.¹⁵⁴ A typical contractual provision to this effect will state that, if a cardholder disputes a payment on the basis of fraud or error, the supplier will reimburse the card issuer for any monies paid together with a processing fee.¹⁵⁵ This agreement is secured by means of a charge over the supplier's property (the charge-back) upon which the card issuer can rely in the event of supplier insolvency.¹⁵⁶ The use of charge-backs therefore effectively shifts the burden of bearing the cost of fraud away from the card issuer and onto the supplier and, if necessary, his estate in bankruptcy. While the reality of charge-backs means that the ultimate liability will rarely lie with the issuer in practice, the importance of the UK Regulations is that they provide a clear guarantee of protection for

¹⁴⁹ This is especially odd in light of the substitution of the term "electronic payment instrument" (EPI) for the term payment card in the *EC Recommendation Concerning Transactions by Electronic Payment Instruments and in particular the Relationship between Issuer and Holder* 97/489/EC. An EPI is defined in the Recommendation as an instrument which enables its holder to transfer monies, make cash withdrawals or load and unload monies onto the instrument at cash dispensing machines, automated teller machines or at the premises of an EPI issuer or an institution which is under contract to accept the payment instrument. See further Donnelly and McDonagh, "Maintaining Standards in Electronic Banking: How Does Ireland Measure Up?" (2000) 7 *Commercial Law Practitioner* 211.

¹⁵⁰ S.I. 2000 No. 2334.

¹⁵¹ S.I. 2004 No. 2095.

¹⁵² Reg. 21(6) states that payment card "includes credit cards, charge cards, debit cards and store cards".

¹⁵³ Reg. 21(2) of the 2000 Regulations and Reg. 14(1) of the 2004 Regulations.

¹⁵⁴ It has been accepted since the decision of Millett J in *Re Charge Card Services* [1987] Ch 150 that payment by card gives rise to three separate contracts (between provider and consumer; between consumer and supplier; and between provider and supplier) which operate bilaterally.

¹⁵⁵ Provided of course that the relevant terms in the contract are enforceable and do not come within the terms of the UK Unfair Contract Terms Act 1977. See Brownsword & Howells, "When surfers start to shop: Internet commerce and contract law", [1999] *LS* 287 at 308-312 for a consideration of circumstances in which charge-backs might be held not to be enforceable. There is no possibility of a similar challenge in Ireland, which has no equivalent to the UK Act.

¹⁵⁶ For discussion of the legal nature of a charge-back, see *In re Bank of Credit and Commerce International SA (No 8)* [1997] 3 WLR 909.

consumers, leaving only the finer details of who pays for this protection to be determined elsewhere.

In relation to the establishment of fraud, the UK Regulations place the burden of proof on the card issuer, providing that “if the consumer alleges that any use made of the payment card was not authorised by him it is for the card issuer to prove that the use was so authorised.”¹⁵⁷ The Regulations do not set out how a card issuer is to perform the rather difficult task of proving the existence of authorisation and some further clarification in this regard would be useful, from a card issuer’s perspective at least. This clear allocation of the burden of proof is in line with the EC Recommendation Concerning Transactions by Electronic Payment Instruments and in particular the Relationship between Issuer and Holder¹⁵⁸ which places the burden of proof on issuers in the event of a dispute¹⁵⁹ and which requires that the holder be exempted from liability if payment is made without physical presentation or electronic identification.¹⁶⁰

In Ireland, the EC (Protection of Consumers in Respect of Contracts made by means of Distance Communication) Regulations 2001¹⁶¹ did little to remedy the deficiencies in the Directive. Regulation 10 provides that a consumer may request cancellation of any payment made under a distance contract, or as appropriate, the recredit or return of such a payment, where fraudulent use has been made of his “payment card”.¹⁶² Such a request must be complied with immediately¹⁶³, and a person who fails to comply with this request is guilty of an offence.¹⁶⁴ The Irish Regulations make no provision for the allocation of the burden of proving fraudulent use nor do they specify who should bear the cost of recrediting. While it might be argued that EU policy, as indicated by the EPI Recommendation,¹⁶⁵ suggests that the burdens and costs should fall on the card issuer, the absence of a clear legislative statement to this effect is unfortunate.

In contrast to the minimalist approach taken in the 2001 Regulations, the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004¹⁶⁶ provide extensive payment protection to buyers of financial services who use payment cards.¹⁶⁷ Regulation 29(1)

¹⁵⁷ Reg. 21(3) of the 2000 Regulations and Reg. 14(2) of the 2004 Regulations.

¹⁵⁸ 97/489/EC: n.148 above.

¹⁵⁹ Art.7(2)(e). However, the Recommendation is more specific than the Regulations in setting out how this burden may be met: it provides (art.7(2)(e)) that the issuer must show that the transaction was accurately recorded and entered into accounts and that it was not affected by technical breakdown or other deficiency.

¹⁶⁰ Art.6(3).

¹⁶¹ S.I. 2001 No. 207.

¹⁶² Reg. 19(1). “Payment card” is defined as including credit cards, charge cards, debit cards and store cards.

¹⁶³ Reg. 10(2).

¹⁶⁴ Reg. 10(3) and Reg. 17.

¹⁶⁵ n.148 above.

¹⁶⁶ SI 2004 No. 853, as amended by S.I. 2005 No. 63.

¹⁶⁷ Reg. 29(6) defines a payment card as “a card issued to a consumer by means of which the consumer . . . can obtain goods, services or cash that, either at the time of the transaction or subsequently, are charged to an account kept in the name of the customer”.

states that the contract between card provider and consumer is “deemed to provide” that the relevant payments are to be recredited or returned to the consumer whenever the card is used fraudulently. Further, Regulation 29(2) provides the consumer is not to be liable for payments made without the consumer’s authorisation after the consumer has informed the card provider of the loss, theft or misappropriation of the card.¹⁶⁸ Regulation 29 contains the most protective measures thus far adopted by any Irish legislation in relation payment card usage¹⁶⁹ and contrasts clearly with the vague provisions found in the 2001 Regulations.

Alleviating the Risks for Pre-paying Buyers

Many supply contracts, including distance contracts with consumers, require the buyer of goods or the recipient of services to pay in advance.¹⁷⁰ The risk for a consumer who pays in advance is that the supplier will not, or cannot, perform his side of the bargain due to fraud or insolvency, respectively. In such a situation, the Directives offer absolutely no protection to the consumer who must resort to the protections afforded by the common law or under legislation.

The protections offered to consumers against supplier fraud or insolvency at common law are very limited in scope. While a consumer has a contractual right of action against the supplier for non-performance¹⁷¹, in the case of fraud, the supplier will most likely be untraceable and, in the case of insolvency, the consumer will have difficulties enforcing the debt unless he can establish some kind of proprietary interest in the insolvent supplier’s estate in bankruptcy. In most distance sales situations, the possibility of achieving this is remote. First, the pre-paying buyer will rarely have proprietary rights over the goods.¹⁷² This is because the passing of property in goods is not generally linked to the payment of the price.¹⁷³ Where goods are advertised in a catalogue or on a website and are bought based on this description, property in the goods would normally not pass to the buyer unless and until the goods are dispatched or at the latest delivered to the buyer, and not at the time of payment. Thus, it is highly unlikely that the payment will be secured in this way. Secondly, while in some limited

¹⁶⁸ Reg. 29, as substituted by Reg. 2 of the 2005 Regulations.

¹⁶⁹ In addition to Reg. 29(1), Reg. 29(4) provides that, if a consumer alleges that the card has been used without the consumer’s authorisation, the onus of establishing that the consumer did in fact authorise the use is placed on the card provider.

¹⁷⁰ While the basic rule in sale of goods legislation provides for “cash on delivery”, in reality, the time of payment can be deferred (*i.e.* credit sales) or brought forward (*i.e.* advance payment).

¹⁷¹ See, *e.g.* Irish Sale of Goods Act 1893, s.51 and UK Sale of Goods Act 1979, s.51.

¹⁷² Goode, “Ownership and Obligations in Commercial Transactions”, (1987) 103 *LQR* 433 at 447-451. In the UK, the rules on the passing of property to pre-paying buyers of goods have been altered to give buyers proprietary rights in certain defined circumstances: see the UK Sale of Goods (Amendment) Act 1995. However, this has limited application to consumers. See further Bradgate and White, “Sale Of Goods Forming Part of a Bulk: Proposals for Reform”, [1994] *LMCLQ* 315.

¹⁷³ See Irish Sale of Goods Act 1893, ss.16-19; and UK Sale of Goods Act 1979, ss.16-20; see further White, *Commercial Law* (2002) Ch.17.

circumstances, buyers may seek to establish the existence of a quistclose trust over monies paid, this is rarely likely to occur in practice.¹⁷⁴ The decision in *Re Kayford Ltd*¹⁷⁵ provides the precedent for claims in this regard. Here, payments to a mail-order company were placed in a separate account headed “Customers’ Trust Deposit Account” with the intention of benefiting customers if the company, which was in financial difficulties, became insolvent. Notwithstanding the fact that the customers had not intended the monies to be held on trust on their behalf, the company’s action was held to be sufficient to establish the existence of a quistclose trust. The monies in the account did not pass to the liquidator upon insolvency but were held on trust for the customers. It is unlikely that a *Re Kayford* situation would arise in most pre-paid distance contracts as this would require a clear intention on the part of the supplier to protect monies received and the supplier would have to put this intention into effect. In the absence of any proprietary rights over the goods or the monies paid, the consumer will have the status of unsecured creditor and will be dependent for repayment on the extent to which assets remain once all secured and preferential debts have been met.

Although the Directives do not provide protection of pre-paying consumers, there is a protective regime in place where the consumer has used a credit card to make the distance purchase. The extent of this protection varies considerably between the UK and Ireland. In the UK, section 75 of the Consumer Credit Act 1974 (CCA 1974) provides that a creditor (in this case, the card issuer under a credit agreement) in a tri-partite debtor-creditor-supplier arrangement is jointly and severally liable together with the supplier for any misrepresentation or breach of contract by the supplier.¹⁷⁶ Further, the consumer has a choice regarding whether to pursue the creditor, the supplier, or both.¹⁷⁷ The Irish legislation provides a much more limited

¹⁷⁴ This form of resulting trust (see *Twinsectra v Yardley* [2002] 2 AC 164) takes its name from the decision in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 where a trust was held to exist where monies have been designated for a specific purpose and have been kept in a separate and specifically identified fund. For an overview of the operation and nature of the quistclose trust, see generally Oakley Parker and Mellows, *The Modern Law of Trusts* (8th ed., 2003) pp.292-300.

¹⁷⁵ [1974] 1 WLR 279. See also *Re Chelsea Cloisters* (1981) 41 P & CR 98 (deposits paid by tenants and lodged in a separate account with the intention that they be repaid at the end of the lease were held to be subject to a trust in favour of the tenants).

¹⁷⁶ See further Bradgate, *Commercial Law* (3rd ed., 2000) pp.588-591 and pp.593-595.

¹⁷⁷ In *Office of Fair Trading v Lloyds TSB Bank plc and Others* [2004] EWHC 2600 (Comm) Gloster J rather controversially held that s.75 does not apply to cover purchases of goods or services where (i) the contract was made wholly outside of the United Kingdom; and (ii) the contract was governed by a foreign law and (iii) the goods were delivered or the services were supplied outside of the United Kingdom (*ibid.*, para.59). Gloster J chose not to rule on the question of whether s.75 would apply where all three of these requirements were not met. While this decision clearly removes face-to-face overseas purchases from the ambit of s.75, it has less impact on on-line purchases where, typically, the goods or services will be delivered within the United Kingdom. On December 21, 2004, the OFT announced its intention to appeal the ruling. At the time of writing, the matter had not been determined by the Court of Appeal. Bradgate explores two other

protection.¹⁷⁸ Section 42(2) of the Consumer Credit Act 1995 permits a right of action against a card issuer/creditor for a default on the part of the supplier only where the credit has been provided exclusively by the specific creditor to customers of the specific supplier.¹⁷⁹ This protection is therefore highly unlikely to be relevant to most consumers in a distance sales context.

In addition to the legislative schemes outlined above, in practice, credit card issuers offer some protection for pre-payments. As noted above¹⁸⁰, the contract between the card issuer and the supplier will typically include a charge-back provision that will come into effect if the card holder disputes a payment (as for example where a card holder has pre-paid for goods or services that cannot be supplied because of insolvency). The operation of this provision gives the card issuer a secured interest in the supplier's estate and a much greater likelihood of recovery in the event of insolvency. It is the practice of card issuers to pass on this benefit to their card holders. While credit card pre-payments may be protected in this way, consumers who pay with debit or EFTPOS cards or who utilise the developing forms of e-payment are left without the same levels of protection. This is a fact of which many customers will be unaware when they choose their method of payment. There is no logical basis for differential treatment regarding the protections offered depending on the form of payment utilised yet this illogical distinction will remain unless an umbrella provision relating to pre-payment in all forms of distance selling is established. One potential solution would require suppliers to establish a pre-payment protection fund, or to participate in a protection scheme operated by a third party.¹⁸¹ A legal requirement of this kind would impact on national property laws and in particular on the law of distribution on insolvency and hence it is a sensitive topic not addressed by the Directives.¹⁸² However, without some form of broader protection, the Directives cannot be said to have made any meaningful contribution to this important aspect of consumer protection.

relevant possible limits on the application of s.75. These are the suggestion that the section does not apply (i) where the credit card finances only part of the transaction (for example, to pay a deposit) and (ii) where the card is used by someone other than the debtor (with the debtor's permission). Bradgate rejects both of these arguments. In relation to the first argument, there is nothing in the wording of the section to require that the entire purchase be funded by the credit. In relation to the second argument, a third party using the card may be acting as agent for the debtor and therefore the section would apply: *ibid.*, p.594.

¹⁷⁸ See generally Bird, *Consumer Credit Law* (1998) pp.294-300.

¹⁷⁹ Further, the right of action only accrues after the consumer has pursued all other remedies against the supplier and has failed to obtain satisfaction.

¹⁸⁰ See further discussion in text to n.153 above.

¹⁸¹ The 1992 Commission Recommendation which supplements Directive 97/7 promotes the use of codes of practice for the protection of consumers regarding distance contracts and recommends that such codes include arrangements to ensure the reimbursement of payments made by consumers at the time of placing the order. Neither the ICC International Code on Direct Marketing (2001) at <www.iccwbo.org/home/statements_rules/rules/2001/code_of_direct_marketing.asp> nor the Federation of European Direct Marketing (FEDMA) Code on e-Commerce and Interactive Marketing (2000) at <www.fedma.org> prohibit "forward trading", *i.e.* where pre-payments are used to purchase goods to satisfy the order, or require the establishment of a pre-payment protection fund.

¹⁸² See further Cremona, n.28 above at 619.

Concluding Remarks

The introduction of the Distance Selling Directive in 1997 was an important first step in providing consumers with legally binding protections. In the five or so years between the introduction of the Distance Selling Directive and that of the Financial Services Directive, the increased usage of ICT has led to a significant shift in the whole nature of distance selling.¹⁸³ The market addressed by the Financial Services Directive differs from that of the Distance Selling Directive therefore not just in terms of the products covered but also in terms of the environment.

The Financial Services Directive constitutes a step forward for a number of reasons. First, it is undoubtedly a positive development to see the protective framework extended to consumers of financial services. Secondly, the Directive seeks to provide more legal certainty by improving on the drafting of the Distance Selling Directive.¹⁸⁴ Lastly, the Financial Services Directive adopts a more balanced approach to withdrawal rights, permitting a consumer to withdraw from a contract for the provision of services after performance of the service has begun but requiring that the consumer pay for the benefit of any services received. In some respects, these improved aspects of the Financial Services Directive draw attention to some of the inadequacies in the Distance Selling Directive. In the main, the improved aspects of the Financial Services Directive arise from the inevitable bedding-down of the Distance Selling Directive rather than because of any inherent characteristics of the product covered. Insofar as this is the case, the argument in favour of greater harmonisation of the two Directives is difficult to refute. We would suggest that, except where provisions relate to the specific nature of the product¹⁸⁵, the protections afforded and the clarity of the protective framework should be the same.

Further, the extension of the protective framework to financial services contracts makes the ongoing exclusion of certain other contracts appear even less justifiable. Most notable is the partial exemption of contracts for the supply of accommodation, transport, catering or leisure services. This is the very market that has most benefitted from the expansion in ICT-based distance selling. Even accepting the legitimacy of compromise between competing supplier and consumer interests in these areas, there is no logical justification for the exclusion of these services from *all* the major protections afforded by the Directives.¹⁸⁶ Why should the purchaser of a plane ticket not be entitled to basic information before committing to the contract? Or, why should a member of a fitness club not be able to withdraw from a contract? The original financial services exemption and the ongoing partial exemption

¹⁸³ For instance, it is now difficult to imagine that the indicative list of distance communications contained in the Distance Selling Directive did not include the Internet: see n.53 above.

¹⁸⁴ Examples include the inclusion in the text of the Financial Services Directive of the provision dealing with several or successive contracts, and the inclusion of a definition of “durable medium”.

¹⁸⁵ For example, the longer list of information requirements under the Financial Services Directive may be justified on the basis that the product sold is inherently more complex and consumers need more information.

¹⁸⁶ See discussion in text to n.78 above.

for accommodation, transport, catering or leisure services evidence a political rather than a legal rationale. It would seem that some supplier lobby groups were more effective than others in persuading the European legislators of their economic needs. We believe that it is time to reassess all the categories of excluded contracts. This is not to say that there is no room for compromise, however, both the legal and the economic rationale for consumer protection/supplier regulation need to be considered before such compromises are made.

While a harmonised and updated version of the Directives would provide a better basis for consumer protection for distance selling of all products, it would not solve all of the difficulties identified in this article. It is inevitable that some definitional uncertainty will remain. Further, the essential compromise required for a Europe-wide measure means that a dissonance between a directive and the common law position is unfortunately to be expected. Nonetheless, significant advances could be made from a revision of the text of the Distance Selling Directive in light of the Financial Services Directive and the new ICT environment.

The limitations of the Directives' protective framework is perhaps most apparent in regard to security of payment. The minimal Article 8 of the Distance Selling Directive is reproduced without amendment in the Financial Services Directive. Although domestic implementing measures have provided some measure of protection in the event of fraudulent use of payment cards, the absence of any statutory protection for consumers of goods and services under the Irish Regulations 2001 is regrettable. In the context of supplier insolvency, although there are protections available to consumers who use credit cards, there is not a consistent level of protection across all payment mechanisms. Yet, for many consumers, it is a matter of chance whether they use their credit card or another payment method. At a very minimum, it should be required that the discrepancy in protection be expressly brought to consumers' attention so that the decision to choose one method of payment over another is at least an informed one. Ultimately, however, some attempt to integrate payment protection into the Directives is necessary if meaningful consumer protection is to be achieved in this field.

This article has argued that there is room for substantive improvements to be made with regard to the legal framework governing distance sales. To conclude, however, it is necessary to broaden the question beyond the text of the Directives, and their implementing measures, and to ask whether the Directives are actually effective in delivering consumer protection, in practice.

Assessing levels of compliance requires basic empirical data. To date, such data is available only in relation to the Distance Selling Directive. A major study carried out by the European Consumer Centre (ECC) on the operation of cross-border Internet shopping indicated that there were significant levels of non-compliance with the provisions of the Directive.¹⁸⁷ Arising from an "information quality examination" of 262 websites, it was found that in 32% of cases the website gave no information about the right to cancel¹⁸⁸, and

¹⁸⁷ See n.18 above.

¹⁸⁸ *ibid.*, p.23.

13% of websites contained no information whatsoever about the terms and conditions of the contract.¹⁸⁹ Further, as part of a “shopping exercise” whereby a total of 114 cross-border EU orders were made, 34% of the orders were not delivered.¹⁹⁰ Of these, 8% had been paid for in advance.¹⁹¹ Information contained with deliveries was also limited. Only 31% of webtraders included written information regarding after-sales service, warranty, and guarantee conditions and only 36% included information regarding the consumer’s right to return the goods.¹⁹² The survey also indicated that there were significant levels of difficulty in obtaining refunds on goods purchased following the exercise of the statutory right of withdrawal: 31.5% of goods returned where not refunded.¹⁹³ Summarising their findings, the ECC concluded that “[c]ross-border e-commerce in the EU is a good shopping alternative unless something goes wrong, which it frequently does.”¹⁹⁴

These difficulties are reflected in a further ECC study regarding the nature and range of complaints received by consumer centres.¹⁹⁵ This study found that 41% of complaints related to non-delivery of ordered goods.¹⁹⁶ The ECC surveys are limited in coverage: the first survey addressed cross-border internet shopping only while the second survey is inevitably skewed by the fact that it is based on complaints received. Nonetheless, the implications of these studies are clear. Many suppliers are either unaware of the Distance Selling Directive or are ignoring its provisions. It is too soon to assess compliance with the Financial Services Directive. However, compliance levels might be expected to be higher given that financial service providers are more used to outside regulation and that high profile financial institutions will be a relatively easy target for investigation.

The fact that relatively significant numbers of suppliers either do not know or do not appear to care about their obligations in regard to distance selling raises the issue of enforcement under the Directives. Both Directives leave the matter of enforcement to the member states. Complaints relating to the Distance Selling Directive may be dealt with at agency level and enforcement to date has generally been achieved through an agreement on the part of the supplier to correct any deficiencies. It is only if this agreement is not forthcoming that the consumer protection agencies apply to

¹⁸⁹ *ibid.*, p.23.

¹⁹⁰ *ibid.*, p.11.

¹⁹¹ *ibid.*, p.10.

¹⁹² *ibid.*, p.13.

¹⁹³ *ibid.*, p.13.

¹⁹⁴ *ibid.*, p.16.

¹⁹⁵ *The European Online Marketplace: Consumer Complaints* (ECC, 2004) at <www.eccdublin.iereources/publications/index.htm>. The analysis related to complaints received during the first ten months of 2003. A total of 590 complaints were received during this time and most of these complaints related to webtraders located within the EU (82% EU; 6 % non-EU and the remaining 12% were not possible to locate).

¹⁹⁶ Of the remaining complaints 23% related to the quality of the goods received; 11% of complaints related to price with the most common difficulty being that the price ultimately paid (usually by deduction from the customer’s credit card) was higher than the one agreed; 10% related to the contract terms with most difficulties here relating to the exercise of the right to withdraw: *ibid.*, pp.16-17.

the courts¹⁹⁷ for an order for compliance.¹⁹⁸ This approach to enforcement makes it difficult to assess the effectiveness of the enforcement agency. Is it the case that agencies are receiving complete co-operation from suppliers and therefore do not need to utilise more heavy-handed enforcement methods or is it the case that distance selling is not at the top of the consumer protection agenda?

Dealing with complaints is of course only one part of achieving compliance. Making sure that suppliers know the law plays as important a role. In the UK, the Department of Trade and Industry and the Office of Fair Trading provide extensive information both for consumers and suppliers regarding, respectively, their rights and duties under the Distance Selling Directive.¹⁹⁹ However, recent research from the UK suggests that non-compliance results, in part, from the fact that many businesses are unaware of the law.²⁰⁰ In Ireland, the basic information available on the Office of the Director of Consumer Affairs website is much less extensive. This would suggest that an Irish survey might find even greater levels of ignorance of the legal provisions among suppliers.

In the meantime, a recent Eurobarometer poll found that only 16% of EU15 citizens had ever bought anything on the Internet.²⁰¹ Of these, the major concerns about buying on-line related to: security of payment (48%); ability to get a refund (38%); delivery (including delay and non-delivery) (36%); credibility of the information on the Internet (27%) and respect for consumer rights (23%).²⁰² Of the 83% of citizens who had not used the Internet to make a purchase the main reason given related to access – e-commerce was not available to 57% of this group.²⁰³ A further 28% said that they were not interested, while 25% said that they did not trust the medium.²⁰⁴ Those consumers who had not purchased on the Internet and who did not trust the medium gave as their prime reason security of payment (73%). Other significant reasons included credibility of the information (44%); delivery issues (goods being damaged, delayed etc) (37%); ability to get a refund (36%).²⁰⁵ Clearly, the legislative structures currently in place need ongoing

¹⁹⁷ Agency powers in this regard are set out in Reg. 27 of the UK Consumer Protection (Distance Selling) Regulations 2000 and Reg. 13 of the Irish EC (Protection of Consumer in Respect of Contracts made by means of Distance Communication) Regulations 2001.

¹⁹⁸ To the authors' knowledge, the only legal action taken by an enforcement agency to date, in Ireland or the UK, in relation to the Distance Selling Directive concerns the reference from the English High Court to the ECJ under art.234 concerning the meaning of "transport service": see discussion in text to n.79 above.

¹⁹⁹ See <www.dti.gov.uk/> and <www.oft.gov.uk/default.htm>.

²⁰⁰ See <www.oft.gov.uk/News/Press+releases/2004/40-04.htm>.

²⁰¹ European Commission, *European Union Public Opinion on issues relating to business to consumer e-commerce* (2004) p.3 at <www.europa.eu.int/comm/consumers/topics/facts_en.htm>.

²⁰² *ibid.*, pp.5-6.

²⁰³ *ibid.*, pp.9-11.

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*, pp.14-16.

monitoring and revision if they are to contribute to building consumer “e-confidence”.