

Remedies for Breach of EU Law Revisited

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Remedies for the Consumer

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1. Introduction

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market ('Unfair Commercial Practices Directive')

Proposal for a Directive of the European Parliament and of the Council on Consumer Rights of 8 October 2008 Com(2008) 614/3 final ('CRD Proposal')

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees ('Consumer Sales Directive')

2. A Variety of Mechanisms

(a) mechanisms as between the parties to the contract

Council Directive 93/13/EC of 5 April 1993 on unfair terms in consumer contracts ('Unfair Terms in Consumer Contracts Directive'), article 6.

(b) Intervention by public bodies and bodies 'having a legitimate interest under national law in protecting consumers'

Unfair Terms in Consumer Contracts Directive, article 7:

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.
2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

The Unfair Terms in Consumer Contracts Regulations 1994 SI 1994/3159,
The Unfair Terms in Consumer Contracts Regulations 1999 SI 1999/2086

Director General of Fair Trading v First National Bank plc [2001] UKHL 52; [2002] 1 A.C. 481
Office of Fair Trading v Abbey National plc [2009] UKSC 6 ('Bank Charges') Enterprise Act 2002 Part 8
Directive 98/27/EC of May 19 1998 on injunctions for the protection of consumers' interests, repealed and replaced by Directive 2009/22/EC of the Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests.

(c) The role of national courts in protecting consumers: the European Court's case-law from *Océano Grupo Editoriale*.

Océano Grupo Editorial SA v Murciano Quintero Joined Cases C-240/98 to C-244/98 of June 27, 2000 [2000] E.C.R. 1-4941
Mostaza Claro v Centro Móvil Milenium SL Case C-168/05 of October 28, 2006 [2007] 1 C.M.L.R. 22.
Pannon GSM Zrt. v Erzsébet Sustikné Györfi Case C-243/08 of 4 June 2009.
Asturcom Telecomunicaciones SL v Rodriguez Nogueira Case C-40/08 of 6 October 2009.

(d) A role for criminal law

Consumer Protection from Unfair Trading Regulations 2008 SI 2008 No. 1277, regulation 8

- (1) A trader is guilty of an offence if—
- (a) he knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence under regulation 3(3)(a); and
 - (b) the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product under regulation 3(3)(b).

BIS, *A Better Deal for Consumers: Delivering Real Help Now and Change for the Future* (White Paper, July 2009).

3. European consumer remedies against traders and their relationship to national laws

(a) Towards 'full harmonisation'? The example of consumer rights in respect of non-conformity of goods.

The *three-fold* layering of remedial response to breach of the statutory implied terms after implementation of the Consumer Sales Directive in the UK: (i) the classic remedies of rejection and termination and/or damages; (ii) repair or replacement by the seller and (iii) 'rescission' or price reduction.

CRD Proposal, esp. art. 4 and Parts IV (consumer sales) and V (unfair terms).

Article 26

Remedies for lack of conformity

1. As provided for in paragraphs 2 to 5, where the goods do not conform to the contract, the consumer is entitled to:

- (a) have the lack of conformity remedied by repair or replacement,
- (b) have the price reduced,
- (c) have the contract rescinded.

2. The trader shall remedy the lack of conformity by either repair or replacement according to his choice.

3. Where the trader has proved that remedying the lack of conformity by repair or replacement is unlawful, impossible or would cause the trader a disproportionate effort, the consumer may choose to have the price reduced or the contract rescinded. A trader's effort is disproportionate if it imposes costs on him which, in comparison with the price reduction or the rescission of the contract, are excessive, taking into account the value of the goods if there was no lack of conformity and the significance of the lack of conformity.

The consumer may only rescind the contract if the lack of conformity is not minor.

4. The consumer may resort to any remedy available under paragraph 1, where one of the following situations exists:

- (a) the trader has implicitly or explicitly refused to remedy the lack of conformity;
- (b) the trader has failed to remedy the lack of conformity within a reasonable time;
- (c) the trader has tried to remedy the lack of conformity, causing significant inconvenience to the consumer;
- (d) the same defect has reappeared more than once within a short period of time.

5. The significant inconvenience for the consumer and the reasonable time needed for the trader to remedy the lack of conformity shall be assessed taking into account the nature of the goods or the purpose for which the consumer acquired the goods as provided for by Article 24(2)(b).

Article 27

Costs and damages

1. The consumer shall be entitled to have the lack of conformity remedied free of any cost.

2. Without prejudice to the provisions of this Chapter, the consumer may claim damages for any loss not remedied in accordance with Article 26.

Draft Report by Dr. A Schwab on the proposal for a directive of the European Parliament and of the Council on consumer rights Chapters I-III (initial version) (COM(2008)0614 – C7-0349/2008 – 2008/0196(COD)) available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE442.789+02+DOC+PDF+V0//EN&language=EN> (additions to original Commission proposal in italics; strike out retained) that:

Article 4

Targeted full harmonisation

1. *Save as otherwise provided by this Directive*, Member States may not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, ~~including more or less stringent provisions to ensure a different level of~~

~~consumer protection~~. Member States shall forward the text of diverging provisions of national law to the Commission.

Article 4(1b) adds that ‘this Article shall not apply to the provisions of Chapter IV as regards contracts excluded from the scope of Chapter IV [which concerned the buyers rights in the original proposal] under Article 21.’

Viviane Reding, Vice-President of the EU Commission and Justice and Fundamental Rights Commissioner, Speech on 15/03/2010 available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/91&format=HTML&aged=0&language=EN&guiLanguage=en>

Article 4(1b) adds that ‘this Article shall not apply to the provisions of Chapter IV as regards contracts excluded from the scope of Chapter IV [which concerned the buyers rights in the original proposal] under Article 21.’

(b) National law filling remedial gaps left by a Directive?

Unfair Terms in Consumer Contracts Directive 1999 article 6

1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

Cofidis SA v Fredout Case C-473/2000 of November 21, 2002 [2002] E.C.R. 1-10875

Case C-203/99 of 10 May 2001 *Veedfald v Århus Amtskommune* [2001] ECR 1-3569 (in the context of Dir. 1985/374/EEC concerning liability for defective products, art. 9),

Case 412/06 of 10 April 2008 *Hamilton v Volksbank Filder eG* esp. A.G. Maduro’s opinion at [24].