

# The Consumer Rights Directive: key concepts

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CONSUMER LAW : CONSUMER PROTECTION : EUROPEAN UNION

**Summary:** *The implementation of the Consumer Rights Directive 2011<sup>1</sup> ('the Directive') has recently been completed in the United Kingdom, primarily through the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 (SI 2013/3134) ('the Consumer Contracts Regulations'). This article will discuss some of the key concepts contained in the Consumer Rights Directive, an understanding of which will remain relevant in the application of the Consumer Contracts Regulations and other measures implementing the Directive. The Directive's implementation coincides with a major overhaul of consumer law in the UK. The Consumer Rights Bill, which aims to simplify and modernise UK consumer law, is currently passing through Parliament. The Consumer Protection (Amendment) Regulations 2014, which come into force in October 2014, will provide consumers with rights of redress if they fall victim to misleading or aggressive commercial practices.<sup>2</sup>*

## Background and overview

The European Commission submitted its proposal for the Consumer Rights Directive on 8<sup>th</sup> October 2008.<sup>3</sup> The proposal formed part of the Commission's review of the consumer *acquis*, launched in 2004, as part of its Action Plan for European contract law.<sup>4</sup> The aim was to achieve a "true internal market for 'business-to-consumer' trade". The legal basis for the Directive is

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<sup>1</sup> Directive 2011/83/EC

<sup>2</sup> SI 2014/870.

<sup>3</sup> 'Proposal for a Directive of the European Parliament and of the Council on consumer rights of 8 October 2008', COM (2008) 614/4.

<sup>4</sup> 'Communication of the Commission to the European Parliament and the Council: A more coherent European Contract Law; an Action Plan', COM (2003) 68 final.

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Article 114 of the Treaty on the Functioning of the European Union,<sup>5</sup> which may be used by the EU to harmonise national laws in order to facilitate the functioning of the internal market.

The original proposal sought to repeal and replace four consumer protection Directives: the Doorstep Selling Directive,<sup>6</sup> the Distance Selling Directive,<sup>7</sup> the Directive on Consumer Goods and Associated Guarantees<sup>8</sup> and the Unfair Contract Terms Directive.<sup>9</sup> The Consumer Rights Directive repealed only the Directives on Doorstep Selling and Distance Selling. Accordingly, the Directives on Consumer Goods and Associated Guarantees and Unfair Contract Terms remain in force.

The Directive distinguishes between three types of contracts: off-premises contracts, distance contracts and on-premises contracts. Articles 5 and 6 of the Directive set out pre-contractual information requirements for all types of contracts. Off-premises and distance contracts are subject to a number of formal requirements set out in Articles 7 and 8 and detailed rules regarding the consumer's right to withdraw from such contracts are contained in Articles 9 to 16.

The Directive divides contracts into a further four categories: sales contracts, service contracts,<sup>10</sup> contracts for online digital content and contracts for the supply of public utilities. The recently published European Commission Guidance on the Directive is very helpful for understanding the categorisation of contracts under the Directive and the requirements that apply to each category.

### **A shift in focus: compliance costs and maximum harmonisation**

Historically, inequalities in bargaining power between consumers and businesses have been the main focus of EU consumer law; the consumer was in need of protection as the weaker party. An obvious example of this approach is Article 3(1) of the Unfair Contract Terms Directive which states:

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<sup>5</sup> Article 114 TFEU allows the European Union to “adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

<sup>6</sup> Directive 85/577/EEC to protect consumers in respect of contracts negotiated away from business premises.

<sup>7</sup> Directive 97/7/EC on the protection of consumers in respect of distance contracts.

<sup>8</sup> Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

<sup>9</sup> Directive 93/13/EEC on unfair terms in consumer contracts.

<sup>10</sup> These are defined in Articles 2(5) and 2(6), respectively.

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‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.’

In contrast to its predecessors, the Consumer Rights Directive expressly recognises the ‘compliance costs’ incurred by businesses as a result of divergences in legislation in the internal market<sup>11</sup> and seeks to strike “the right balance between a high level of consumer protection and the competitiveness of enterprises”.<sup>12</sup>

This balance has been struck through maximum harmonisation, with Article 4 of the Directive providing that:

‘Member States shall 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, unless otherwise provided for in this Directive.’

Maximum harmonisation, also known as ‘full harmonisation’, prevents Member States from maintaining or adopting more restrictive rules in the area covered by the harmonising measure, in this case the Consumer Rights Directive.<sup>13</sup>

The Directive is another example of the Commission’s policy shift from minimum harmonisation – where an EU measure sets out minimum standards, allowing Member States to maintain or introduce rules that exceed the level of protection offered by the EU measure – to maximum harmonisation.<sup>14</sup>

Some have observed that the maximum harmonisation nature of this Directive will undermine the level of consumer protection in certain Member States. This is particularly so because the minimum harmonisation measures repealed by the Directive – the Directives on Doorstep Selling and Distance Selling – have now become the maximum level of protection, which Member States are not permitted to exceed; the Directive now acts as both a floor and ceiling.

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<sup>11</sup> Recitals 6 and 40.

<sup>12</sup> Recital 4.

<sup>13</sup> For an application of this principle under the Unfair Commercial Practices Directive (Directive 2005/29/EC), please see Joint cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV and Galatea BVBA v Sanoma Magazines Belgium NV* [2010] All ER (EC) 694 and Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH* [2011] All ER (EC) 338.

<sup>14</sup> Other examples of maximum harmonisation measures include the Directive on Distance Marketing of Financial Services (Directive 2002/65/EC), the Consumer Credit Directive (Directive 2008/48/EC) and the Unfair Commercial Practices Directive.

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## Definitions and scope

The scope of the Directive is set out in Article 3; it applies to “any contract concluded between a trader and a consumer”. The relevant definitions are contained in Article 2. ‘Consumer’ is given a relatively narrow definition:

‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.’

‘Trader’, on the other hand, is given a wide definition, which expressly includes both privately and publicly owned natural and legal persons.

As noted above, the Directive is a maximum harmonisation measure. However, as the Directive makes clear in Recital 13:

‘Member States should remain competent, in accordance with Union law, to apply the provisions of this Directive to areas not falling within its scope. Member States may therefore maintain or introduce national legislation corresponding to the provisions of this Directive, or certain of its provisions, in relation to contracts that fall outside the scope of this Directive’.

It goes on to provide a number of examples, which include extending the application of the Directive to persons falling outside the Directive’s definition of ‘consumer’, such as small and medium-sized enterprises.

The Directive excludes certain categories of contracts from its application, including those for financial services, immovable property and passenger transport services (subject to certain exceptions).<sup>15</sup> Further, the Directive shall not affect the general contract law of Member States, insofar as these are not regulated by the Directive.<sup>16</sup> In addition, the Directive provides Member States with an optional cut-off point for the application of the Directive for minor transactions.<sup>17</sup> The UK has made use of this provision, setting the limit at £42 (regs. 7(4) and 27(3) of the Consumer Contracts Regulations).

Importantly, the Directive seeks to define the relationship between its provisions and those of other EU measures that regulate specific sectors. Article 3(2) provides:

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<sup>15</sup> Article 3(3).

<sup>16</sup> Article 3(5).

<sup>17</sup> Article 3(4).

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‘If any provision of this Directive conflicts with a provision of another Union act governing specific sectors, the provision of that other Union act shall prevail and shall apply to those specific sectors.’

This echoes the wording of Article 3(4) of the Unfair Commercial Practices Directive (‘the UCPD’).<sup>18</sup> It has been argued that the application of the UCPD is only ousted where an “irreconcilable conflict” exists between the UCPD and the relevant sectoral measure.<sup>19</sup> A broad view would suggest that where a specific sectoral measure applies, it ousts the application of the UCPD.<sup>20</sup> It remains to be seen what significance the courts attribute to the word ‘conflict’.

### **Implementation in the UK**

As noted above, the bulk of the Directive’s provisions have been implemented by the Consumer Contracts Regulations, which apply to contracts between traders and consumers made on or after 13 June 2014. These Regulations implement the information and cancellation requirements of the Directive (and will be the subject of a forthcoming article in the *Journal of Financial Law*). The provisions of the Directive regarding above-cost surcharges were implemented by the Consumer Protection (Payment Surcharges) Regulations 2012 (SI 2012/3110). The provisions relating to inertia selling are implemented by way of an amendment to the Consumer Protection from Unfair Trading Regulations (new regulation 27(A), inserted by regulation 39 of the Consumer Contracts Regulations).

Enforcement procedures under Part 8 of the Enterprise Act 2002 will be available where there has been a breach of the Consumer Contracts Regulations (see the Enterprise Act 2002 (Part 8 EU Infringements) Order 2013).

Whilst domestic implementing measures will be the main focus of enforcement authorities and businesses operating in the UK, the key concepts of the Directive will remain of relevance. It will be particularly important to remain conscious of the scope of the Directive, as EU law precludes

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<sup>18</sup> Article 3(4) of the UCPD provides: “In the case of conflict between the provisions of this Directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.”

<sup>19</sup> Orlando, ‘The Use of Unfair Contractual Terms as an Unfair Commercial Practice’, *European Review of Contract Law* (2011) 25 at 50–51.

<sup>20</sup> Jonathan Goulding of Gough Square Chambers has successfully argued this point at first instance in *Dorset County Council v Alpine Elements Ltd* (Bournemouth Magistrates’ Court, District Judge House, 17.04.13). Please see <http://goughsq.co.uk/dorset-cc-v-alpine-elements-ltd/> for further details.

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Member States from maintaining or adopting measures that are more restrictive than the provisions of the Directive in areas covered by the Directive. It will also be crucial to consider the extent of its application when other, more specific, EU measures are in place (see Article 3(2)), as the existence of such measures may have the effect of ousting the application of the Directive.