

INTRODUCTION TO EU CONSUMER PROTECTION

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I. Prologue

Is there a need to contemplate EU laws on protection of the consumer for the Armenian authorities and public at large? The answer is certainly in the affirmative if one takes into consideration the provisions contained in article 43 of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other part¹ (the “PCA”):

“(1) The parties recognize that an important condition for strengthening the economic links between the Republic of Armenia and the Community is the approximation of the Republic of Armenia’s existing and future legislation to that of the Community. The Republic of Armenia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

(2) The approximation of laws shall extend to the following areas in particular: ... consumer protection.”

This article clearly indicates that consumer protection is an area that the European Union considers sufficiently important to request the Armenian authorities to upgrade the Armenian legal system so that it reaches a level that is comparable or compatible with the European Union regulations. How can the rationale for this ambitious endeavour be explained, bearing in mind the manifold opportunities that it opens to the Armenian producers and consumers alike?

Firstly, we can take into consideration that the Doha Round of Negotiations relying on the Ministerial Declaration adopted on 14 November 2001 contemplates a number of areas related to consumer protection. They include negotiations about agriculture, the liberalisation of services, including financial services, discussions on labelling, product safety, deceptive practices, and intellectual property issues. Even prior to the Ministerial Declaration, the European Community had tabled at the WTO a proposal for the improvement of market access opportunities in relation to food products². The European Community defines its objectives as follows:

- “to obtain effective protection against usurpation of names in the food and beverages sector;
- to make market access effective, by ensuring that products which have the right to use a certain denomination are not prevented from using such a name on the market. To prevent such a use amounts to a barrier to trade, and deprives such products of access, as their denomination is the basis of consumer recognition and therefore carries economic value;

¹ OJ L239, 09-09-1999, p.3. The PCA was signed on 22-04-1996 and entered into force on 01-07-1999.

² See WTO document G/AG/NG/W/18.

- to ensure consumer protection and fair competition through regulation of labelling. Labelling rules become more and more important as an instrument of product differentiation and consumer choice. They should be addressed with a view to ensuring that they also contribute to protection against usurpation and consumer deception.”

Hence, consumer protection becomes a part of the ongoing multilateral trade negotiations (at least, until July 2006).

Furthermore, all trade facilitation rules in the PCA combined lead to the following conclusion: one of the main critical factors for the success of the PCA resides precisely in the compatibility of certain basic regulations applicable to trade. Among the different means available to achieve this goal, we should emphasize here the establishment of a level playing field for enterprises (i.e. compatible competition laws and regulations) and for consumers (i.e. consumer protection standards) alike. It is indeed unthinkable that products that do not meet EU consumer protection standards are dumped in the Armenian market with the support of the PCA and its trade facilitation rules.

The European Community is also active on different arena developing and improving consumer protection policies beyond its own borders. The Commission participates actively in the Committee on Consumer Policy of the Organisation for Economic Co-operation and Development (OECD) whose main areas of work are:

- building consumer trust in the digital economy;
- assessing and regulating the impact of new technologies and emerging business practices on consumers; and
- examining consumer policy regimes, including the economic underpinning of consumer policy and its interaction with competition policy.

Finally, the Council of Europe’s activities in the field of consumer protection deserve also some consideration here, since all the states participating in the PCA are among their 46 members. The Parliamentary Assembly of the Council of Europe adopted on 17 May 1973 the so-called Consumer Protection Charter³ that has no real binding effect. Without prejudice to this lack of enforceability, the European Economic Community adopted in 1975 a Resolution⁴ delimiting the scope of consumer rights (the right to protection of health and safety, the right to protection of economic interests, the right of redress, the right of information and education, and the right of representation (see below)). The legal basis for this Resolution was article 2 of the Treaty of Rome that included among the tasks of the ECC the promotion throughout the Community of a harmonious development of economic activities, a continuous and balanced expansion and an accelerated raising of the standard of living. The improvement of the quality of life being among the tasks of the ECC, the drafters of the Resolution deemed to be implied in such tasks “protecting the health, safety and interests of the consumer”.

³ The so-called Charter was adopted in form of Recommendation 705(1973). See <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta73/EREC705.htm>.

⁴ Council Resolution of 14 April 1975 on a preliminary programme of the ECC for a consumer protection and information policy (OJ C92, 25-4-1975, p. 1) and the Preliminary Programme of the EEC for a consumer protection and information policy (OJ C92, 25-4-1975, p. 2-16). See [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425(01):EN:HTML) and [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425\(02\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31975Y0425(02):EN:HTML).

Among the other instruments adopted by the Council of Europe in the field of consumer protection we recall here:

- the Convention on the Liability of Hotel-keepers concerning the property of their guests, adopted in Paris on 17 December 1962⁵;
- the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, adopted in Strasbourg on 28 January 1981⁶;
- the European Convention on Transfrontier Television, adopted in Strasbourg on 5 May 1989⁷, as amended;
- etc.

Consumer protection has thus certainly acquired an international dimension⁸. In such circumstances, it is quite relevant to understand the scope and content of consumer protection under EU law.

II. The History of Consumer Protection

Is there something new under the sun when focussing our attention of EU protection of the consumer? The first answer that comes to our mind is: “Not at all”.

We must recognize that consumer protection has been around since the night of times. Let us just mention here a number of examples that we will encounter again, when dealing with the modern provisions in European law:

- Laws laid down by Moses and reported in the Bible prevent the consumption of unclean animals, especially animals that had die from causes other than supervised slaughter.
- The oldest known weights date back to around 8000 B.C. and by 3.000 BC weighing had begun for good.
- Assyrian writing tablets provided descriptions of how to determine correct weights and measures for foodgrains.
- The Egyptians prescribed requirements for labelling of certain foods.
- In Athens, beer and wines were inspected to ensure their purity and soundness.
- The Romans provided a well-organized state controlled food control system to protect consumers from being defrauded. This system virtually disappeared with the demise of the Roman Empire. However, the main legal principle developed in Roman law with respect to consumer protection is referred to “caveat emptor” (see description below); this doctrine heavily influenced trade in the Middle Ages and the Anglo-Saxon common law system.
- In the Middle Ages, individual European countries passed laws concerning the quality and safety of eggs, sausages, cheese, beer, wine and bread; some of these rules are still applicable today. For instance the “Assize of Bread and Ale” of 1266 in England regulated the weight of the Farthing Loaf, and the quantity of a Penny

⁵ See <http://conventions.coe.int/Treaty/en/Treaties/Word/041.doc>.

⁶ See <http://conventions.coe.int/Treaty/en/Treaties/Word/108.doc>

⁷ See <http://conventions.coe.int/Treaty/en/Treaties/Word/132.doc>

⁸ For the European citizen, the Transatlantic Consumer Dialogue (TACD) is another key element of the international dimension that consumer protection has acquired. Noteworthy, the TAC ensures a continued and close dialogue between consumer organizations on the European and American continent and counterweights the influence that the Transatlantic Business Dialogue (TABD) could attain.

of Ale, according to the price of the ingredients. Bakers or Brewers who gave short measure could be fined, put in the pillory or flogged.

- In the Middle Ages, enforcement of weights and measures, and food statutes was in the hand of the Monarch's local agents. As early as 1340 the post of the Clerk of the Market was established in London. The post-holder in each town was responsible for ensuring that all false weights and measures were destroyed.
- In the Middle Ages, many countries regulated that the taking of any compensation whatsoever for any credit was termed usury. In 1545, England fixed a legal maximum interest rate. In other Western European countries, the Catholic Church censured usurer, and when they died, the Church confiscated their land and properties.
- In the colonies, situated far away from the mainland, profiteering and exorbitant profit margins became recurrent infringements of regulations. Furthermore, the creation of monopolies, such as the Rum Corps in Australia, took full advantage of the lack of any sound competition in a given market.
- Hallmarks on silver, gold and platinum must be hallmarked before sold to the public. Hallmarking is as important now as it was 500 years ago, when the first laws regulating this old form of consumer protection was passed by Parliament in Scotland (in 1485).
- In the 1790, the metric system was introduced in France for weighing and measuring. This system, based on natural constants, was adopted by 18 countries in 1875. In 1897 it became legal for trade in Great Britain where it still coexists with the Imperial units. Today, Great Britain along with the United States of America are the only major trading nations not solely using the metric system.

“Caveat emptor” is usually translated into English as “let the buyer beware” This principle of law imposes on a purchaser the risk of defects in title or quality of the thing purchased, unless there is an express or implied warranty, or some fraud or misrepresentation on the part of the seller. It applied to sales agreements concluded for the acquisition of specific goods (as opposed to generic products) on condition that the seller behaved in good faith Sales of generic products – which is more common in trade relations – was subject to the will of the parties uniquely and to their exchange of agreements.

The principle “caveat emptor” was subsequently softened during the Roman Republic with the introduction of the sellers' liability in case of hidden defaults.

This principle was then adopted in Common Law as a result of the judicial reluctance to intervene in contractual disputes: in particular, Courts were unwilling to imply terms into contracts where there were no express terms.

In any case, the effect of caveat emptor was that buyers were naturally disadvantaged by a lack of knowledge or expertise about what he was buying.

The second answer to the initial question should be that all examples given above serve only the purpose of underlining the evolution observed in the protection of consumers in History. The more openly trade was operated the more protection was granted to the consumers. It is only understandable that consumer protection in Roman markets disappeared after the demise of the Roman Empire.

III. Consumer protection nowadays in the European Union

The reverse process can be ascertained within the European Union: the creation of the Single Market and the European Union's commitment to multilateral trade supports the need for an increased protection of the consumer.

We have seen above that the first instruments dealing with consumer protection within the European Union (at that time, still the European Economic Community) relied on the interpretation of general rules rather than on a clear mandate granted in the Treaty of Rome, i.e. the international agreement establishing the European Economic Community. Not surprisingly, the Single Market required amendments and a clear mandate to orchestrate from Brussels the new consumer protection policy in a uniform manner for all Member States.

Thus, the Consolidated Version of the Treaty establishing the European Community, after the amendments introduced by the Treaty of Maastricht of 7 February 1992⁹ regulates now unambiguously the scope of EU consumer protection in the following terms:

“Article 153 (ex-article 129 A)

1. The Community shall contribute to the attainment of a high level of consumer protection through:

(a) measures adopted ... in the context of the completion of the internal market;

(b) specific action which supports and supplements the policy pursued by the Member States to protect the health, safety and economic interests of consumers and to provide adequate information to consumers.

2. The Council ... shall adopt the specific action referred to in paragraph 1(b).

3. Action adopted pursuant to paragraph 2 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.”

To this rule, we could still append article 38 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000¹⁰, which reads as follows:

“Union policies shall ensure a high level of consumer protection.”

Many Action Plans have been adopted and implemented by the European Commission on the basis of these rules.

For the sake of the present booklet, we will now present briefly some Directives and some of their implementing EU Regulations¹¹ that are in force within the European Union in different fields of consumer protection. In view of the scope of the subject matter we will limit ourselves to presenting mainly Directives in the next pages. This selection of legal instruments only serves the purpose of giving a general overview to the Armenian reader in

⁹ See OJ C325, 24-12-2002 or http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf.

¹⁰ See http://europarl.europa.eu/charter/default_en.htm.

¹¹ A copy of all these legal instruments is available over the Internet under <http://eur-lex.europa.eu/en/repert/1520.htm>

view of providing some guidelines for adopting and implementing a national policy in this field. There are plenty of technical rules and many more areas that we could not mention in this brochure. For this reason, we can only refer the reader to specialists, in case further details are needed.

The importance of a comprehensive knowledge and thorough understanding of these rules cannot be sufficiently emphasized. For the producer or importer, the marketability of his products may be at stake. On the other hand, the consumer may enjoy rights that were unknown to him. In any case, the specialisation resulting from the explosion in consumer protection regulations cannot be denied any more.

A. Horizontal or general measures of consumer protection

Commission Recommendation of 30 March 1989 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes; Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes

Mediation and arbitration, or ombudsman systems are, if not the preferred means to settle disputes in the field of consumer protection, at least a frequently used alternative to the classic judicial procedures. The European Commission began examining this particular area in its Green Paper on the access of consumers to justice and the settlement of consumer disputes in the Single Market. The results obtained confirmed the urgent need for Community action with a view to improving the situation as it was in 1993.

The European Commission recommends that all existing bodies and bodies to be created with responsibility for the out-of-court settlement of consumer disputes respect the following principles:

- (a) principle of independence: it must be ensured to guarantee the impartiality of its actions. In practice this principle is applied at the time of appointing the members of the Body;
- (b) principle of transparency: this principle requires the provision of precise information to the consumer on a wide range of issues and the publication of annual reports;
- (c) adversarial principle: the procedure to be followed allows all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts' statements;
- (d) principle of effectiveness: no lawyers are required and the procedure entails only moderate costs. The duration of the procedure must be short;
- (e) principle of legality: the decision taken may not result in the consumer being deprived of the protection afforded by the mandatory provisions of the law of the Member State in whose territory the Body is established. All decisions are communicated to the parties concerned, in writing or any other suitable form, stating the grounds on which they are based;
- (f) principle of liberty: the decision taken by the Body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted this. The consumer's recourse to the out-of-court procedure may not be the result of a commitment prior to the materialisation of the dispute, where such commitment has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute;
- (g) principle of representation: the procedure does not deprive the parties of the right to be represented or assisted by a third party at all stages of the procedure.

Member States are in any case encouraged to create such Bodies. A intra-EU network of such Bodies has also been fostered.

Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)

The liberalisation of the telecommunications sector and increasing competition and choice for communications services go hand in hand with parallel action to create a harmonised regulatory framework which secures the delivery of universal service. The concept of universal service evolves in such a way that it reflects advances in technology, market developments and changes in user demand. The regulatory framework established for the full liberalisation of the telecommunications market defined the minimum scope of universal service obligations and established rules for its costing and financing.

The aim of the Directive is to ensure the availability throughout the European Community of good quality publicly available services through effective competition and choice and to deal with circumstances in which the needs of end-users are not satisfactorily met by the market. The Directive establishes the rights of the end-users and the corresponding obligations on undertakings providing publicly available electronic communication networks and services. The Directive also defines the minimum set of services of specified quality to which all end-user have access, at an affordable price in the light of specific national conditions, without distorting competition. The Directive also sets out obligations with regard to the provision of certain mandatory services such as the retail provision of leased lines.

B. Consumer information, education and representation

The different legal instruments of this category often include very detailed technical specifications. We have therefore chosen to limit our presentation to more general legal instruments adopted by the institutions of the European Union.

Geographical indications and designations of origin. Commission Regulation (EC) 1107/96 of 12 June 1996 on the registration of geographical indications and designations of origin under the procedure laid down in article 17 of Council Regulation 2081/92

The provisions of Council Regulation 2081/92 and 2082/92 (described in the next title) complement each other, while regulating different means to pinpoint qualities in a way that the consumer's choice is facilitated. In practice, designations of origin, geographical indications and symbol serve consumers to understand what they are purchasing in a Single Market, where products of the region are offered together with products produced far away from the place where they are sold.

Before the adoption of the EU system most Member States protected names or recognized names established by usage; the EU institutions simply registered at the European level those geographical indications and designations of origin that were sufficiently known in the Member States. In order to give an example of the long list of such names, we will mention here only:

- Orkney lamb;
- Scottish lamb;

- Camembert de Normandie;
- Roquefort;
- Gorgonzola;
- etc.

The objective is to facilitate the identification of the true identity of many products produced in the Member States, and this to the benefit of the consumer.

The European institutions have merely created a procedure for the registration of such products. In the end, the registration of a product in the register provides the consumer with the security of the quality he purchases with the product. The standards defining the products are thus not adopted by a “Brussels technocrat” but by the producers organized in associations or similar.

Commission Regulation (EEC) 1848/93 of 9 July 1993, laying down detailed rules for the application of Council Regulation (EEC) 2082/92 on certificates of specific character for agricultural products and foodstuffs

These rules constitute a Community system created in response to requests from consumers for information about specific traditional products. The European Commission was thus confronted in the early 1990’s with the need to explain the meaning of the Community symbol and the indication to the public, without thereby removing the need for producers and/or processors to promote their respective products. The necessary steps to inform the public of the meaning of the indication and of the Community symbol are undertaken by the European Commission. Such steps do not take the form of aid to producers and/or processors.

The creation of a system to upgrade products of a specific character allows producers of agricultural products and foodstuffs to raise the profile of their products in the eyes of the consumers throughout the whole of the European Union by registering the name in a Community register. The presence of the symbol (or logo) is deemed to provide real assurance to the consumer.

The European Union institutions decided to let national and Community symbols coexist peacefully. The result is that many products offer now a list of symbols that are not always easy to understand for the consumer, notably when abroad.

In order to be eligible for registration, a product must be specific within the meaning of the Regulation. This means that it must be clearly distinct from other products in the same category, and must exhibit a traditional character by way of traditional raw materials, a traditional composition, or a traditional method of production and/or processing.

The Regulation sets precise deadlines for the registration of agricultural products and foodstuffs that deserve certificates of specific character. The Regulation also sets out the gathering of information that is required for an evaluation and the granting of the symbol to a specific product.

The certification of specific character for agricultural products and foodstuffs was put into practice providing for a time period for lodging objections.

National inspection bodies are organized and regulated in the EU legal provisions. These national inspections ensure consumer protection with a view to monitoring the observance and constancy of the specific characteristics attested.

At the end of the day, the adoption of these rules has allowed producers and/or processors to attach to their products specific symbols indicating (in the national language of the place where the products are sold) “TRADITIONAL SPECIALTY GUARANTEED”. The symbol being identical in the different languages, the consumer may easily identify traditional products and distinguish them from industrial products.

Interestingly, the European Commission has also issued a graphic manual that serves as a guide to printing the symbols.

Council Directive 89/398/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to foodstuffs intended for particular nutritional uses; Council Directive 90/496/EEC of 24 September on nutrition labelling for foodstuffs; Commission Directive 94/54/EC of 18 November 1994 concerning the compulsory indication on the labelling of certain foodstuffs of particulars other than those provided for in Council Directive 79/112/EEC; Commission Directive 2004/77/EC of 29 April 2004 amending Directive 94/54/EC as regards the labelling of certain foods containing glycyrrhizinic acid and its ammonium salt; Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of laws of the Member States relating to the labelling, presentation and advertising of foodstuffs; Commission Directive 2002/67/EC of 18 July 2002 on the labelling of foodstuffs containing quinine, and of foodstuffs containing caffeine

The list of Directives on consumer protection in foodstuffs is not complete. Among the most important area of consumer protection, the European Union institutions regulate foodstuffs from two major perspectives: additives which are accepted and information to be provided to the consumer.

It deserves little effort to justify the need for labelling on all foodstuffs products that the foodstuff contains. The provisions in European law go into the detail of describing the exact definition of each of the technical terms used in the industry. Just to give some examples of the complexity of such definitions we mention here some of the definitions contained in Directives:

- ‘sugars’ means all monosaccharides and disaccharides present in food, but excludes polyols;
- ‘fat’ means total lipids, and includes phospholipids;
- ‘protein’ means the protein content calculated using the formula: protein = Kjeldahl nitrogen x 6,25;
- etc.

European consumers are thus assured that the standard of quality of a given foodstuff will be uniform throughout the territory of the Member States of the European Union.

It is worth recalling here that the first legal instrument of the European Communities in the field of labelling foodstuffs is the Council Directive 79/112/EEC of 18 December 1978. It is thus since almost 30 years that the institutions of the European Union deal with this technically complex issue.

The basic principle for the adoption of that Directive and all subsequent ones, is that detailed labelling, in particular giving the exact nature and characteristics of the product which enables the consumer to make his choice in full knowledge of the facts, is the most appropriate solution. This solution also creates the fewest obstacles to free trade. Anyhow, differences between legal provisions applied in Member States on the labelling of foodstuffs could lead to unequal conditions of competition.

It is thus required that the labelling and the methods used do not:

- (a) be such as could mislead the purchaser to a material degree, particularly:
 - (i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production;
 - (ii) by attributing to the foodstuff effects of properties which it does not possess;
 - (iii) by suggesting that the foodstuff possesses special characteristics when in fact all similar foodstuffs possess such characteristics;
- (b) attribute to any foodstuff the property of preventing, treating or curing a human disease (except for mineral waters).

It is compulsory to disclose in the labels of foodstuffs:

- (a) the name under which the pre-packed foodstuff is sold;
- (b) the list of ingredients;
- (c) the quantity of certain ingredients;
- (d) the net quantity;
- (e) the date of minimum durability or, in the case of foodstuffs which, from the microbiological point of view, are highly perishable, the 'use by' date;
- (f) any special storage conditions or conditions of use;
- (g) the name or business name and address of the manufacturer or packager, or of a seller established in the European Community; special provisions apply to butter;
- (h) particulars of the place of origin or provenance where failure to give such particulars might mislead the consumer to a material degree as to the true origin or provenance of the foodstuff;
- (i) instructions for use when it would be impossible to make appropriate use of the foodstuff in the absence of such instructions;
- (j) with respect to beverages containing more than 1,2% by volume of alcohol, the actual alcoholic strength by volume.

There are plenty of detailed provisions for each of the points indicated above; many ingredients of foodstuff are regulated in specific Directives. Consumer protection meets on occasion technical standards required by the legislator. Therefore, consumer protection has acquired a particular dimension that transcends the original idea of protecting the interests of the consumer. This topic materializes in particular when dealing with genetically modified organisms for instance. Of course, genetically modified organisms have been the object of regulations with respect to their placing on the market, to the assignment of unique identifiers and to the transboundary movements of such organisms in line with the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (the latter being usually characterized as a measure for the protection of health and safety, see new chapter). We would also mention that a set of consumer protection rules have been adopted by the European Union legislators on spirit drinks, pre-packaged drinks and others.

C. Protection of health and safety

We could also include under this heading many legal instruments approved by the institutions of the European Union, but, due to the constraints of the present booklet, we had to pick and choose a limited number of samples. The revised eco-label award scheme is one of the measures that are frequently included under this heading. This is also the case for explosives for civil uses, food supplements and contaminants in foodstuffs, or dangerous substances and preparations. In order to provide the reader with a meaningful overview of consumer protection regulations of the European Union, we will again limit ourselves to those measures that are more general in scope than the very specialized subjects covered by different legal instruments.

Council Directive 88/378/EEC of 3 May 1988 on the approximation of laws of the Member States concerning the safety of toys

The Directive takes into consideration the technical standards set by the European Committee for Standardization (CEN) and the European Committee for Electrotechnical Standardization (CENELEC).

The objective of the Directive does not raise major questions. ‘Toys’ are defined as any product or material designed or clearly intended for use in play by children of less than 14 years of age.

According to the Directive, toys may only be placed on the market if they do not jeopardize the safety and/or health of users or third parties when they are used as intended or in a foreseeable way, bearing in mind the normal behaviour of children.

The Directive also creates the “EC mark” denoting conformity with the relevant harmonized technical standards and which is compulsory for the marketing of toys in the European Union. A Standing Committee is also created (more precisely, the formal creation of the Standing Committee is the object of Directive 83/189/EEC, while the Directive under consideration specifies its authority in the field of safety of toys).

Risks directly addressed in the Directive are those:

- (a) which are connected with the design, construction or composition of the toy;
- (b) which are inherent in the use of the toy and cannot be completely eliminated by modifying the toy’s construction and composition without altering its function or depriving it of its essential properties.

The degree of risk present in a toy must be commensurate with the ability of the users, and where appropriate their supervisors, to cope with it. This applies in particular to toys which, by virtue of their functions, dimensions and characteristics, are intended for use by children of under 36 months. To observe this principle, a minimum age of users of toys and/or the need to ensure that they are used only under adult supervision must be specified where appropriate.

Labels on toys and/or their packaging and the instructions for use which accompany them must draw the attention of user or their supervisors fully and effectively to the risks involved in using them and to the ways of avoiding these risks.

The Directive also regulates how to cope with particular risks (physical and mechanical properties of toys, flammability, electrical properties, hygiene, radioactivity, etc.).

The real-life experience that can be reported here is that frequently newspapers publish that a given toy has been withdrawn from the markets because it was determined that it did not meet the EU technical standards. Protecting the youngest in society is certainly a goal that the European Union is pursuing effectively since decades.

Council Regulation (EURATOM) 3954/87 of 22 December 1987 laying down maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs following a nuclear accident or any other case of radiological emergency

The accident at the Chernobyl nuclear power-station on 26 April 1986 became a catalyst for a number of regulations and directives adopted by the institutions of the European Union to protect the consumers.

At first, the European Community adopted measures to ensure that certain agricultural products were only introduced into the Community according to the common arrangements which safeguard the health of the population while maintaining the unified nature of the Single Market and avoiding deflection of trade. Similar measures include, but are not limited to the Council Decision of 14 December 1987 on Community arrangements for the early exchange of information in the event of radiological emergency and, at the international level, the Convention on Early Notification of a Nuclear Accident of 26 September 1986.

The EURATOM Regulation lays down the procedure for determining the maximum permitted levels of radioactive contamination of foodstuffs and of feedingstuffs which are placed on the market following a nuclear accident or any other case of radiological emergency which is likely to lead or has led to significant radioactive contamination of foodstuffs and feedingstuffs.

‘Foodstuffs’ is defined as products which are intended for human consumption either immediately or after processing; ‘feedingstuffs’ means products which are intended for animal nutrition.

The EURATOM Regulation outlines the procedures for the European Commission to propose to the Council a Regulation on the maximum levels of contamination in the event of a nuclear accident.

Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety

The first Directive on general product safety was adopted by the Council in 1992; less than 10 years later an upgraded version had to be approved.

The purpose of the Directive is to ensure that products placed on the market are safe. ‘Product’ means, for the purpose of the Directive, any product – including in the context of providing a service – which is intended for consumers or likely, under reasonably foreseeable conditions, to be used by consumers even if not intended for them, and is supplied or made available, whether for consideration or not, in the course of a commercial activity, and whether new, used or reconditioned. This definition does not apply to second-

hand products supplied as antiques or as products to be repaired or reconditioned prior to being used, provided that the supplier clearly informs the person to whom he supplies the product to that effect.

Consequently, 'safe product' is defined as any product which, under normal or reasonably foreseeable conditions of use including duration and, where applicable, putting into service, installation and maintenance requirements, does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons, taking into account the following points in particular:

- (a) the characteristics of the product, including its composition, packaging, instructions for assembly and, where applicable, for installation and maintenance;
- (b) the effect on other products, where it is reasonably foreseeable that it will be used with other products;
- (c) the presentation of the product, the labelling, any warnings and instructions for its use and disposal and any other indication or information regarding the product;
- (d) the categories of consumers at risk when using the product, in particular children and the elderly.

The feasibility of obtaining higher levels of safety or the availability of other products presenting a lesser degree of risk does not constitute ground for considering a product to be 'dangerous'.

A product is also deemed safe when, in the absence of specific provisions of the European Community governing the safety of the product in question, it conforms to the specific rules of national law of the Member State in whose territory the product is marketed, such rules being drawn up in conformity with the Treaty. A product is also presumed safe as far as the risks and risk categories by relevant national standards are concerned when it conforms to voluntary national standards transposing European standards, the references of which have been published in the Official Journal. The conformity of a given product to the general safety requirement may also be assessed on a case by case basis taking into consideration the parameters determined in the Directive.

'Dangerous product' means any product that does not meet the definition of 'safe product'.

The main rule in the Directive is that producers are obliged to place only safe products on the market. European standards take here centre stage.

Other obligations of producers include the following:

- (a) producer are required to provide consumers with the relevant information to enable them to assess the risks inherent in a product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings, and to take precautions against those risks. The presence of warnings does not exempt any person from compliance with the other requirements laid down in the Directive; and
- (b) producers must also adopt measures commensurate with the characteristics of the products which they supply, enabling consumers to be informed of risks which the products might pose.

Distributors are required to act with due care to help to ensure compliance with the applicable safety requirements. They participate in monitoring the safety of products placed on the market, especially by passing on information on product risks, keeping and providing the documentation necessary for tracing the origin of products, and cooperating in the action taken by producers and competent authorities to prevent risks.

Member States may ensure the implementation of the Directive. They are also in charge of market surveillance, aimed at guaranteeing a high level of consumer health and safety protection, which entails cooperation between their competent authorities. In any case, Member States may adopt measures or actions to prevent, restrict or impose specific conditions on the possible marketing or use, within their respective territory, of products by reason of a serious risk. In such case, they are required to inform the other Member States within a procedure defined in the Directive.

D. Protection of economic interests

This chapter includes mostly legal instruments of a horizontal character, in the sense that they are applied to a large number of situations. For this reason, the description of these legal instruments is more detailed than the description in the two previous headings.

Council Directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising

This Directive has common elements with Directive 2005/29/EC, discussed below. We have used here the consolidated version of the relevant provisions in both Directives.

Basically, the Directive relies on the existence of widely differing laws on advertising in the different Member States and on the risk that misleading advertising can lead to the distortion of competition within the Common Market.

‘Misleading advertising’ is defined as any advertising which in any way, including its presentation, deceives or is likely to deceive the person to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons injures or is likely to injure a competitor.

‘Comparative advertising’ is defined as any advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor.

The application of these terms is subject to criteria that are defined in the Directive.

Hence, in determining whether advertising is misleading, account must be taken of all its features, and in particular of any information it contains concerning:

- (a) the characteristics of goods and services, such as their availability, nature, execution, composition, method and date of manufacture or provision, fitness for purpose, uses, quantity, specification, geographical or commercial origin or the results to be expected from their use, or the results and material features of tests or checks carried out on the goods or services;
- (b) the price or the manner in which the price is calculated, and the conditions on which the goods are supplied or the services provided; or

(c) the nature, attributes and rights of the advertiser, such as his identity and assets, his qualifications and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

Comparative advertising is now permitted, as far as the comparison is concerned, if the following conditions are met:

- (a) it is not misleading within the meaning of EU rules;
- (b) it compares goods or services meeting the same needs or intended for the same purpose;
- (c) it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;
- (d) it does not discredit or denigrate the trade marks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;
- (e) for products with designation of origin, it relates in each case to products with the same designation;
- (f) it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;
- (g) it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;
- (h) it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trade marks, trade names, other distinguishing marks, goods or services and those of a competitor.

Member States must ensure that adequate and effective means exist to combat misleading advertising in order to enforce compliance with the provisions on comparative advertising in the interest of traders and competitors. To this effect, persons and organizations must be entitled to take legal action against misleading advertising, or bring such advertising before an administrative authority competent either to decide on complaint or to initiate appropriate legal proceedings. Member States have the authority to decide whether the Courts or administrative bodies are entrusted with the implementation of these rules. These national bodies have the powers to eliminate the continuing effects of misleading advertising or unpermitted comparative advertising until the cessation is ordered by a final decision, if appropriate. Furthermore, these national bodies may require the publication of a corrective statement.

Interestingly, the Directive requires that the impartial and efficient national bodies normally give reasons for their decisions.

Advertisers may be requested to furnish evidence as to the accuracy of factual claims contained in their advertisements.

Member States are allowed to maintain or introduce more stringent provisions in their national laws, except for comparative advertising, as far as the comparison is concerned.

Council Directive 85/374/EEC of 25 July 1985, and Council Directive 92/59/EEC of 29 June 1992 on general product safety; Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999 amending Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability of defective products

These Directives tackle issues related to the modernisation of the principle of caveat emptor. The notion of liability without fault on the part of the producer becomes the main legal instrument in case of defective products.

This said, the Directive does not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by Member States. It does not affect any rights which an injured person may have according to the rules of law of contractual and non-contractual liability or a special liability system existing at the time when the Directive is notified.

Hence, the term 'defective product' needs a clear legal definition. Firstly, the term 'product' is delimited as follows: it includes all movables, with the exception of primary agricultural products and game even though incorporated into another movable or into an immovable. It includes electricity. 'Primary agricultural product' refers to products of the soil, of stock-farming and of fisheries, excluding the products that have undergone initial processing.

Secondly, a product is defective when it does not provide the safety which a person is entitled to expect, taking into account all circumstances, including:

- (a) the presentation of the product;
- (b) the use to which it could reasonably be expected that the product would be put;
- (c) the time when the product was put into circulation.

Notwithstanding this, a product is not considered as defective for the sole reason that a better product is subsequently put into circulation.

The producer is liable for damage caused by a defect in his product. Furthermore, the liability of the producer is not reduced when the damage is caused both by a defect in product and by an act or omission of a third party, save where the provisions of national law determine otherwise with respect to the right of contribution or recourse. However, the liability of the producer may be reduced or even disallowed when having regard to all the circumstances, the damage is caused both by a defect in the product and by the fault of the injured person or any person to whom the injured person is responsible.

The liability of the producer may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability.

The term 'producer' incorporates in fact two clearly distinguishable categories:

- (a) the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer; and
- (b) any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business.

Where the producer of the product cannot be identified, each supplier of the product is treated as its producer, unless he informs the injured person, within a reasonable time, of the identity of the producer, or of the person who supplied him with the product. The same rule applies in the case of an imported product.

If two or more persons are liable for the same damage, they are considered jointly and severally liable, without prejudice to national laws concerning the rights of contribution or recourse.

The injured person is only required to prove the damage, the defect and the causal relationship between defect and damage.

'Damage' is defined in the Directive as:

- (a) damage caused by death or by personal injuries;
- (b) damage to, or destruction of, any item of property other than the defective product itself, with a lower threshold of EUR 500, provided that the item of property:
 - (i) is of a type ordinarily intended for private use or consumption; and
 - (ii) was used by the injured person mainly for his own private use or consumption.

Without prejudice to this definition of the term damage, the Directive recognizes that national provisions relating to non-material damage may override the described provisions.

The producer is not liable for the product if he proves:

- (a) that he did not put the product into circulation;
- (b) that, having regard to the circumstances, it is probable that the defect that caused the damage did not exist at the time the product was put into circulation by him or that this defect came into being afterwards;
- (c) that the product was neither manufactured by him for sale or any form of distribution for economic purpose, nor manufactured and distributed by him in the course of his business;
- (d) that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;
- (e) that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered; or
- (f) in the case of the manufacturer of a component, that the defect is attributable to the design of the product in which the component has been fitted or to the instructions given by the manufacturer of the product.

Member States may provide that a producer's total liability for damage resulting from death or personal injury and caused by identical items with the same defect are limited to a certain amount. This amount may however not be less than EUR 70.000.000.

In this particular case, a limitation period of three years applies to proceedings for the recovery of damages provided for in this Directive. The limitation period begins to run from the day on which the plaintiff becomes aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. National laws and regulations in the field of suspension or interruption of the limitation period prevail over the provisions of the Directive.

Rights conferred upon the injured person are extinguished upon the expiry of a 10 years period from the date on which the producer put into circulation the actual product that caused the damage, unless the injured person instituted proceedings against the producer in the meantime.

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises

The main object of this Directive is to regulate doorstep selling. The provisions coincide to a great extent with those of Directive 97/7/EC on distance selling that is described below. We should however indicate here that the provisions of the Directive on distance selling are more detailed than those of the present Directive.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts

Back in 1993 this Directive was praised as a breakthrough for the protection of consumers' interests within the European Union. At present, this Directive is perfectly integrated in the national legal systems of Member States.

What do we understand under the concept 'unfair terms'? A contractual term which has not been individually negotiated is regarded as unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Then, a term is always regarded as 'not individually negotiated' where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of pre-formulated standard contracts. The fact that certain aspects of a term or one specific term have been individually negotiated does not exclude the application of the Directive to the rest of the contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

In practice, such pre-formulated contracts exist in huge quantities.

It is most relevant that where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect is incumbent on him. This rule makes it very difficult for a seller or supplier to get rid of the legal presumption described.

The unfairness of a contractual term is assessed taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all circumstances attending the contract and to all other terms of the contract. Contractual provisions on which the basic contract is dependent come also into play here.

Prices are never to be considered as unfair, or part of an unfair term in a contract. Parties are free to determine prices.

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must also be drafted in plain, intelligible language. Where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer must prevail.

Member States must legislate in the sense that unfair terms used in a contract concluded with a consumer by a seller or supplier are not binding on the consumer; such a contract may only remain binding on the parties if the contract is capable of continuing in existence without the unfair terms.

Member States must also ensure that consumers do not lose the protection given by the Directive by virtue of a choice of law clause determining that the laws of a non-Member State are applicable to the contract in question, if the latter has a close connection with the territory of the European Union.

The requirement to establish adequate and effective means to prevent the continued use of unfair terms in consumer contracts includes provisions whereby persons and organizations (i.e. consumer protection organizations) may take action under national laws before the courts of administrative authorities with a view to determining that certain contractual terms are unfair – and prohibiting their use.

The Directive also contains a list of clauses that may be regarded as unfair. We have chosen the following examples:

- making an agreement binding on the buyer whereas the provision of services by the seller is subject to a condition whose realization depends on his own will alone;
- requiring any consumer who fails to fulfil his obligations to pay a disproportionately high sum in compensation;
- authorizing the seller to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller to retain the sums paid for services not yet supplied by him where it is the seller himself who dissolves the contract;
- enabling the seller to terminate a contract of indeterminate duration without reasonable notice, unless there are serious grounds for doing so;
- irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
- etc.

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1977 on the protection of consumers in respect of distance contracts

‘Distance contracts’ means any contract concerning goods or services concluded between a supplier and a consumer under an organized distance sales or service-provision scheme run by the supplier, who, for the purpose of the contract makes exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded.

The Directive requires that the consumer receives in good time prior to the conclusion of the contract the following information:

- (a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address;
- (b) the main characteristics of the goods or services;
- (c) the price of the goods or services, including all taxes;
- (d) delivery costs, where appropriate;
- (e) the arrangements for payment, delivery or performance;
- (f) the existence of a right of withdrawal;
- (g) the cost of using the means of distance communication, where it is calculated other than at the basic rate;
- (h) the period for which the offer or the price remains valid; and

(i) where appropriate, the minimum duration of the contract in the case of contracts for the supply of products or services to be performed permanently or recurrently.

Unsurprisingly, this information should be provided in a clear and comprehensible manner in a 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.

In the case of telephone communications, the identity of the supplier and the commercial purpose of the call must be made explicitly clear at the beginning of any conversation with the consumer.

The consumer may not waive the rights conferred on him by the transposition of this Directive into national law.

The consumer must receive written confirmation of the information referred to above in good time during the performance of the contract. In any case, the following must be provided:

- (a) written information on the conditions and procedures for exercising the right of withdrawal;
- (b) the geographical address of the place of business of the supplier to which the consumer may address any complaints;
- (c) information on after-sales services and guarantees which exist; and
- (d) the conditions for cancelling the contract where it is of unspecified duration or a duration exceeding one year.

This rule does not apply to services which are performed through the use of a means of distance communication, where they are supplied on only one occasion and are invoiced by the operator of the means of distance communication. Nevertheless, the consumer must in all cases be able to obtain the geographical address of the place of business of the supplier to which he may address complaints.

For any distance contract the consumer must have a period of at least seven working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. This seven working day period begins to run as from receipt of the written confirmation of information described above.

This period of seven days begins in the case of goods, from the day of receipt of the written confirmation of information described above. In the case of services, from the day of conclusion of the contract or from the date of receipt of the written confirmation of information described above if this obligation is fulfilled after conclusion of the contract, provided that this period does not exceed a three-month period.

If the supplier fails to submit written confirmation of information, the period is three months from the day of receipt of the goods by the consumer, or, from the date of the conclusion of the contract for the delivery of services.

The consumer may not exercise his right of withdrawal in respect of contracts:

- (a) for the provision of services, if performance has begun with the consumer's agreement, before the end of the seven working day period;
- (b) for the supply of goods and services the price of which is dependent on the fluctuations of the financial market which cannot be controlled by the supplier;
- (c) for the supply of goods made to the consumer's specifications or clearly personalized or which, by reason of their nature, cannot be returned or are liable to deteriorate or expire rapidly;
- (d) for the supply of audio or video recordings or computer software which were unsealed by the consumer;
- (e) for the supply of newspapers, periodicals and magazines;
- (f) for gaming and lottery services.

Unless the parties have agreed otherwise, the supplier must execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order to the supplier. Where the supplier fails to perform his side of the contract on the grounds that the goods or services are unavailable, the consumer must be informed of this situation and must be able to obtain a refund of any sums he has paid as soon as possible and in case within 30 days. Member States may soften this rule and allow suppliers to provide the consumer with goods or services of equivalent quality and price.

Member States must adopt adequate rules to allow consumers to request cancellation of a payment where fraudulent use has been made of his card in connection with distance contracts covered by the Directive. Obviously, in the event of fraudulent use all unduly charged amounts must be re-credited to the consumer.

Use by a supplier of the following means requires the prior consent of the consumer:

- (a) automated calling system without human intervention (i.e. automatic calling machines); and
- (b) facsimile machines.

Regrettably the European Union did not include in this list e-mails – and spam!

Member States must ensure that adequate and effective means exist to ensure compliance with the Directive in the interests of consumers. This includes provisions whereby one or more bodies may take action under national law to ensure that the national provisions for the implementation of the Directive are applied. Such bodies include:

- (a) public bodies or their representatives;
- (b) consumer organizations having a legitimate interest in acting.

Member States may institute or maintain more stringent provisions than those of the Directive.

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers

Not so long ago expensive jewellers exposed in their windows beautiful jewels without disclosing the price for each piece of art. In expensive restaurants, menus did not always indicate the price of each meal offered to the consumer.

While the application of the Directive that we will discuss in this chapter may be hampered by shopkeepers in some particular fancy places, the general rules are certainly applied scrupulously in most shops within Member States. Nevertheless, the rules described here are minimum standards, as Member States may adopt and maintain provisions which are more favourable as regards consumer information and comparison of prices, without prejudice to their obligations under the Treaty.

The purpose of the Directive is to stipulate indication of selling price and the price per unit of measurement of products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices.

‘Selling price’ means the final price for a unit of the product, or a given quantity of the product, including Value Added Tax and all other taxes. Thus, consumers will not be confronted with the classic price tags in the United States where after a certain amount of money, the shopkeeper adds “plus taxes”. This would not be allowed in the territory of the European Union.

The selling price and the unit price must be disclosed for all consumer products; the unit price need not be indicated if it is identical to the sales price. The selling price and the unit price must be unambiguous, easily identifiable and clearly legible.

Member States must lay down penalties for infringement of national provisions adopted in application of the Directive; they must also take the necessary measures for the enforcement of such rules.

Directive 98/7/EC of the European Parliament and of the Council of 16 February 1998 concerning consumer credit

The main objective of this Directive is to harmonize the method of calculating the annual percentage rate of charge for consumer credit.

Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests

The main objective of this Directive is to establish new mechanisms that allow infringements harmful to collective interests of consumers to be terminated in good time. Such collective interests should be understood as meaning interests which do not include the cumulation of interests of individuals who have been harmed by an infringement. The idea is to solve the transfrontier practices that produce effects in a Member State other than that in which they originate.

For the Republic of Armenia this Directive has only a limited interest, while it is relevant to simply indicate the underlying principles regulated therein.

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

The title of this Directive indicates that we are dealing here with one of the legal instruments that adapt the old caveat emptor doctrine to the modern consumer society. It is thus one of the cornerstones of the consumer protection policy of the European Union. Moreover, the Directive clearly indicates that its rules contain the minimum protection

granted within Member States to the consumer. In other words, depending on the Member State the consumer may even have better rights than those described in this chapter.

The core of the Directive is the following rule: the seller must deliver goods to the consumer which are in conformity with the contract of sale.

Consumer goods are defined as any tangible movable item with the exception of:

- (a) goods sold by way of execution or otherwise by authority of law;
- (b) water and gas where they are not put up for sale in a limited volume or set quantity; or
- (c) electricity.

Such consumer goods are presumed to be in conformity with the contract if they:

- (a) comply with the description given by the seller and possess the qualities of the goods which the seller has held out to the consumer as a sample or model;
- (b) are fit for any particular purpose for which the consumer requires them and which he made known to the seller at the time of conclusion of the contract and which the seller has accepted;
- (c) are fit for the purposes for which the goods of the same type are normally used; and
- (d) show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or labelling.

The knowledge of lack of conformity by the consumer at the time the contract was concluded determines the existence of a lack of conformity at a later stage.

Any lack of conformity resulting from incorrect installation of the consumer goods is deemed to be equivalent to lack of conformity of the goods if installation forms part of the contract of sale and the goods were installed by the seller or under his responsibility. This rule applies equally if the product, intended to be installed by the consumer, is installed by the consumer and the incorrect installation is due to a shortcoming in the installation instructions.

The core rule of the Directive applies as follows:

- (a) the seller is liable to the consumer for any lack of conformity which exists at the time the goods were delivered;
- (b) in the case of lack of conformity, the consumer is entitled to have the goods brought into conformity free of charge by repair or replacement (unless this is impossible or disproportionate), or to have an appropriate reduction made in the price, or the contract rescinded with regard to those goods.

Where the final seller is liable to the consumer because of a lack of conformity resulting from an act or omission by the producer, a previous seller in the same chain of contracts or any other intermediary, the final seller is entitled to pursue remedies against the person or persons liable in the contractual chain. National law is applicable to this second stage remedies. From the perspective of the consumer, the Directive facilitates him exercising his rights: his claim is addressed only to the seller, who then can claim back whatever he is

condemned to pay or to do for the consumer. The consumer is not a party to this subsequent procedure.

The seller is liable where any lack of conformity becomes apparent within two years as from delivery of the goods. This limitation period may not be reduced by Member States, but for second-hand goods, the seller and consumer may agree contractual terms which have a shorter time period for the liability of the seller – but never less than one year!

Consumers must however inform the seller of the lack of conformity within a period of two months from the date he detected such lack of conformity.

A further element developed in the Directive – as indicated above – is the guarantee. A guarantee is legally binding on the offerer under the conditions laid down in the guarantee statement and the associated advertising. Such guarantee must:

- (a) state that the consumer has legal rights under applicable national legislation governing the sale of consumer goods and make clear that those rights are not affected by the guarantee; and
- (b) set out in plain intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, notably the duration and territorial scope of the guarantee as well as the name and address of the guarantor.

On request of the consumer, the guarantee must be made available in writing or feature in another durable medium available and accessible to him. Of course, such document must be drafted in one of the official languages of the incumbent Member State.

The Directive also clarifies that any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller's attention which directly or indirectly waive or restrict the rights resulting from the Directive is not binding on the consumer.

Regulation (EC) 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights

From the title we can understand that the Regulation deals notably with the phenomenon of overbooking. Overbooking – not defined in the Regulation – is a common practice whereby an airline accepts and processes more reservations than it has seats available on a given flight. The underlying assumption of the airline is that many passengers will not show up at the airport and that by this practice it will avoid flying with empty seats in the cabin.

It goes without saying that denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.

The protection accorded by the Regulation embraces:

- (a) scheduled and non-scheduled flights, including those forming part of a package tour, departing from an airport located in a Member State; or
- (b) scheduled and non-scheduled flights, including those forming part of a package tour, departing from an airport located in a third country to an airport situated in a territory of a Member State, when a Community carrier operates the flight.

Consequently, the Regulation also applies to the low-cost airlines and not only to the larger national carriers. More precisely, it applies only to passengers transported by motorised fixed wing aircraft. Hence, it does not apply to flights operated in helicopters, as is the case, for instance, in the air link between Malaga and Ceuta in Spain.

It is, of course, necessary that the passengers have a confirmed reservation on the flight concerned and present themselves timely for check-in (as stipulated in writing or, if no time is indicated, 45 minutes before the published departure time).

When an operating air carrier reasonably expects to deny boarding on a flight, it must first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passengers concerned and the operating air carrier. Practice proves that this operation usually takes place by means of an announcement by loudspeakers at the airport; air carriers have no reason to offer higher “benefits” than the amount of the compensation stipulated in the Regulation. For this reason, it appears that this formula is not really effective in practice.

The aircraft carrier may only deny boarding after the exercise described in the previous paragraph. If boarding is denied to passengers against their will, the operating air carrier must immediately compensate them in accordance with the provisions described below, and assist them in the manner described below also.

Virtually the same regulation applies for the cancellation of flights.

As for delays, when an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure, passengers must be offered assistance by the operating air carrier in the following hypothesis:

- (a) when the delay lasts for two hours or more in the case of flights of 1.500 kilometres or less;
- (b) when the delay lasts for three hours or more in the case of all intra-Community flights of more than 1.500 kilometres and of all other flights between 1.500 and 3.500 kilometres;
- or
- (c) when the delay lasts for four hours or more in the case of all flights not falling under (a) or (b).

This means that the sanction for a delay is providing assistance to the passengers; monetary compensation is only granted if boarding is denied.

Monetary compensation is fixed as follows:

- (a) EUR 250 for all flights of 1.500 kilometres or less;
- (b) EUR 400 for all intra-Community flights of more than 1.500 kilometres, and for all other flights between 1.500 and 3.500 kilometres; and
- (c) EUR 600 for all flights not falling under (a) or (b).

These figures are in general acceptable for economy class passengers; business class passengers will not feel adequately treated if they are denied boarding.

Assistance includes the right to reimbursement (within 7 days) of the full cost of the ticket, or a return ticket to the first point of departure at the earliest opportunity, or re-routing under comparable transport conditions, to the final destination at the earliest opportunity, or at a later date at the passenger's convenience, but for the latter case, subject to availability of seats.

The second level of assistance is named "right to care" and means that passengers are offered free of charge:

- (a) meals and refreshment in a reasonable relation to the waiting time;
- (b) hotel accommodation where a stay of more than a night becomes necessary, or where a stay additional to that intended by the passenger becomes necessary; and
- (c) transport between the airport and the place of accommodation (hotel or other).

In addition, passengers must be offered free of charge two telephone calls, telex or telefax messages, or e-mails.

Air carriers are of course allowed to upgrade passengers' flight conditions, while downgrading is only accepted when the passenger receives monetary compensation within 7 days. This monetary compensation is calculated on the basis of the price paid for the ticket.

The Regulation opens the door to other forms of compensation stipulated in national laws. It also requires air carriers to inform passengers of their rights.

Directive 2004/47/EC of the European Parliament and the Council of 6 June 2002 on financial collateral agreements

This Directive is part of the package on security settlement systems.

It applies to 'financial collateral agreements' defined as a title transfer financial collateral agreement or a security financial collateral agreement, whether or not these are covered by a master agreement or general terms and conditions. Hence, the financial collateral agreement is a category composed of two components. These are also defined in the Directive. 'Title transfer financial collateral agreement' means an arrangement, including repurchase agreements, under which a collateral provider provides full ownership of financial collateral to a collateral taker for the purpose of securing or otherwise covering the performance of relevant financial obligations. 'Security financial collateral agreement' means an arrangement under which a collateral provider provides financial collateral by way of security in favour of, or to, a collateral taker and where the full ownership of the financial collateral remains with the collateral provider when the security right is established.

Member States are not allowed to require that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral agreement or the provision of financial collateral under a financial collateral arrangement be dependent on the performance of any formal act.

The main object of the Directive is to ensure that on the occurrence of an enforcement event of financial collateral arrangements, the collateral taker is able to realise any financial collateral provided under, and subject to the terms agreed in, a security financial

collateral agreement. Of course, such realisation must be done in the manners described in the Directive.

Appropriation of financial collateral is only possible if:

- (a) this has been agreed by the parties in the security financial collateral arrangement; and
- (b) the parties have agreed in the security financial collateral arrangement on the valuation of the financial instruments.

If and to the extent that the terms of a security financial collateral arrangement so provide, Member States must ensure that the collateral taker is entitled to exercise a right of use in relation to financial collateral provided under the security financial collateral arrangement. Where the collateral taker exercises a right of use, he thereby incurs an obligation to transfer equivalent collateral to replace the original financial collateral at the latest on the due date for the performance of the relevant financial obligations covered by the security financial collateral arrangement. Alternatively, the collateral taker may, on the due date for the performance of the relevant financial obligations, either transfer equivalent collateral, or, if and to the extent that the terms of a security financial collateral arrangement so provide, set off the value of the equivalent collateral against or apply it in discharge of the relevant financial obligations.

Member States must ensure that a title transfer financial collateral arrangement can take effect in accordance with its terms.

This Community regime applies thus to the provision of securities and cash as collateral as both security interest and title transfer structures, including repurchase agreements (the so-called repos). The Directive supports thus the freedom to provide services and the free movement of capital in the Single Market in the area of financial services. It must be said that the application of this Directive and its impact on certain insolvency provisions can only be applied in a quite developed financial market.

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)

This Directive relies on the Council Directive concerning misleading and comparative advertising and more specifically on the fact that that Directive does not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers. The result of this is that Member States' provisions on misleading advertising diverge significantly.

These disparities cause uncertainty as to which national rules apply to unfair commercial practices harming consumers' economic interests; they also create many barriers affecting business and consumers. This uncertainty and the obstacles can only be eliminated by creating rules at the level of the European Community, as the Directive claims.

Thus, the provisions of the Directive are also applicable to advertising.

The Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. Hence, it protects consumer economic interest from unfair business-to-consumer commercial practices. Some aspects of unfair

competition are thus covered by the Directive, but the European Commission reserves its right to further propose regulations in this area. A 'consumer' is any natural person who, in commercial practices covered by the Directive, is acting for purposes which are outside his trade, business, craft or profession.

'Transactional decisions' are defined as any decision taken by a consumer concerning whether, how and on what terms to purchase, make payment in whole or in part for, retain or dispose of a product or to exercise a contractual right with respect to the product, whether the consumer decides to act or to refrain from acting.

Notwithstanding the scope of the Directive, it is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract, and to rules determining the jurisdiction of courts. It is also without prejudice to any deontological code of conduct or similar governing regulated professions (like lawyers, physicians, etc.).

The Directive creates the notion of unfair commercial practices: They are prohibited and include:

- misleading actions and omissions; and
- aggressive commercial practices.

Commercial practices are deemed unfair if:

- (a) it is contrary to the requirements of professional diligence; and
- (b) it materially distorts or is likely to materially distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed, or of the average member of the group when a commercial practice is directed to a particular group of consumers. 'To materially distort the economic behaviour of consumers' should be interpreted as using a commercial practice to appreciably impair the consumer's ability to make an informed decision, thereby causing the consumer to take a transactional decision that he would not have taken otherwise.

A commercial practice falls into the category of 'misleading' if it contains false information and is therefore untruthful or in any way, including its overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation of one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:

- (a) the existence or nature of the product;
- (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity. Specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
- (c) the extent of the trader's commitment, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct and indirect sponsorship or approval of the trader or the product;
- (d) the price or the manner in which the price is calculated, or the existence of a specific price advantage;
- (e) the need for a service, part, replacement or repair;

- (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial, or intellectual property rights or his awards and distinctions;
- (g) the consumers' rights, including the right to replacement or reimbursement, or the risks he may face.

A second definition of 'misleading commercial practices' includes practices if, in its factual context, taking account of all its features and circumstances, causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

- (a) any marketing of a product, including comparative advertising, which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or
- (b) non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound, where:
 - (i) the commitment is not aspirational but is firm and is capable of being verified; and
 - (ii) the trader indicates in a commercial practice that he is bound by the code.

With respect to misleading omissions, the Directives spells out that a commercial practice is regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitation of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. This definition of 'misleading omission' includes the situation where a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to above, or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

In the case of an invitation to purchase, the following information is regarded as material, if not already apparent from the context:

- (a) the main characteristics of the product, to an extent appropriate to the medium and the product;
- (b) the geographical address and the identity of the trader, such as his trading name and, where applicable, the geographical address and the identity of the trader on whose behalf he is acting;
- (c) the price inclusive of taxes, or where the nature of the products means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, all additional freight, delivery or postal charges or, where these charges cannot reasonably be calculated in advance, the fact that such additional charges may be payable;
- (d) the arrangements for payment, delivery, performance and the complaint handling policy, if they depart from the requirements of professional diligence; or
- (e) for products and transactions involving a right of withdrawal or cancellation, the existence of such right.

Among the fundamental principles in EU consumer protection we should certainly mention the clear announcement of the final price. This principle appears in many rules adopted by the institutions of the European Union, including paragraph (c) of the list above. The importance of this principle is further proven by the recent initiative of the European Commission to adopt a Directive compelling low cost airlines operating in the European Union to disclose not only the price of the fare, but also all expenses and airport fees that will be charged. In fact, low cost airlines usually advertise flights for prices that are easily doubled when the passenger purchases the ticket.

Finally, the Directive determines that a commercial practice is regarded as aggressive, if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs the average consumer's freedom of choice or conduct with regard to the product and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise. The following elements are relevant for deciding whether a commercial practice uses harassment, coercion, including the use of physical force, or undue influence:

- (a) its timing, location, nature or persistence;
- (b) the use of threatening or abusive language or behaviour;
- (c) the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgement, of which the trader is aware, to influence the consumer's decision with regard to the product;
- (d) any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; or
- (e) any threat to take any action that cannot legally be taken.

It is most relevant that the Directive also requires Member States to ensure that adequate and effective means exist to combat unfair commercial practices. Such means include the adequate legal actions to be instituted by the consumer; such legal actions can be pursued before the judiciary or administrative authorities, including arbitration or mediation boards. The final objective of the enforcement is the cessation or the prohibition of the unfair trade practice; proof of actual loss or damage, or of intention or negligence on the part of the trade is not necessary. Member States must also have to the disposal of consumers accelerated procedures to achieve the cessation or prohibition of unfair trade practices. Furthermore, Member State must lay down penalties for infringements of national rules transposing the Directive of the European Union. Such penalties must be effective, proportionate and dissuasive.

The Directive also contains a list of practices which are in all circumstances considered unfair. This list includes the following cases:

- (a) falsely stating that a product will only be available for a very limited time, or that it will be available on particular terms for a very limited time, in order to elicit an immediate decision and deprive consumers of sufficient opportunity or time to make an informed decision;
- (b) undertaking to provide after-sales service to consumers with whom the trader has communicated prior to a transaction in a language which is not an official language of a Member State where the trader is located and then making such service available only in another language without clearly disclosing this to the consumer before the consumer is committed to the transaction;

- (c) claiming to be a signatory to a code of conduct when the trader is not;
 - (d) displaying a trust mark, quality mark or equivalent without having obtained the necessary authorisation;
 - (e) making a materially inaccurate claim concerning the nature and extent of the risk to the personal security of the consumer or his family if the consumer does not purchase the product;
 - (f) claiming that the trader is about to cease trading or move premises when he is not;
 - (g) claiming that products are able to facilitate winning in games of chance;
- etc.

IV. The future of consumer protection within the European Union

In order to close our short presentation we simply mention here that at the time of drafting this brochure, the attention of officials and legislators at the European Union focus on the Health and Consumer Protection Programme 2007-2013, adopted on 6 April 2005, as far as consumer protection is concerned. The most striking element of this Programme is that it brings together consumer protection and health issues; we have seen however, that the boundaries of consumer protection were not always clear in the past. In order to synchronize these areas, the Programme determines common objectives and objectives that are specific for consumer protection and for health.

We cannot deal here with the different legislative initiatives that are pending now at the level of the European institutions; we can simply state that legislative endeavours in the field of consumer protection remain quite aggressive.

We will conclude the brochure with a copy of the Basic Principles of EU consumer policy¹² which will certainly remain in force for many years to come:

1. buy what you can, where you can;
2. if it does not work, send it back;
3. high safety standards for food and other consumer goods;
4. know what you are eating;
5. contract should be fair to consumers;
6. sometimes consumers can change their mind;
7. making it easier to compare prices;
8. consumers should not be misled;
9. protection while you are on holiday;
10. effective redress of cross-border disputes.

¹² The brochure can be downloaded from http://ec.europa.eu/consumers/cons_info/10principles/en.pdf.