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(Information)

COMMISSION

Communication from the Commission to the Council and the European Parliament on European contract law

(2001/C 255/01)

CONTENTS

	<i>Page</i>
1. Introduction	2
2. Purpose of the communication	3
3. Present situation of contract law	4
3.1. Existing legislation	4
3.1.1. International instruments	4
3.1.2. Description of the Community <i>acquis</i>	4
3.2. Implications for the internal market	4
3.3. Uniform application of Community law	6
4. Options for future Community initiatives in contract law	7
4.1. Option I — No Community action	8
4.2. Option II — To promote the development of common contract law principles leading to more convergence of national laws	8
4.3. Option III — To improve the quality of legislation already in place	9
4.4. Option IV — To adopt new comprehensive legislation at Community level	10
4.5. Any other options	11
5. Conclusions	11

1. INTRODUCTION

1. Over recent years, discussion has intensified on possible harmonisation of substantive private law, in particular contract law ⁽¹⁾.
2. The European Parliament has adopted a number of resolutions on the possible harmonisation of substantive private law. In 1989 and 1994 the European Parliament called for work to be started on the possibility of drawing up a common European code of private law ⁽²⁾. Parliament stated that harmonisation of certain sectors of private law was essential to the completion of the internal market. Parliament further stated that unification of major branches of private law in the form of a European civil code would be the most effective way of carrying out harmonisation with a view to meeting the Community's legal requirements in order to achieve a single market without frontiers.
3. Furthermore, in its resolution of 16 March 2000 concerning the Commission's work programme 2000, the European Parliament stated 'that greater harmonisation of civil law has become essential in the internal market' and called on the Commission to draw up a study in this area ⁽³⁾. In its reply of 25 July 2000 to the European Parliament, the Commission stated that it would 'present a communication to the other Community institutions and the general public with the aim of launching a detailed and wide-ranging discussion, without losing sight of the date of 2001 set by the European Council at Tampere'. The Commission also stated that 'in view of the importance of secondary legislation for the development of the internal market and future commercial and technological trends, this communication will analyse this legislation, in force or in preparation, at Community level in the relevant areas of civil law in order to identify and assess any gaps, as well as the academic work which has been or is being carried out'.
4. Indeed the conclusions of the European Council held in Tampere requested, in point 39, 'as regards substantive law an overall study on the need to approximate Member State's legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings' ⁽⁴⁾. A consultative document has been announced in the

Commission's 'scoreboard for the evaluation of progress in the establishment of an area of freedom, security and justice' ⁽⁵⁾. The Tampere European Council dealt with issues concerning judicial civil cooperation on the basis of Title IV of the EC Treaty. In this regard this communication can be considered as a first step towards the implementation of the Tampere conclusions.

5. Finally, this communication was also included in the Commission communication on e-commerce and financial services ⁽⁶⁾ within the policy area of ensuring coherence in the legislative framework for financial services.
6. Leading representatives of the academic world have had detailed discussions on harmonising certain sectors of contract law. Two drafts of a contract code ⁽⁷⁾ and of general principles of contract law ⁽⁸⁾ have recently been published. This academic work continues, and includes work on other issues not included in the two published drafts, such as contracts in the specific areas of financial services, insurance contracts, building contracts, factoring and leasing as well as some areas of the law of property. In particular, the academic work is focusing on areas that have a particular significance for securing rights across the European borders ⁽⁹⁾.

⁽⁵⁾ COM(2000) 167 of 24 March 2000, last updated in May 2001, see COM(2001) 278 final of 23 May 2001

⁽⁶⁾ COM(2001) 66 final of 7 February 2001, p. 11.

⁽⁷⁾ The Pavia Group has recently published its *European contract code - preliminary draft*, (Universita Di Pavia, 2001) based on the work of the Academy of European Private Lawyers. This code contains a body of rules and solutions based on the laws of members of the European Community and Switzerland and covers the areas of contractual formation, content and form, contractual interpretation and effect, execution and non-execution of a contract, cessation and extinction, other contractual anomalies and remedies.

⁽⁸⁾ The Commission on European contract law (which has received a major part of its subsidies from the European Commission) has published *Principles of European contract law parts I and II*, edited by Ole Lando and Hugh Beale (Kluwer Law International, 2000). These common principles for the countries of the European Community concern the issues of formation, validity, interpretation and contents of contracts, the authority of an agent to bind his principal, performance, non-performance and remedies. The book provides text proposals for common rules and includes commentary and comparative analysis for each rule.

⁽⁹⁾ Another important ongoing academic exercise in this area is the Study Group on a European civil code consisting of academic experts of the 15 Member States and some candidate countries. Their work concerns areas like sales/services/long-term contracts, securities, extracontractual obligations or transfer of property on movable goods and includes a comparative research with the final objective of a fully formulated and commented draft on the areas concerned.

⁽¹⁾ Ole Lando and Hugh Beale (eds), *Principles of European contract law parts I and II*, (Kluwer Law International, 2000); Academy of European Private Lawyers, *European contract code — preliminary draft*, (Universita Di Pavia, 2001) hereafter referred to as 'the Pavia Group'; the 'Study Group for a European civil code'. A comprehensive discussion, including a detailed bibliography, of the issues concerning civil law in Europe can be found in Hartkamp, Hesselink, Hondius, Joustra, Perron (eds), *Towards a European civil code* (Kluwer Law International, 1998).

⁽²⁾ OJ C 158, 26.6.1989, p. 400 (resolution A2-157/89); OJ C 205, 25.7.1994, p. 518 (resolution A3-0329/94).

⁽³⁾ OJ C 377, 29.12.2000, p. 323 (resolution B5-0228, 0229, 0230/2000, p. 326 at point 28).

⁽⁴⁾ Presidency conclusions, Tampere European Council 15 and 16 October 1999, SI(1999) 800.

7. The aim of the academic work carried out varies from the establishment of a binding code to principles similar to 'restatements' that can be used to provide reliable comparative information on the European legal situation in these areas.
8. The approximation of certain specific areas of contract law at Community level has covered an increasing number of issues. In the area of consumer law no fewer than seven Directives dealing with contractual issues were adopted in the period from 1985 to 1999 ⁽¹⁾. Other areas also show increased harmonisation ⁽²⁾.
9. This sectoral harmonisation has concerned specific contracts or specific marketing techniques. Directives have been adopted where a particular need for harmonisation has been identified.

2. PURPOSE OF THE COMMUNICATION

10. The European Commission is interested at this stage of the discussion in gathering information on the need for

farther-reaching Community action in the area of contract law, in particular to the extent that the case-by-case approach might not be able to solve all the problems which might arise. This does not preclude the right of initiative of the Commission to make proposals in the future for specific actions on contract law aspects if a specific need for this exists, in particular on-going initiatives launched or to be launched in the framework of the internal market policy.

11. The purpose of this communication is therefore to broaden the debate by encouraging contributions from consumers, businesses, professional organisations, public administrations and institutions, the academic world and all interested parties. Part C examines the current situation of contract law, the reasons for its importance in cross-border negotiations and problems of uniform application of Community law. Part D presents a general framework for future Community policy in the area of contract law.

12. Contract law encompasses several areas of law. These are linked to Member States' different cultural and legal traditions, but most Member States' legal regimes for contract law have similar concepts and rules. Contract law constitutes the principal body of law regulating cross-border transactions and some Community legislation regulating contract law already exists, although this legislation has taken a sector-by-sector approach.

13. The areas concerned by this communication include contracts of sale and all kinds of service contracts, including financial services ⁽³⁾. General rules on performance, non-performance and remedies are an indispensable basis for these contracts and are therefore also covered. Additionally, rules on general issues such as the formation of a contract and its validity and interpretation are also essential. Furthermore, because of the economic context, rules on credit securities regarding movable goods as well as the law of unjust enrichment may also be relevant. Finally, the aspects of tort law linked to contracts and to its other features relevant to the internal market should also be taken into consideration in so far as they are already part of existing Community law.

14. In certain areas of private law, contracts are only one of the tools of regulation given the complexity of the relationship between the parties concerned. These areas, such as employment law and family law, give rise to particular issues and are not covered by this communication.

⁽¹⁾ 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 (OJ L 171, 7.7.1999, p. 12). Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29). Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59). Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L 372, 31.12.1985, p. 31). Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L 42, 12.2.1987, p. 48) as modified by Directive 90/88/EEC (OJ L 61, 10.3.1990, p. 14) and Directive 98/7/EC (OJ L 101, 1.4.1998, p. 17). Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (OJ L 144, 4.6.1997, p. 19). Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (OJ L 280, 29.10.1994, p. 83).

⁽²⁾ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ L 382, 31.12.1986, p. 17). Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (OJ L 171, 17.7.2000, p. 1). Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions (OJ L 200, 8.8.2000, p. 35). Council Directive 85/374/EEC of 25 of July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29) as modified by Directive 1999/34/EC (OJ L 141, 4.6.1999, p. 20). Directive 97/5/EC of the European Parliament and the Council of 27 January 1997 on cross-border credit transfers (OJ L 43, 14.2.1997, p. 25) should be noted as examples.

⁽³⁾ COM(2001) 66 final of 7 February 2001, p. 11.

15. The Commission intends to focus the attention of this communication on two areas: firstly on possible problems resulting from divergences of national contract law, and secondly on options for the future of contract law in the Community. This will enable the Commission to define its future policy in this area and to propose any necessary measures.

3. PRESENT SITUATION OF CONTRACT LAW

3.1. Existing legislation

3.1.1. *International instruments*

16. International remedies offer solutions to certain potential problems related to differences in national contract law. The first remedy is the application of uniform private international rules to determine which law is applicable to the contract. The most important of these rules is the 1980 Rome Convention ⁽¹⁾, ratified by all Member States.
17. The rules of the Rome Convention apply to contractual obligations in any situation involving a choice between the laws of different countries ⁽²⁾. Under the Rome Convention parties may agree on which national law to apply. However, the Convention places limits on this choice of applicable law and determines which law is applicable if no choice is made. Furthermore, the rules do not apply to areas mentioned in Article 1 of the Convention (such as questions relating to the status or legal capacity of natural persons or to insurance contracts which cover risks situated in the territories of the Member States of the European Community).
18. The second remedy is the establishment of harmonisation of substantive law rules at an international level. Here the most relevant instrument is the 1980 United Nations Convention on Contracts for the International Sale of

Goods (the CISG), adopted by all Member States except the United Kingdom, Portugal and Ireland.

19. The CISG establishes uniform rules for the international sale of goods, which apply to sales contracts unless the parties state otherwise. Some areas are excluded from the scope of the Convention, such as the sale of goods bought for personal, family or household use and the sale of stocks, shares, investment securities or negotiable instruments.

20. The Convention includes provisions dealing with the formation of a contract (offer and acceptance of offer), and the rights and obligations of the seller and the buyer. The Convention does not govern the validity of the contract or of its provisions, nor does it cover the effect which the contract may have on the property in the goods sold. The Convention also does not address the seller's liability beyond the contract.

3.1.2. *Description of the Community acquis*

21. Several Community acts include provisions harmonising private law. Certain directives specify rules on the conclusion of a contract, on the form and the content of an offer and its acceptance and on the performance of a contract, i.e. the obligations of the contracting parties. Several directives also specify in detail the content of the information to be provided by the parties at different stages, in particular before concluding a contract. Certain directives cover rights and obligations of the contracting parties regarding the execution of a contract, including poor execution and non-execution.
22. A description of the most relevant Community acts regarding contract law is given in Annex I. Annex II lists binding and non-binding international instruments relating to substantial private law issues. Annex III is a structured presentation of the *acquis* illustrating the extent to which legislation at Community level as well as the CISG has already dealt with issues of contract law of areas concerned by this communication.

3.2. Implications for the internal market

23. The Commission would like to find out if the coexistence of national contract laws in the Member States directly or indirectly obstructs the functioning of the internal market, and if so to what extent. If such obstacles do exist, the European institutions may be called on to take appropriate action.

⁽¹⁾ 1980 Rome Convention on the Law Applicable to Contractual Obligations (consolidated version) (OJ C 27, 26.1.1998, p. 34).

⁽²⁾ Alongside the Convention there is also the Brussels Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the accession of the new Member States to that Convention. This determines which forum is competent to deal with a case. For all Member States except Denmark this Convention is to be replaced as from 1 March 2002 by Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1).

24. The EC Treaty has given the European institutions powers to facilitate the establishment and functioning of the internal market, in particular the free movement of goods, persons, services and capital. This has allowed the European Community to reduce significantly impediments for economic actors, including manufacturers, service providers, intermediaries and consumers, to operate throughout the Community and beyond.
25. Technical developments, such as the possibilities offered by the Internet for electronic commerce, have made it easier for economic actors to conclude transactions over long distances. The introduction of the euro as the common currency of 12 of the Member States is also an important factor in facilitating cross-border trade. However, in spite of the major successes achieved thus far, certain problems still remain. Markets are not as efficient as they could and indeed should be, to the detriment of all parties involved.
26. The exchange of goods and services, be it through sales, leasing or barter is governed by a contract. Problems in relation to agreeing, interpreting and applying contracts in cross-border trade may therefore affect the functioning of the internal market. Do existing contract law rules meet the current and future needs of businesses and consumers in the internal market, or is Community action required?
27. Generally, national contract law regimes lay down the principle of contractual freedom. Accordingly, contracting parties are free to agree their own contract terms. However, each contract is governed by the laws and court decisions of a particular State. Some of these national rules are not mandatory and contracting parties may decide either to apply these rules or to agree different terms instead. Other national rules, however, are mandatory, in particular where there is an important disparity between the positions of the contracting parties, such as contracts with tenants or consumers.
28. Normally these different national regimes do not create any problems for cross-border transactions, as parties can decide which law will govern their contract. By choosing one national law, they accept all the mandatory rules of that law, as well as those non-mandatory rules which they do not replace by different terms. However, conflicts may arise between mandatory rules of the laws in one country with contradictory mandatory rules of another national law. These conflicts between different mandatory rules may have a negative impact on cross-border transactions.
29. Although not required by national laws, certain clauses in contracts may result from common practice in a given Member State, especially if such practice has been formalised in standard contracts. It may be hard to agree a contract containing terms and conditions different from those generally applied in a particular Member State. There may be important economic or even legal reasons why it is hard or even impossible for a party to agree to the terms and conditions in a standard contract that is generally used in the other party's Member State. Yet, for similar reasons, it may be hard for the latter party to accept the type of terms which are common practice in the first party's Member State.
30. For consumers and SMEs in particular, not knowing other contract law regimes may be a disincentive against undertaking cross-border transactions. This has been part of the rationale for some existing Community acts aimed at improving the functioning of the internal market. Suppliers of goods and services may even therefore regard offering their goods and services to consumers in other countries as economically unviable and refrain from doing so. In the field of subcontracting, the provisions covering subcontracting and supply contracts are quite different in the different Member States⁽¹⁾. These differences may make it difficult for subcontractors, mostly SMEs, to make cross-border agreements.
31. Moreover, disparate national law rules may lead to higher transaction costs, especially information and possible litigation costs for enterprises in general and SMEs and consumers in particular. Contracting parties could be forced to obtain information and legal advice on the interpretation and application of an unfamiliar foreign law. If the applicable law has been chosen in the contract, this applies to the contracting party whose law has not been chosen. It applies to a minor extent also to contracts where the parties have agreed standard contract terms in the cases where these terms do not cover all possible problems.
32. These higher transaction costs may furthermore be a competitive disadvantage, for example in a situation where a foreign supplier is competing with a supplier established in the same country as the potential client.
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- ⁽¹⁾ Provisions range from a specific subcontracting law in Italy and a law on payment conditions to subcontractors in France, to civil code provisions on contractual relations in most Member States (e.g. in Germany subcontracting falls under a 1976 law on the general terms of business and under a few articles of the civil code).

33. The Commission is seeking contributions on how far issues described above create problems for the internal market, and what other issues relating to contract law also obstruct the functioning of the internal market.

3.3. Uniform application of Community law

34. The European Community legislator must ensure consistency in the drafting of Community legislation as well as in its implementation and application in the Member States. The measures adopted by the European Community must be consistent with each other, interpreted in the same manner and produce the same effects in all Member States. The Court of Justice of the European Communities (the ECJ) has stated that 'the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community' ⁽¹⁾.

35. In the area of contract law the European legislator has taken a 'piecemeal' approach to harmonisation. This approach combined with unforeseen market developments, could lead to inconsistencies in the application of Community law. For example, under certain circumstances ⁽²⁾ it is possible to apply both the doorstep selling Directive and the timeshare Directive. Both Directives give the consumer a right of withdrawal; however the time period during which the consumer can exercise this right is different. Although such cases of conflicts between rules are exceptional, the Commission would welcome information on problems resulting from possible inconsistencies between Community rules.

36. Using abstract terms in Community law can also cause problems for implementing and applying Community

law and national measures in a non-uniform way. Abstract terms may represent a legal concept for which there are different rules in each national body of law ⁽³⁾.

37. In general, differences between provisions in directives can be explained by differences in the problems which those directives seek to solve. One cannot, therefore, require that a term used to solve one problem is interpreted and applied in precisely the same manner in a different context. However, differences in terms and concepts that cannot be explained by differences in the problems being addressed should be eliminated.

38. In addition, domestic legislation adopted by Member States to implement Community directives refers to domestic concepts of these abstract terms. These concepts vary significantly from one Member State to another ⁽⁴⁾. The absence of a uniform understanding in Community law of general terms and concepts at least in specific or linked areas) may lead to different results in commercial and legal practice in different Member States ⁽⁵⁾.

⁽¹⁾ Case C-357/98 *The Queen v Secretary of State for the Home Department ex parte: Nana Yaa Konadu Yiadom* [2000] ECR-9265, at paragraph 26. See also Case C-287/98 *Luxemburg v Linster* [2000] ECR-6917, at paragraph 43; Case C-387/97 *Commission v Greece* [2000] ECR-5047; Case C-327/82 *Ekro v Produktschap voor Vee en Vlees* [1984] ECR I-107, at paragraph 11. The principle of uniform application also applies in the area of private law see Case C-373/97 *Dionisios Diamantis v Elliniko Dimosio (Greek State), Organismos Ikonomikis Anasinkrotisis Epikhiriseon AE (OAE)* [2000] ECR I-1705, at paragraph 34; Case C-441/93 *Pafitis and Others v TKE and Others* [1996] ECR I-1347, at paragraphs 68 to 70.

⁽²⁾ See Case C-423/97, *Travel-Vac S.L. and Manuel José Antelm Sanchís* [1999] ECR I-2195..

⁽³⁾ These matters have recently been examined by a European Parliament study, drafted by a team of high ranking independent legal experts. It states with regard to the example of the term 'damage' that 'The European laws governing liability do not yet have even a reasonably uniform idea of what damage is or how it can be defined, which naturally threatens to frustrate any efforts to develop European directives in this field'; European Parliament, DG for Research: 'Study of the systems of private law in the EU with regard to discrimination and the creation of a European civil code' (PE 168.511, p. 56). Some Directives (Article 9 of Directive 85/374/EEC, Article 17 of Directive 86/653/EEC) contain differing definitions of the term 'damage'. Each definition, however, is intended solely for the purpose of each respective Directive. Other Directives (Article 5 of Directive 90/314/EEC) use the term without defining it.

⁽⁴⁾ This problem is highlighted by a case pending with the Court of Justice (C-168/00, *Simone Leitner/TUI Deutschland GmbH & Co. KG*). On the basis of a package travel contract concluded under Austrian law with a German tour operator, the complainant seeks compensation for 'moral damages' (unrecoverable holiday spent in hospital). Austrian law does not grant compensation for this kind of damage, but the laws of Germany and some other Member States do. The complainant points to Article 5 of the package travel Directive, saying that this Article establishes a specific concept of 'damage' that includes 'moral damage'.

⁽⁵⁾ The Commission has emphasised for example in its report on the application of the commercial agents Directive (COM(1996) 364 final of 23 July 1996) that the application of the system of compensation for damage foreseen in the Directive concerning the same factual situation produces completely different practical results in France and the UK due to different methods of calculation for the quantum of compensation.

39. This kind of problem does not only apply to horizontal questions concerning general terms of contract law as mentioned above. It is also relevant to specific economic sectors ⁽¹⁾.

40. The Commission is reflecting whether, in order to avoid the kind of problems described above, the necessary consistency could be ensured through the continuation of the existing approach or should be improved through other means. The Commission is therefore interested in receiving information on practical problems relating to contract law resulting from the way that Community rules are applied and implemented in the Member States.

4. OPTIONS FOR FUTURE COMMUNITY INITIATIVES IN CONTRACT LAW

41. Responses to this document may show that there are impediments to the functioning of the internal market for cross-border transactions. If these problems cannot be solved satisfactorily through a case-by-case approach, a horizontal measure providing for comprehensive harmonisation of contract law rules could be envisaged at Community level. However, there are of course limits to the power of the Commission and the other Community institutions to intervene in this area.

42. Any measure must be in accordance with the principles of subsidiarity and proportionality, as described in Article 5 of the EC Treaty and the Protocol on subsidiarity and proportionality. As the European Parliament pointed out in its resolutions on the better lawmaking reports ⁽²⁾, the subsidiarity principle is a binding legal standard that does not rule out the legitimate exercise of the Community's competencies. The need to achieve balanced application of this principle has been highlighted by a number of Member States ⁽³⁾ and the European institutions.

43. The principle of subsidiarity serves as a guide as to how the Community powers are to be exercised at Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so

require, and conversely, to be restricted or discontinued where it is no longer justified ⁽⁴⁾. There should be clear benefits to taking action at Community level instead of national level. Where the intention is to have an impact throughout the Community, Community-level action is undoubtedly the best way of ensuring homogeneous treatment within national systems and stimulating effective cooperation between the Member States.

44. Moreover, legislation should be effective and should not impose any excessive constraints on national, regional or local authorities or on the private sector, including civil society. The principle of proportionality, which is one of the general principles of Community law, requires that measures adopted by Community institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued ⁽⁵⁾. Clearly, the Commission is duty-bound to propose whatever measures are necessary to supplement Member States' efforts to achieve the Treaty's objectives. The Commission follows two criteria designed to guarantee that fixed objectives are complied with in both political and legal terms: the ability of national and regional authorities, and of civil society, to act to achieve the objectives laid down in a Community provision, and the compatibility or conformity of these objectives with national or sectoral practices ⁽⁶⁾.

45. Preparing legislative proposals by way of communications and green and white papers is one way of consulting the private sector, civil society and institutions at all levels on the expediency, level and content of legislative instruments in order to achieve these objectives. Additionally, the Commission will seek to identify areas of intervention by involving both civil society and business with a view to producing legislative instruments geared to users' real needs. This communication and possible further documents are intended to determine whether Community action is needed and if so in which areas.

⁽¹⁾ The problem referred to here also exists outside the contract law area. Thus in its report on the regulation of European securities markets, the Committee of Wise Men led by Alexandre Lamfalussy pointed to problems resulting from the use in certain Directives in the financial area of ambiguous notions, which allowed Member States to apply these Directives in a disparate manner. Final report, Brussels, 15 February 2001, Annex 5 (initial report of 9 November 2000).

⁽²⁾ COM(2000) 772 final of 30 November 2000, p. 3.

⁽³⁾ COM(2000) 772 final of 30 November 2000, p. 3.

⁽⁴⁾ See Protocol on the application of the principles of subsidiarity and proportionality (OJ C 340, 10.11.1997, p. 105).

⁽⁵⁾ Case C-331/88 Fedesa [1990] ECR-4023 at paragraph 13; Joined Cases C-133/93, C-300/93 and C-362/93 Crispoltoni [1994] ECR-4863 at paragraph 41; Case C-157/96 *The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte: National Farmers' Union* [1998] ECR-2236 at paragraph 60.

⁽⁶⁾ COM(2000) 772 final of 30 November 2000, pp. 8 and 9.

46. There are a number of options that can be considered should the case-by-case approach not fully solve the problem. This communication briefly examines four possible scenarios:
- I. no Community action;
 - II. to promote the development of common contract law principles leading to more convergence of national laws;
 - III. to improve the quality of legislation already in place;
 - IV. to adopt new comprehensive legislation at Community level.
47. There are other options beyond these, and these options could also be combined. These options may cover the field of contract law or other fields within private law. Each option could be used for specific economic sectors or apply horizontally. The binding character of a measure would depend on the area to which the measure applied and all the interests at stake. However, as a matter of principle, all options should allow contracting parties the freedom they need to conclude the contract terms best suited to their specific needs.
48. Another approach, which is not discussed here as it goes beyond the level of a European initiative, could be the negotiation of an international treaty in the area of contract law. This would be comparable to the CISG but with a broader scope than purely the sale of goods. However, the provisions of the CISG could also be integrated into options II and IV which would increase their acceptance in commercial and legal practice.
- 4.1. Option I — no Community action**
49. In many cases the market creates problems of public concern, but it also develops its own solutions. The effectiveness of the market in responding to different social values and to public opinion should not be underestimated. As a result of competitive behaviour, many of the problems created by the market may be solved automatically by the pressure exercised by the interest groups involved (consumers, NGOs, enterprises). Public authorities can enhance this coincidence of self-interest and public interest.
50. Different incentives by Member States and trade associations, for example offering assistance and advice on cross-border transactions can efficiently channel the market in a specific direction (for example speed up the use of new technologies or encourage new types of commercial practices). These could compensate for the economic and psychological risks of cross-border trade activity, whether these risks are perceived or real. Different services from economic operators can efficiently overcome problems of cross-border transactions that have been identified. For example, trade associations could offer assistance or advice to SMEs ⁽¹⁾.
51. Economic developments, in particular the increasing integration of markets into a genuine internal market, also create incentives for national policymakers and legislators to look for solutions to problems with contracts involving parties in other Member States. This could result in a certain degree of 'soft harmonisation', not driven by binding Community rules, but coming about as a result of economic developments. This could solve some of the problems for intra-Community trade, provided that there is a genuine and fair free choice of law for contracting parties, full, correct and freely available information about the existing rules and practices and fair and affordable alternative dispute resolution mechanisms.
- 4.2. Option II — to promote the development of common contract law principles leading to more convergence of national laws**
52. In order to achieve more convergence of national contract laws, one solution would be for the Commission
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- ⁽¹⁾ Below are two examples of national/industry associations' initiatives that aim at providing a solution for cross-border contractual problems through voluntary agreements on cross-border model contracts:
- in 1999 a group of six German industry federations, the so-called working group of the components supply industry, agreed on a set of minimum clauses for cross-border contracts. However, this model applies to cross-border contracts ruled exclusively by German law (the contracting parties must agree to rule the cross-border contract in question under German law) and includes provisions on prices, confidentiality, moulds, equipment, industrial property rights, guarantee, liability, product damage, etc.
 - also Orgalime (European group of the mechanical, electrical, electronic and metal-working industries) issued a model for international 'consortium agreement' to foster cross-border inter-enterprise cooperation.

to promote comparative law research and cooperation between, among others, academics and legal practitioners (including judges and experts). This cooperation could aim to find common principles in relevant areas of national contract law. The existing work in this area could be used and developed, including the results of academic studies and conclusions drawn in international academic forums. The framework for this research and cooperation could be a kind of partnership, in which the Community institutions, and more particularly the Commission, could play a coordination role. In the field of transnational contracts, some common solutions, principles or even sets of rules could be defined.

53. The outcome of these discussions could vary from common principles to the drafting of guidelines or specific codes of conduct for certain types of contracts. The common principles could be useful for contracting parties at the drafting stage of new contracts, as well as for the execution of contracts. They could also be useful for national courts and arbitrators who have to decide legal issues, especially concerning cross-border cases, which are not fully covered by binding national rules or where no legislative rules exist at all. The courts or arbitrators would know that the principles they were applying represented the solution common to all the national contract law systems in the Community. At the same time common principles could help national courts which have to apply foreign law to have a basic understanding of the underlying general principles of law. The guidelines could be followed as much as possible by Member States or the Community when issuing new legislation or adapting old legislation in the area of contract national law.

54. The application of common principles could even lead to the creation of customary law provided that there is a long and continued application and a commonly shared conviction. This might influence or even change existing commercial practice in the Member States that could create impediments to the full functioning of the internal market.

55. Once those common principles or guidelines were established and agreed on by all interested parties in the Member States, broad dissemination should be ensured among those who would be supposed to apply them. This would ensure coherent and uniform application of the common principles or guidelines. These common principles or guidelines could however only be applied on a voluntary basis. If this were indeed done continuously by a sufficiently large number of legal practitioners as well as Community and national legislators, this would bring about greater convergence in

the area of European contract law. However, for this option to be meaningful, it is clear that the common principles should be defined in such a way as to meet all legitimate requirements.

56. Another solution could concern standard contracts. In order to facilitate economic transactions a large number of standard contracts are in use in all Member States. Such standard contracts spare parties the need to negotiate the contract-terms for every single transaction. They also provide a degree of certainty to parties and obtain almost semi-regulatory status. It is precisely for this reason that it is often difficult to agree a contract with a party in another Member State which does not comply with the standard contract terms that the other party is used to. Parties from different Member States may indeed be used to different terms which are in standard use in their respective States. These problems could be solved, in conformity with Community law, if standard contracts were developed for use throughout the Community. The Commission could promote the development of such standard contracts by interested parties.

4.3. Option III — to improve the quality of legislation already in place

57. The Lisbon European Council has asked the Commission, the Council and the Member States 'to set out by 2001 a strategy for further coordinated action to simplify the regulatory environment'. Answering this request, the Commission has given an initial response through an interim report to the Stockholm European Council⁽¹⁾ which takes stock of the situation and sets out the Commission's initial thoughts on putting the Lisbon mandate into practice.

58. Improving the quality of legislation already in place implies first modernising existing instruments. The Commission intends to build on action already undertaken on consolidating, codifying and recasting⁽²⁾ existing instruments centred on transparency and clarity. Quality of drafting could also be reviewed; presentation and terminology could become more coherent. Apart from those changes regarding the presentation of legal texts, efforts should moreover be focused systematically

⁽¹⁾ Interim report from the Commission to the Stockholm European Council 'Improving and simplifying the regulatory environment', COM(2001) 130 of 7 March 2001.

⁽²⁾ See interim report, COM(2001) 130 of 7 March 2001, p. 10.

on simplifying and clarifying the content of existing legislation ⁽¹⁾. Finally, the Commission will evaluate the effects of Community legislation and will amend existing acts if necessary ⁽²⁾.

59. Where appropriate, directives could be subject to simplification of their provisions. In fact, for several years now, the Community has been pursuing a policy of simplifying Community legislation. The SLIM initiative ⁽³⁾ (simpler legislation for the internal market) remains one of the most ambitious examples of the ongoing simplification work. Simplification exercises ⁽⁴⁾ could be used to improve the quality, reduce the volume of existing regulatory instruments, and, at the same time remedy possible inconsistencies or even contradictions between legal instruments.

60. Moreover, a further improvement would be to adapt the substance of existing legal instruments where necessary ⁽⁵⁾ before adopting new ones. For instance, the scope of application of various directives should be extended if necessary and if appropriate to those contracts or transactions which have many similar features to those covered by the Directive but, for various reasons, were not included in the scope of application of the Directive at the moment of its adoption. This would ensure greater coherence within a well-defined sector of activities or type of transactions ⁽⁶⁾. Along the same lines, reasons why different solutions are given to similar problems in the context of different directives should be re-examined.

4.4. Option IV — to adopt new comprehensive legislation at Community level

61. Another option would be an overall text comprising provisions on general questions of contract law as well as specific contracts. For this option, the choice of instrument and the binding nature of the measures need to be discussed.

62. The choice of instrument depends on a number of factors, including the degree of harmonisation envisaged.

63. A directive would, on one hand, give Member States a certain degree of flexibility to adapt the respective provisions of the implementation law to their specific national economic and legal situation. On the other hand, it may allow differences in implementation which could constitute obstacles to the functioning of the internal market.

⁽¹⁾ See interim report, COM(2001) 130 of 7 March 2001, p. 10.

⁽²⁾ See interim report, COM(2001) 130 of 7 March 2001, p. 9.

⁽³⁾ The SLIM (simpler legislation for the internal market) pilot project: this project was introduced in 1996 as an initiative for improving the quality of internal market legislation, for counteracting superfluous legislation and for limiting the costs associated with implementation. SLIM attempts to focus attention on specific issues and is not meant to advocate deregulation. The work is extremely targeted, in order to be run in a limited period of time, and focused on making precise recommendations.

The European institutions have agreed that simplification ought not to encroach on the *acquis communautaire*. In essence, simplification is to be prevented from acting as a passkey to calling in question again harmonisation reached in sectors like health protection, worker and consumer protection, environmental policy and free trade. Simplification, this is the idea, should become a resource for completing the internal market, not for dismantling it.

⁽⁴⁾ — BEST (business environment simplification task force): in 1997 the Commission also set up the business environment simplification task force (BEST). This task force submitted a report containing 19 recommendations in 1998. These focused on the business environments in the Member States in a wide variety of fields.

— The action plan for the single market: the action plan was launched in 1997, listing four strategic objectives: making the rules more effective, dealing with market distortions, removing barriers to market integration, and finally ensuring an internal market that benefits all citizens of the Union.

— The 'state of the art' on simplification in the 'better lawmaking' reports: each year, since 1995, the Commission publishes a report on 'better lawmaking' in which it also reports on the contribution it has made to simplifying EU rules.

— The Interinstitutional Agreement on drafting quality: this Agreement was published in March 1999, following on from the Treaty of Amsterdam and is binding on the Commission, the Council and the European Parliament.

⁽⁵⁾ The abovementioned 'Study of the systems of private law in the EU with regard to discrimination and the creation of a European civil code', launched by the European Parliament states in general terms that 'The existing rules enshrined in the agreements and directives need to be systematically gone over with a fine tooth comb, incorporated into national law where necessary, supplemented in content and refined in form. They must be coordinated and dovetailed with each other, cleansed of all redundant regulation, inconsistency and terminological insularity, so that they can ultimately be fitted into a systematically coherent structure, into the 'overall picture' of a codified system'.

⁽⁶⁾ A limited scope of application is typical for many directives (e.g.: Directives 85/577/EEC on doorstep selling: not covered are insurance contracts, contracts on real estate, construction, 97/7/EC on distance contracts: not covered are contracts on real estate, construction, 94/47/EC on time-sharing contracts: covered are only contracts with a minimum term of three years, Directive 2000/35/EC on combating late payment in commercial transactions: transactions with consumers are not covered).

64. A regulation would give the Member States less flexibility for its integration into the national legal systems, but on the other hand it would ensure more transparent and uniform conditions for economic operators in the internal market.
65. A recommendation could only be envisaged if a purely optional model is chosen.
66. Concerning the binding nature of the measures to be proposed, the following approaches, which can also be combined, are:
- (a) a purely optional model which has to be chosen by the parties. An example would be a recommendation ⁽¹⁾ or a regulation ⁽²⁾ which applied when the parties agree that their contract was to be governed by it;
- (b) a set of rules which would apply unless their application were excluded within the contract. This kind of legislation already exists in the context of the late payments Directive ⁽³⁾ or in the CISG ⁽⁴⁾. This approach would create fall-back provisions where the contracting parties are free to agree on other solutions by way of contract, i.e. the application of a coexisting national law or contract-specific solutions. It would ensure that contracting parties keep complete contractual freedom to define the content of the contract. At the same time it would represent a 'safety net' which would only apply if no specific contractual provisions were in place;
- (c) a set of rules whose application cannot be excluded by the contract.
67. The third approach would replace existing national law, while the first would co-exist with national law. The second approach could coexist with national law or replace it.
68. Each applicable set of rules could distinguish between mandatory and non-mandatory rules.
69. A combination of the abovementioned second and third options could, for instance, be envisaged in areas of law like consumer protection where, besides a general and automatically applicable set of fall-back provisions, some mandatory provisions which cannot be waived by the contracting parties still apply.
- 4.5. **Any other options**
70. As indicated above, the list of options is not exhaustive but only indicative. Therefore, the Commission welcomes any other suggestions for efficient and effective solutions to the problems identified.
5. CONCLUSIONS
71. The purpose of this communication is to initiate an open, wide-ranging and detailed debate with the participation of the institutions of the European Community as well as of the general public, including businesses, consumer associations, academics and legal practitioners. In the light of the feedback received, the Commission will, within its right of initiative, decide on further measures.
72. In particular the Commission would like to have views on problems for the functioning of the internal market resulting from the coexistence of different national contract laws. To be the most useful, such information should be as specific as possible. Ideally, it should include concrete examples of cases in which differences between the contract laws of the Member States have made intra-Community trade more onerous or even impossible for manufacturers, service providers, traders or consumers. This may include cases in which sellers, businesses or consumers have incurred substantial additional costs as a result of differing legal requirements in Member States.
73. Moreover, the Commission is keen to receive feedback on which of the possible options explained in part D (or other possible solutions) would be the most appropriate in order to solve the problems identified in the present communication.

⁽¹⁾ See for example Article 1:101(2) of the Principles of European contract law (see footnote 1, p. 2).

⁽²⁾ An example could be the Council Regulation on the Statute for a European Company on which the Council adopted a political orientation on 20 December 2000 (Council document 14.886-00, 1 February 2001).

⁽³⁾ Article 3(1)(b) of Directive 2000/35/EC provides for specific criteria for defining the date as of which interest shall become payable, if the date or period for payment is not fixed in the contract (30 days following the date of receipt by the debtor of the invoice or 30 days after the date of receipt of the goods or services). Article 3(1)(d) provides for a 'statutory interest rate' to be paid, unless otherwise specified in the contract.

⁽⁴⁾ See Article 6 CISG.

All parties wishing to contribute to the debate are requested to send their contribution **by 15 October 2001**. These contributions should be sent if possible in electronic form to European-Contract-Law@cec.eu.int, or otherwise in writing to the European Commission, rue de la Loi 200, B-1040 Brussels. Each contribution should be marked 'Communication on European

contract law'. In order to stimulate a real debate on the issue, the Commission has published this communication on the Commission's Europa website under http://europa.eu.int/comm/off/green/index_en.htm. Incoming contributions will be published on the same website if senders request.

ANNEX I

IMPORTANT COMMUNITY ACQUIS IN THE AREA OF PRIVATE LAW*General remarks*

The purpose of the following non-exhaustive presentation is to describe the *acquis communautaire* that is relevant to private law, in particular to contract law. The objectives of some directives are clearly aimed towards the harmonisation of national contractual rules. Other directives have a more indirect effect on these rules.

1. CONSUMER CONTRACT LAW

General comments

This section shows that among the lacunas relating to Community directives concerning contract law there is an absence of any reference to the formation of a contract and the sanctions that will apply in the case of non-adherence to obligations in the directives concerning pre-contractual information.

1.1. *Sale of consumer goods and associated guarantees***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***Objective*

To ensure consumer protection and strengthen consumer confidence in cross-border shopping by laying down a common set of minimum rules valid no matter where the goods are purchased.

Content

Directive 1999/44/EC harmonises the notion of lack of conformity of consumer goods with the contract, the consumers' rights in the case where the consumer buys a defective product and the conditions under which the consumer can exercise these rights. Consumer goods are defined, with exceptions, as any tangible movable item (Article 1(2)(b)). These must be in conformity with the contract of sale (Article 2(1)). Article 2(2) contains presumptions when consumer goods are deemed to be in conformity with the contract.

The seller is liable to the consumer for any lack of conformity that exists when the goods are delivered to the consumer that become apparent within a period of two years (Article 5(1)), unless at the moment of conclusion of the contract of sale the consumer knew or could not reasonably be unaware of the lack of conformity (Article 2(3)). Any lack of conformity becoming apparent within six months of delivery will be presumed to have existed at the time of delivery, unless proof to the contrary is furnished or this presumption is incompatible with the nature of the goods or the nature of the lack of conformity (Article 5(3)).

Upon a lack of conformity notified to the seller, the consumer is entitled to ask for the goods to be repaired or replaced free of charge within a reasonable period and without considerable inconvenience to the consumer (Article 3(2)). If repair or replacement is impossible or disproportionate, or if the seller has not remedied the lack of conformity within a reasonable period of time or without major inconvenience to the consumer, the consumer may ask for an appropriate reduction to be made to the price (Article 3(5)). Alternatively, where the lack of conformity is not minor, the consumer may request that the contract be rescinded (Article 3(6)).

When the final seller is liable to the consumer because of a lack of conformity, the final seller will be entitled to pursue remedies against the person responsible, under the terms of national law. The lack of conformity, however, must result from an act of commission or omission by the producer, a previous seller in the same chain of contracts or any other intermediary (Article 4).

Any guarantee ⁽¹⁾ will be binding as per the terms set down in the guarantee, written contract or the associated advertising (Article 6(1)). Further, the guarantee must feature in a written document, freely available for consultation before purchase showing in particular the duration and territorial scope of the guarantee, and the name and address of the guarantor (Article 6(2) and (3)). Where such a guarantee is offered and it does not conform to the provisions contained in the Directive the consumer may still require the guarantee to be honoured (Article 6(5)). Contractual terms or agreements waiving or restricting the rights resulting from the Directive are not binding on the consumer (Article 7(1)).

1.2. *Unfair terms in consumer contracts*

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

Objective

To eliminate unfair terms from contracts drawn up between a professional and a consumer.

Content

Directive 93/13/EEC applies to non-mandatory, non-negotiated contractual terms incorporated in contracts drawn up between a professional and a consumer (Article 1). A non-negotiated term is unfair when it establishes a significant imbalance, to the consumer's detriment, between the rights and obligations of the contracting parties (a list of unfair terms is annexed to the Directive) (Article 3). An allegedly unfair contractual term is assessed in the light of the nature of the goods or services covered by the contract, the circumstances in which the contract is drawn up and other terms in the contract or in another contract to which it relates (Article 4). Where there is doubt as to the meaning of a term, the interpretation most favourable to the customer will prevail (Article 5). In all cases, such contractual terms found to be unfair will not bind the consumer (Article 6).

1.3. *Package travel, package holidays and package tours*

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours

Objective

To approximate the laws, regulations and administrative provisions of the Member States concerning package travel, package holidays and package tours sold or offered for sale in the territory of the Community.

Content

Directive 90/314/EEC applies to the sale of a pre-arranged combination of transport, accommodation and or other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package. For the Directive to be applicable it is necessary that two or more of these elements are sold or offered for sale at an inclusive price and the service covers a period of more than 24 hours or includes overnight accommodation.

Any brochure made available to the consumer must indicate clearly and accurately the price, destination, itinerary and the means of transport used, type of accommodation, meal plan, passport and visa requirements, health formalities, timetable for payment and the deadline for informing the consumer in the event of cancellation (Article 3). Information contained in the brochure becomes part of the contract (Article 3). Further, before conclusion of a contract the organiser is required to provide, in writing, certain information regarding passports, visas (periods for obtaining them) and health formalities (Article 4).

The organiser of the package must supply in writing the times and places of intermediate stops, details of the place to be occupied by the traveller, the name address and telephone number of the organiser's local representative or, failing that, an emergency telephone number. There are additional details that must be provided where the journey is to involve the transport of a minor as well as information on optional contracts covering insurance or assistance (Article 4(1)). The consumer may transfer his/her booking to another person (Article 4(3)).

⁽¹⁾ Any additional undertaking given by a seller or producer over and above the legal rules governing the sale of consumer goods offered by the seller or producer.

The price stipulated in the contract may only be changed if this is expressly provided for in the contract and variations in price may only reflect changes in exchange rates, transportation costs, taxes or fees chargeable (Article 4(4)). Significant alterations to the contract entitle the consumer to withdraw from the contract without penalty and, should the consumer withdraw, he is entitled to reimbursement of the sums paid (Article 4(6)). The organiser is responsible for the failure to perform or the improper performance of the contract and, where appropriate, the consumer is entitled to compensation for the non-performance of the contract (Article 4(7)).

Member States shall take the necessary steps to ensure that the organiser and/or retailer party to the contract is liable to the consumer for the proper performance of the obligations arising from the contract. The organiser and/or retailer is/are liable for any damage arising from failure to perform or improper performance provided that failure to perform or improper performance is attributable to their fault or that of another supplier of services. The quantum of damage may be limited in accordance with the international conventions. Where damage results that is not of the nature of personal injury, a reasonable contractual limitation can be placed on the quantum of compensation for this damage (Article 5).

The consumer must communicate any failure in the performance of a contract which he perceives on the spot to the supplier of the services concerned and to the organiser and/or retailer in writing or any other appropriate form at the earliest opportunity. This obligation must clearly and explicitly stated in the contract (Article 5). In cases of complaint, the organiser and/or retailer or his local representative, if there is one, must make prompt efforts to find appropriate solutions (Article 6).

1.4. ***Contracts negotiated away from business premises***

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

Objective

To protect consumers against dishonest business practices in connection with contracts negotiated away from business premises.

Content

Directive 85/577/EEC applies to contracts, involving a payment of over EUR 60 (Article 3), entered into between a trader and a consumer during an excursion organised by the trader away from his business premises. The Directive is also applicable to contracts entered into during a visit by a trader to a consumer's home or place of work. Provided the visit does not take place at the express wish of the consumer or, where the consumer requested the visit, the consumer could not have known the extent of the trader's commercial activities the Directive is applicable. Finally, the Directive also applies to contracts in respect of which the consumer makes a contractual or non-contractual offer to receive a visit from or take part in an excursion organised by a trader (Article 1). The trader is required to inform consumers in writing about their right to cancel the contract (Article 4). Once informed, consumers have seven days within which to exercise this right of cancellation (Article 5).

1.5. ***Consumer credit***

Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit as modified by Directives 90/88/EEC and 98/7/EC

Objective

To harmonise the rules governing consumer credit while ensuring a high level of consumer protection.

Content

Directive 87/102/EEC applies to credit agreements whereby a creditor grants a consumer credit in the form of a delayed payment, a loan or a similar financial arrangement (Article 1). Credit agreements are to be made in writing incorporating the essential terms of the contract including a statement of the annual percentage rate of charge and the conditions under which this may be amended (Article 4).

When credit is advanced on a current account other than on credit card accounts, the consumer has only to be informed of certain matters in writing at or before the time the agreement is concluded. In particular, the consumer must be informed of the credit limit (if there is one), the annual rate of interest and charges applicable and any changes thereof and the procedure for terminating the agreement (Article 6). Where there is a consumer credit agreement granted for the acquisition of goods with a right of repossession granted to the creditor, Member States must lay down the conditions under which the goods may be repossessed and ensure there is no unjustified enrichment (Article 7).

Under a consumer agreement, where a consumer has discharged his or her obligations before the due date, the consumer is entitled to an equitable reduction in the cost of the credit (Article 8). Consumer rights are to remain unaffected by any assignment to a third party (Article 9). The Member State must also ensure further consumer safeguards. These safeguards include protection if the consumer uses bills of exchange, promissory notes and cheques for making payments or giving securities (Article 10). Also, under certain conditions, there is a right of redress against the grantor of credit when the consumer has purchased goods or services under a credit agreement from a person other than the creditor and the goods or service are not supplied or are not in conformity with the contract. This right is in particular available only if the consumer has sought redress against the supplier but failed to obtain satisfaction (Article 11).

1.6. *Distance contracts*

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

Objective

To approximate the laws, regulations and administrative provisions of the Member States concerning distance contracts between consumers and suppliers by laying down a common set of minimum rules.

Content

Directive 97/7/EC applies to any contract ('distance contract') concerning goods or services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier. For Directive 97/7/EC to be applicable, the supplier, for the purpose of the contract, must make exclusive use of one or more means of distance communication up to and including the moment at which the contract is concluded (Article 2(1)).

Prior to the conclusion of a distance contract, the consumer must be provided with clear and comprehensible information, complying with the principles of good faith in commercial transactions. In particular, this information must state: the identity and, possibly, the address of the supplier; the characteristics of the goods or services and their price; delivery costs; the arrangements for payment and delivery or performance; the existence of the right of withdrawal; the period for which the offer or the price remains valid and the minimum duration of the contract, where applicable, the cost of using the means of distance communication. Where dealings are by telephone, the identity of the caller and commercial purpose of the call must be made clear at the beginning (Article 4).

The consumer must receive written confirmation or confirmation in another durable medium (electronic mail) at the time of performance of the contract. The following information must also be given in writing: arrangements for the exercise of the right of withdrawal; the place to which consumer complaints are to be addressed; information relating to after-sales service; conditions under which the contract may be rescinded (Article 5).

The consumer has the right of withdrawal with regard to most distance contracts. Where the supplier has met his obligations relating to the provision of information, the consumer has at least seven working days to cancel the contract without penalty. Where the supplier has failed to meet his obligations concerning information, this period is extended to three months (Article 6(1)). The supplier is obliged to repay the amounts paid by the consumer within 30 days after the exercise of the right of withdrawal (Article 6(2)).

In principle, the supplier has 30 days in which to perform the contract (Article 7(1)). Where the supplier fails to perform his side of the contract, the consumer must be informed and any sums paid refunded (Article 7(2)). In some cases it is possible to supply substitute goods and services. Member States shall ensure that appropriate measures exist to allow a consumer to request cancellation of a payment where fraudulent use has been made of his payment card in connection with distance contracts covered by Directive 97/7/EC. In the event of fraudulent use of a payment card, the consumer is to be credited with the sums paid or have them returned (Article 8).

Where unsolicited goods are supplied, the consumer's failure to reply does not constitute consent (Article 9). The use of an automatic calling machine or fax machine by a supplier to communicate with a consumer requires the prior consent of the consumer. Other means of distance communication that allow individual communication may be used only where there is no clear objection from the consumer (Article 10).

Public bodies, consumer and professional organisations may take action before the courts or competent administrative bodies in the event of disputes. (Article 11).

1.7. *Timeshare immovable property*

Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis

Objective

To approximate laws, regulations and administrative provisions of the Member States on the protection of persons who purchase the right to use immovable property on a timeshare basis.

Content

Directive 94/47/EC covers aspects relating to information on the constituent parts of the contract relating to the right to use immovable property on a timeshare basis and the procedures for cancelling and withdrawing from such contracts (Article 1). On request, the vendor is required to supply a document containing a general description of the property. Also certain minimum items referred to in the Annex to the Directive (identity and domicile of the parties concerned, number of the building permit, etc.), along with details of how to obtain further information, should this be required, is to be supplied in the same document. This information forms an integral part of the contract (Article 3).

The purchaser has a right of withdrawal. This may be done within 10 days of signing the contract without giving any reason with the effect of the cancellation of the contract (Article 5(1)). Only those expenses incurred as a result of the conclusion of and withdrawal from the contract are liable to be repaid (Article 5(3)). The purchaser's right of cancellation may be exercised within three months of signing the contract if the information required by the Directive is not included. In this eventuality the purchaser is not required to make any repayment (Article 5(1)). Any clauses incorporated into the contract that are contrary to the rights of the purchaser and/or the responsibilities of the vendor under the Directive will not be binding on the purchaser (Article 8).

1.8. *Distance-marketing of consumer financial services*

Proposal for a directive concerning the distance-marketing of consumer financial services, and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC ⁽¹⁾

Objective

To establish a harmonised and appropriate legal framework for distance contracts, pertaining to financial services while ensuring an appropriate level of consumer protection.

Content

This proposal for a directive aims to establish common rules to govern the conditions under which distance contracts for financial services are concluded. The proposal covers contracts for retail financial services negotiated at a distance by any means that does not require the simultaneous physical presence of the parties to the contract.

By the proposal there is a duty to provide information to the consumer prior to the conclusion of the contract. The supplier is required to transmit a draft contract to the consumer, in writing or other durable form, provided that the consumer gives his consent to the transmission. The draft contract is to include all the contractual terms and conditions, together with a summary of them.

⁽¹⁾ As at 5 December 2000, this proposal was awaiting a Council Common Position following a first reading in the European Parliament where modifications were made to the original proposal.

The proposal refers to the entitlement to a reflection period for the consumer prior to the conclusion of a contract and the right of withdrawal with some exemptions, together with the obligation of payment for services rendered provided these are rendered before the consumer exercises the right of withdrawal.

Payments made by electronic means can be cancelled if fraudulent use is made of such means and limits are placed on certain means of distance communication.

2. SYSTEMS OF PAYMENT

2.1. *Late payments in commercial transactions*

Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions

Objective

To combat late payments made as remuneration in commercial transactions within the European Union, whether the delays in payment are between enterprises or between the public sector and an enterprise.

Content

Directive 2000/35/EC contains a wide range of measures to combat late payments in commercial transactions within the European Union. The Directive applies to all payments made as remuneration for commercial transactions (Article 1). These measures apply to all delays in payment between enterprises and between the public sector and enterprises (Article 2(1)).

In addition the Directive lays down a legal framework to discourage late payments. In particular, Member States shall ensure that interest shall become payable from the day following the date or the end of the period for payment set down in the contract. If the date or period for payment is *not* fixed in the contract, interest shall become payable automatically, without the necessity of a reminder, 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment. Where there is a procedure of acceptance or verification by which conformity of the goods or services with the contract is to be ascertained, interest shall become payable 30 days after the date of the procedure. If the debtor receives an invoice or an equivalent request for payment earlier or on the date on which such acceptance or verification takes place, time runs from the later date. The interest rate charged for late payments shall be that applied by the European Central Bank plus a margin of seven percent at least (Article 3).

Member States shall also provide in conformity with the applicable national provisions that the seller retains title to goods until they are fully paid, if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods (Article 4). Member States are also to provide that, where the debt is not in dispute, an enforceable title can be obtained irrespective of the amount of the debt, usually within 90 calendar days of the lodging of the creditor's action or application at the court or other competent authority (Article 5).

2.2. *Cross-border credit transfers*

Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers

Objective

To establish minimum information and performance requirements for cross-border credit transfers up to EUR 50 000, effected in the currencies of the Member States and in euro within the European Union and the European Economic Area and carried out on the initiative of an originator. The overriding purpose of Directive 97/5/EC is to enable funds to be transferred from one part of the Community to another rapidly, reliably and inexpensively. Debit transfers and payments by cheque are not within the scope of Directive 97/5/EC.

Content(1) *Obligation of transparency vis-à-vis the customer (Articles. 3 and 4)*

Before carrying out a cross-border credit transfer, institutions must provide *general* information on the arrangement of such a transfer. In particular, the execution time, the method of calculating any commission fees and charges payable by the customer to the institution, the value date applied by the institution, details of complaint and redress procedures, the reference exchange rates used.

After a cross-border credit transfer has been carried out, institutions must provide information consisting of a reference enabling the customer to identify the transfer, the actual (original) amount of the transfer, the amount of any charges or commissions payable by the customer and the value date applied by the institution.

If the originator has specified that the transfer charges are to be completely borne by the beneficiary or that the charges shall be shared with the beneficiary, the latter must be informed of this by his own institution.

(2) *Minimum standards for the transfer*

In cases of cross-border credit transfers with stated specifications, the institution must, at the customer's request, either give an undertaking concerning the time needed for carrying out the transfer and the commission fees and charges, or refrain from accepting to carry out the transfer (Article 5).

The transfer must be effected within the agreed time limit. If this agreed time limit is not complied with, rules providing for compensation have been included in the Directive. No compensation is to be paid if the beneficiary's institution can establish that the delay is attributable to the originator or to the beneficiary (Article 6).

The originator's institution, any intermediary institution and the beneficiary's institution, after the date of acceptance of the cross-border credit transfer order, shall each be obliged to execute that credit transfer for the full amount thereof. This is the case unless the originator specifies that the costs of the cross-border credit transfer are to be borne wholly or partly by the beneficiary. Wrongful deductions by the originator's or the beneficiary's institution or any intermediary institution must be refunded (Article 7).

In cases where an originator's institution accepts a transfer order but the relevant amount is not credited to the account of the beneficiary's institution the money-back guarantee of up to EUR 12 500 plus interest and charges applies (Article 8).

2.3. *Settlement finality in payment and securities settlement systems***Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems***Objective*

To reduce the systemic risk inherent in payment and securities settlement systems and to minimise the disruption caused by the insolvency of a participant in such a system. Directive 98/26/EC was created to deal with the legal problems specifically linked to insolvency situations and bankruptcy (i.e. rights of foreign creditors) and to protect the development of a single monetary policy in the European monetary union (EMU) by promoting the efficiency of cross-border operations.

Content

Directive 98/26/EC protects 'netting' ⁽¹⁾ in securities settlement systems, insulates collateral given to the operators of these systems from the effect of bankruptcy and clarifies the law applicable to dispositions of collateral evidenced by recording in a register ('book-entry securities'). Settlement systems for securities are also protected by a general clause

⁽¹⁾ The conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed (Directive 98/26/EC, Article 2(k)).

against the insolvency of a participant in a system (Articles 1 and 2). The law governing rights and obligations arising from participation in a securities settlement system is the law applicable to that system (Article 3(3)). The Directive also covers collateral security provided in connection with operations of the central banks of the Member States in the performance of their central banking functions (including national monetary policy) (Article 4).

3. COMMERCIAL AGENTS

Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents

Objective

Directive 86/653/EEC coordinates national laws governing the legal relationships of self-employed commercial agents and their principals. An objective of social protection for commercial agents is pursued by the Directive, which sets minimum levels of harmonisation in this area. The provisions of the Directive cannot be derogated from to the detriment of a commercial agent. Agreements leading to a contract more favourable to the commercial agent are permitted. The Directive also lays down provisions concerning the remuneration of the agent and the right to indemnity or reparation where the agent suffers harm by the cessation of the contract.

Content

(1) Scope of application

Directive 86/653/EEC applies to contracts for goods (and not services) made between a self-employed intermediary (the commercial agent) and the principal. The commercial agent must have the continuing authority to negotiate the sale or the purchase of goods on behalf of and in the name of another person (the principal) or to negotiate and conclude such transactions on behalf of and in the name of that principal in return for payment.

Under the Directive the notion of a commercial agent has independence from the principal at its core, therefore excluding salaried commercial intermediaries and representatives of the principal from the scope of application of the Directive (Article 1). Certain further categories of commercial agents are also excluded from the scope of the Directive (Article 2).

(2) Obligations imposed on parties to the contract (Articles 3 to 5)

Directive 86/653/EEC imposes a non-excludable obligation on a commercial agent to look after his principal's interests and act dutifully and in good faith. The duty includes the obligation on the agent to make proper efforts to negotiate and, where appropriate, conclude the transactions upon which he has received instructions. The agent must also communicate to the principal all the necessary available information and comply with the reasonable instructions given by principals.

The principal has a reciprocal non-excludable obligation to act dutifully and in good faith. In particular, to provide the commercial agent with necessary documentation relating to the goods concerned. The principal must also obtain for the commercial agent the information necessary for the performance of the agency contract, in particular notification once the principal anticipates that the volume of commercial transactions will be significantly lower than that which could have been normally expected.

(3) Remuneration for the commercial agent (Articles 6 to 12)

In the absence of an agreement to the contrary made between the parties and without prejudice to the application of compulsory provisions of the Member States, a commercial agent shall be entitled to the remuneration that is customary for commercial agents in the market upon which the agent is operating. Where there is no commercial customary practice, the commercial agent shall be entitled to reasonable remuneration taking into account all the aspects of the transaction (Article 6).

Where the commercial agent is remunerated wholly or in part by commission a commercial agent shall be entitled to commission on transactions concluded during the period covered by the agency contract. The commission arrangement envisaged under the Directive is as follows:

- (1) the agent is entrusted with a specific geographical area or group of customers or alternatively, where the agent has an exclusive right to a specific geographical area or group of customers; and
- (2) the transaction has been entered into with a customer belonging to that area or group (Article 7).

The entitlement to a commission on commercial transactions continues after the agency contract has been terminated (Article 8), provided the payment of the commission is equitable in the circumstances (Article 9). The commission becomes due once the transaction has been executed and should not be paid any later than on the last day of the month following the quarter in which it became due (Article 10).

The principal shall supply the commercial agent with a statement of the commission due within a set time period. The agent is entitled to demand that he be provided with all information that is available to the principal that is needed to check the amount of commission due to him (Article 12).

(4) Form, duration and termination of the contract (Articles 13 to 20)

Directive 86/653/EEC leaves open the possibility of concluding an agency contract in verbal or written form, it is left to the Member States to determine whether an agency contract shall be valid if not evidenced in writing. Regardless of this, each party is entitled to receive from the other, on request, a signed written document setting out the terms of the agency contract (Article 13).

A fixed-term agency contract that continues to be performed beyond its agreed duration shall be converted into an agency contract for an indefinite period (Article 14).

An agency contract for an indefinite term may be terminated by notice equal to one month for every year that the contract remains in force. The parties cannot agree a shorter term than this. If the parties agree a longer term than this then the period of notice must be the same for both parties. Member States may fix the period of notice at four to six months, once the contract has been effective for a corresponding number of years (Article 15).

Directive 86/653/EEC also imposes an obligation on all Member States to take necessary measures to ensure the commercial agent has a right to indemnity (Article 17(2)) or compensation (Article 17(3) and (4)) where the principal has terminated the agency contract without justification (Article 18). This right may not be derogated from before the agency contract expires.

Further, in contracts relating to commercial agency, a restraint-of-trade clause will only be valid if it is no more than two years in duration and only to the extent that it is concluded in writing. The restraint-of-trade clause must also relate to a geographical area or group of customers and geographical area entrusted to the commercial agent, and to the kind of goods covered by his agency under the contract. The provisions in Directive 86/653/EEC do not affect the provisions of national law restricting the validity or enforceability of restraint of trade clauses or reducing the obligations in the parties resulting from such agreements (Article 20).

4. POSTING OF WORKERS

Directive 96/71/CE of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services

Objective

To remove uncertainties and obstacles which may impede the freedom to provide services, by increasing legal certainty and allowing identification of the terms and conditions of employment applicable to workers who carry out temporary work in a Member State other than that whose law governs their employment relationship; to avoid the risks of abuse and exploitation of posted workers.

Content(1) *Scope*

The Directive applies to undertakings which, in the framework of the transnational provision of services, post workers to the territory of a Member State:

- on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended,
- to an establishment or to an undertaking owned by the group,
- as a temporary employment undertaking, to a user undertaking.

(2) *Obligations*

Member States must ensure that undertakings guarantee posted workers a central core of mandatory protective rules laid down in the Member State in which the work is carried out:

- by law, regulation or administrative provision, and/or
- by collective agreements or arbitration awards which have been declared universally applicable, in so far as they concern the activities set out in the Annex to the Directive (construction).

Conditions of work and employment to be covered are:

- maximum work periods and minimum rest periods,
- minimum paid annual holidays,
- minimum rates of pay, including overtime rates,
- conditions of hiring-out of workers, in particular by temporary employment undertakings,
- health, safety and hygiene at work,
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people,
- equality of treatment between men and women and other provisions of non-discrimination.

5. *LIABILITY FOR DEFECTIVE PRODUCTS*

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999).

Objective

Directive 85/374/EEC (as amended by Directive 1999/34/EC) is an internal market measure striking a balance between a high level of consumer protection and a stable legal framework of liability for producers, thus eliminating competition distortion due to diverging liability regimes and facilitating the free circulation of goods under common liability rules.

Content

Council Directive 85/374/EEC of 25 July 1985 sets common liability rules in the case of damages caused to individuals by defective goods. A defective product is any movable that is lacking the safety which the public at large is entitled to expect, taking into account the presentation of the product, the reasonably expected use of the product and the time when the product was put into circulation (Articles 2 and 6).

Directive 1999/34/EC extended the scope of Council Directive 85/374/EEC to primary agricultural products. Producer liability in each Member State is limited to a threshold of no lower than EUR 70 million for death or personal injury caused by identical items with the same defect (Article 16). The Directive does not affect the rights victims may have under existing legislation on contractual and non-contractual liability.

The producer (or the importer) is liable to compensate the death or personal injury and damages to property caused by the defective product, whether or not he is negligent. The victim has to prove the existence of actual damage, a defect in the product and a causal link between both (Article 4). The Directive introduces joint and several liability where several persons are liable for the same damage (Article 5). The producer is not liable if he proves the existence of exonerating circumstances by which he has reduced or, where appropriate, no liability in case of the victim's contributory negligence (Article 7).

The victim must file an action for damages before the end of a three-year limitation period. Under the Directive, the producer is not liable for damage 10 years after the product has been put on the market (Article 10). Waivers of liability are not valid.

6. ELECTRONIC COMMERCE

6.1. *Electronic commerce services*

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce')

Objective

Directive 2000/31/EC seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States. (Article 1(1)).

Content

The Directive contains a number of specific obligations relevant concerning contract law, in particular the following.

- Member States shall ensure that their legal systems allow contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of being made by electronic means (Article 9(1)).
- Transparency rules applicable to the contractual process are to be respected by the service provider. These rules provide that the service provider must clearly, comprehensively and unambiguously ensure certain information is given to the consumer; in particular, the different technical steps to follow to conclude the contract. For example, whether or not the concluded contract will be filed by the service provider and will be accessible, the technical means for identifying and correcting input errors prior to the placing of the order and the languages offered for the conclusion of the contract. Further, the service provider must also indicate any relevant codes of conduct to which he subscribes and information on how these codes can be consulted electronically. This information must be supplied prior to the order being placed by the recipient of the service (Article 10(1) and (2)).
- Where the recipient of the service places his order through technological means, the service provider has to acknowledge receipt of the recipient's order without undue delay. Receipt takes place where the party to whom the communication is addressed is able to access them. (Article 11(1)).
- Member States shall ensure that the service provider makes available to the recipient of the service the technical means allowing him to identify and correct input errors, prior to the placing of the order. (Article 11(2)).

6.2. *Electronic signatures*

Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures

Objective

To ensure the proper functioning of the internal market in the field of electronic signatures, by creating a harmonised and appropriate legal framework for the use of electronic signatures within the European Community.

Content

Directive 1999/93/EC enforces the recognition of electronic signatures that have previously been unrecognised, solely by reason of their electronic form. The Directive sets criteria which forms the basis for the legal recognition of electronic signatures by focusing on certification services (Article 1). Electronic signatures that conform to the requirements of Directive 1999/93/EC will automatically be accorded the same status as written signatures in the law of the Member State concerned. These signatures are then admissible as evidence in legal proceedings in the same manner as handwritten signatures (Article 5).

7. FINANCIAL SERVICES

General remarks

Directives concerning banking, assurance and movable valuables set down a financial and prudential regime that regulates the conditions of establishment and the allocation of services of financial institutions in the European Community. By definition, therefore, these do not consist of private law arrangements. The sole texts that concern aspects of private law relevant to contract law and financial services are as follows.

7.1. *Banking*

7.1.1. Solvency ratios for credit institutions

Directive 96/10/EC of the European Parliament and of the Council of 21 March 1996 amending Directive 89/647/EEC as regards recognition of contractual netting by the competent authorities (solvency ratios for credit institutions)

Objective

To contribute to the harmonisation of prudential supervision and to strengthen solvency standards among Community credit institutions, thereby protecting depositors and investors and maintaining banking stability.

Content

The amended Directive on solvency ratios applies to credit institutions (defined in Directive 77/780/EEC). The own funds of each credit institution are expressed as a proportion of the risk-adjusted value of its assets and off-balance-sheet business (Article 5(1)).

The risk-adjusted value of assets and off-balance-sheet business relates primarily to the credit risks associated with counterpart default, and a distinction is made between the degrees of risk associated with particular assets and off-balance-sheet items, and with particular categories of borrower (Article 5).

Weightings vary between low-risk items and high-risk items (Article 6). The prescribed minimum ratio is 8 % (Article 10). After January 1993, credit institutions are required to maintain at all times a ratio of at least 8 %. It is the responsibility of the national supervisory authority to ensure this ratio is adhered to (Article 10(3)).

7.2. **Insurance**

7.2.1. Life insurance

Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life insurance (first life assurance Directive)

Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (second life assurance Directive)

Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive)

Objective

To facilitate the effective exercise of the right to supply life assurance services and lay down special rules relating to freedom to provide cross-frontier services in the life assurance field.

Content

These Directives in the field of life assurance lay down a detailed regime in the field of life insurance. This includes a very detailed obligation to provide essential information concerning a proposed contract for the provision of life assurance. Some of the clauses contained in the Directives are of general application, whereas others apply only to the provision of cross-border services. The Directives are applicable to both individual and group life assurance, but not to the management of group pension funds.

Directive 92/96/EEC draws a distinction between those insurance contracts undertaken on the initiative of the policy holder and a second category, including all individual contracts not resulting from such initiatives. Life insurance contracts *not* entered into upon the initiative of the policy holder, the second category, gain a greater degree of protection.

Contracts entered into on the initiative of the policy holder are subject to the control of the State of the establishment of the insurer. Before entering into a life assurance contract of his own initiative in another Member State, the policy holder must sign a statement that he is aware that the commitment is subject to the rules of supervision of the Member State of the insurer who is to cover the commitment. The own-initiative policy holder also has a period of between 15 to 30 days within which to cancel the life assurance contract (Directive 90/619/EEC, Article 15).

A different regime applies to contracts other than those made on the initiative of the policy holder. These are subject to the application of and the supervision by the Member State in which the service is supplied, the supervisory rules of the Member State of commitment (risk country control). This is the case so long as the parties do not make a valid choice of the law of another country.

There are also provisions on the choice of law that is to govern the relationship between the insurer and policy holder. In general, the law applicable will be the law of the Member State of where the commitment was made. There are, however, provisions to allow the freedom to choose a different contract law.

Every contract subject to European Community life insurance rules is subject only to indirect taxes on premiums applicable in the Member State of commitment. The tax arrangements of the country of the policy holder are therefore applied for the benefit of that country.

7.2.2. Insurance other than life insurance

Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive)

Objective

To lay down rules for the exercise of cross-frontier non-life insurance which balances the needs of freedom of services and consumer protection.

Content

Directive 92/49/EEC amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) establishes the obligation on a non-life insurer to inform a prospective party to an insurance contract of certain details. In particular the insured must be informed of the Member State in which the head office or, where appropriate, the branch of the insurer with which the contract is to be concluded is or is to be situated. Any document that grants insurance cover must state the address of the head office or where appropriate the branch of the insurance undertaking granting cover (Article 43). Directive 92/49/EEC also places an obligation on the insurer to inform the insured of the law applicable to the contract before the conclusion of proposed insurance contract (Article 31).

7.3. **Transactions in securities**

7.3.1. Publication of listing particulars

Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing-up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing

Objective

Council Directive 80/390/EEC aims to provide actual and potential investors in securities with adequate and objective information, by coordinating the requirements regarding the listing particulars to be published by issuers of securities. Council Directive 80/390/EEC also coordinates the requirements for the drawing-up, scrutiny and distribution of listing particulars to be published for the admission of securities to official stock exchange listing.

Content

Listing particulars shall contain all necessary information, on both natural and legal persons, to enable investors and their investment advisers to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuers and of the rights attaching to such securities (Article 4). Similar requirements are applicable to the auditing of accounts (which are included in the listing particulars).

Violation of these obligations normally will lead to misleading information being published. This will be sanctioned as violation of contract law or tort law depending on the provisions of national law.

The designated competent authorities are required to check that listing particulars meet the requirements set out in Directive 80/390/EEC and, consequently, may be liable in private law in the case of approval of listing particulars containing misleading information (Article 18). Directive 80/390/EEC does not affect the liability of the competent authority. This continues to be governed solely by the applicable national law (Article 18(4)).

7.3.2. Public offer prospectus

Public offer prospectus — Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public

Objective

To coordinate the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public for the first time.

Content

Directive 89/298/EEC applies to securities, except open-ended collective investment undertakings and euro-securities, which are offered for the first time to the public for subscription or sale in a Member State (Article 1(1)).

Directive 89/298/EEC imposes the requirement for the prospectus to be published by the person making the public offer (Article 4). The prospectus should include all information needed to make an informed financial assessment of the securities (Article 11). There are less-detailed rules of disclosure where there is no application for official listing.

Directive 89/298/EEC does not impose the obligation of examination of the public offer prospectus before publication by competent authorities; this is left to the discretion of the Member State. The only public offer prospectuses that can be mutually recognised and used for multinational offers, however, are those which have been drafted and examined according to the requirements of Directive 80/390/EEC on listing particulars (Article 21).

7.3.3. Investment services in the securities field

Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field.

Objective

To liberalise access to stock exchange membership and financial markets in host Member States for investment firms authorised to provide the services concerned in their home Member States.

Content

Council Directive 93/22/EEC requires a Member State to draw up rules of conduct which investment firms shall observe at all times (Article 10). These rules must implement the principles set out in the Directive. National rules are obliged to require, amongst other things, that the investment firm acts honestly and fairly in conducting its business activities in the best interest of its client. The investment firm is also required to seek from its client information regarding their financial situation, investment experience and objective with regard to the services requested. The investment firm is further required to make adequate disclosure of relevant material information and avoid conflicts of interests (Article 11).

These are not contract law provisions — many provisions might influence a contractual situation, however, they are not part of contract law themselves.

8. PROTECTION OF PERSONAL DATA

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

Objective

To harmonise national laws relating to the processing of personal data and protect the rights and freedoms of persons, in particular the right to privacy.

Content

Directive 95/46/EEC seeks to ensure a high level of personal data protection in the European Union. The Directive regulates at Community level the basic civil right of privacy as regards the processing of personal data, especially in view of a substantial increase in the cross-border flow of personal data caused by the internal market.

(1) The contract

- Data processing is permissible if it is necessary for the performance of a contract to which the data subject (a natural person who can be identified, directly or indirectly) is party or in order to take steps at the request of the data subject prior to entering in to the contract (Article 7).

- Where a processor (the natural or legal person) processes data on behalf of a controller (the natural or legal person which determines the purposes and means of the processing of personal data), there must be a contract or other legal act that governs their relationship. This contract or other legal act should include certain guarantees that bind the processor to the controller, for instance that the processor shall act only on instructions from the controller (Article 17).

(2) Transfer of personal data to third countries

Directive 95/46/EC stipulates that the transfer of personal data to third countries can take place only if the third country in question ensures an 'adequate level of protection' (Article 25). There are, however, special situations which by way of derogation and in the absence of an adequate level of data protection ensured by the recipient country, the transfer of personal data to third countries may take place (Article 26).

(3) Agreements and expressions of will (*Rechtsgeschäft* in German legal literature)

Article 2(h) of Directive 95/46/EC defines the data subject's consent in general terms. Specific requirements for the data subject's consent to processing of personal data are listed in Article 7 (unambiguous consent) and Article 8 (explicit consent).

(4) Liability

Article 23 of Directive 95/46/EC regulates the liability for unlawful processing of personal data and compensation to the data subject for the damage suffered.

9. COPYRIGHT AND RELATED RIGHTS

General remarks

Contract law in the field of intellectual property rights (IPR) has been left to national legislative provisions to a large extent. Nevertheless, international protection of copyright and related rights is the subject of three major multilateral agreements. Namely, these are the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961) and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs Agreement, 1995). Furthermore, the European Community and its Member States have already decided to ratify the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) which significantly update international protection for intellectual property and improve the means to fight piracy worldwide (see Annex I).

In the field of copyright and related rights the European Community has adopted five Directives (see below). There is a further Directive dealing with the protection of layout. These Directives set out specific rules concerning in particular, the contents of the substantive rights, the remuneration of right-holders and the administration of that remuneration.

Licensing contracts and contractual relations concerning copyright have not been subject to overall harmonisation within the Community. On the other hand, rights administration or licensing in general and the issue of collective management in particular has been addressed in several Community instruments.

9.1. *Rental, lending and other rights related to copyright in the field of intellectual property*

Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

Objective

To harmonise the law relating to rental right, lending right and certain rights related to neighbouring rights, including the right of fixation, reproduction, broadcasting and distribution to the public, so as to provide a high level of protection of literary and artistic property.

Content

Council Directive 92/100/EEC provides for an exclusive right to authorise or prohibit the rental and lending of both works subject to copyright and other objects subject to neighbouring rights.

Provisions of the Directive refer to contractual relationships between performers and authors on the one side, and film producers on the other (Article 2(5), (6) and (7)). They contain rules on the presumption of transfer of certain rights in film productions including the right for authors and performers to equitable remuneration for rental of phonograms and films that cannot be waived (Article 4). The administration of this right may be entrusted to collecting societies representing authors or performers. The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences (Articles 2(4), 7(2) and 9(4)).

9.2. Term of protection of copyright and certain related rights**Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights***Objective*

Council Directive 93/98/EEC establishes a total harmonisation of the period of protection for all types of works and subject matter protected by copyright and related rights in the Member States.

Content

Under Council Directive 93/98/EEC the duration of protection for copyright lasts 70 years after the death of the author (or 70 years after an anonymous work is lawfully available to the public), and 50 years for the neighbouring rights after the event setting the term running (Article 1). Directive 93/98/EEC also deals with other issues, such as the protection of previously unpublished works (Article 4) critical and scientific publications (Article 5) and photographic works (Article 6).

9.3. Computer programs**Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs***Objective*

Directive 91/250/EEC aims to harmonise Member States' legislation concerning the protection of computer programs in order to create a legal environment that will afford a degree of security against unauthorised reproduction of such programs.

Content

Directive 91/250/EEC gives copyright protection to computer programs as literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. It provides a number of exclusive rights and lists some exceptions to these rights (including the important possibility of de-compiling a program to make it interoperable with other programs). It also provides rules on some issues of enforcement and harmonises the level of originality required for protection.

The Directive addresses issues of contractual relations by granting minimum rights to users. In particular, the right for any lawful user of a computer program to make a back-up copy of the program, 'in so far as it is necessary for that use', may not be set aside by contract (Article 5(2)). The possibility to observe, study or test the functioning of the program (Article 5(3)) cannot be prevented by contract. Furthermore, the Directive provides that any contractual provisions contrary to the de-compilation exception (Article 6) are null and void.

9.4. **Databases**

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases

Objective

Directive 96/9/EC provides harmonised protection, for both original databases, through the Directive's copyright provisions, and non-original databases through a sui generis regime.

Content

Any original collections of work and compilation of data or other materials are covered by the copyright provisions contained in Directive 96/9/EC (Article 1). In addition, the Directive introduces a sui generis regime setting out to protect non-original databases made with substantial investments for a period of 15 years (Article 10).

The sui generis right may be transferred, assigned or granted under contractual licence (Article 7(3)). The Directive also contains a provision similar to those in Directive 91/250/EEC on the legal protection of computer programs (Article 8). In particular, any contractual agreement contrary to the possibility for the lawful user to extract and reutilise insubstantial parts of the database for any purposes whatsoever, shall be null and void.

9.5. **Satellite broadcasting and cable retransmission**

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission

Objective

To fill the gaps in the protection of programmes broadcast across borders where satellite broadcasting or cable retransmission are involved. Directive 93/83/EEC aims to remove legal uncertainties resulting from disparities in Member States' levels of protection of copyright and neighbouring rights in national rules and uncertainties concerning the applicable law in the field of cross-border satellite broadcasting and the cable retransmission of programmes from other Member States.

Content

Directive 93/83/EEC completes the Community's initiative on establishing a European audiovisual area, namely the missing elements to the 'television without frontiers Directive' (89/552/EEC), which does not contain provisions on copyright.

Directive 93/83/EEC states the principle that broadcasting and cable retransmission rights should only be acquired by (individual or collective) agreements (instead of statutory licence systems) (Articles 3 and 8). The Directive also stipulates the mandatory administration by collecting societies of cable retransmission rights (Article 9). It also provides for the assistance of one or more mediators in the case that no agreement is concluded regarding authorisation of the cable retransmission of a broadcast (Article 11) and aims to prevent the abuse of negotiating positions (Article 12).

9.6. **Topographies of semiconductor products**

Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products

Objective

To provide for the legal protection of the layout designs (topographies) of semiconductor products, whether individual components or a part or the whole of an integrated circuit on a semiconductor chip.

Content

Directive 87/54/EEC protects the intellectual property rights of the creator of a layout design, providing that the design is a product of the creator's own intellectual effort and is not commonplace in the industry. It includes the rights to authorise or prohibit (a) the reproduction of a protected design and (b) its commercial exploitation or importation of a design or a product incorporating the design.

Ongoing legislative actions

On the basis of the relevant provision (Article 14 ter) in the Berne Convention, the European Commission proposed a Directive on the artist's resale right (*droit de suite*)⁽¹⁾. Resale right is the right whereby the author, or after his death, his heirs or other beneficiaries, receives a percentage of the resale price of a work in the field of visual arts each time it is resold.

The Council has already reached a Common Position; according to Article 6(2) of the Common Position the administration of the resale right may be entrusted to collecting societies.

The draft Directive on copyright and related rights in the information society aims to ensure an internal market in copyright and related rights with particular emphasis on new products and services. It will adjust and complement the existing Community framework on copyright and related rights to respond to the new challenges of technology, to the benefit of both right-holders and users. Furthermore, it will implement the main obligations in substance of the WIPO-Internet Treaties at European Community level. Council has already reached political agreement on a Common Position. Final adoption of the Directive on copyright and related rights in the information society could be attained by early 2001⁽²⁾.

10. PUBLIC PROCUREMENT

Ongoing legislative action

The European Commission has published a proposal to simplify and modernise the Directives on the coordination of procedures for the award of public supply contracts, public service contracts and public works contracts⁽³⁾. The proposal is presented in the form of a single text for supply, works and service contracts in order to codify the procedures relating to these in one single text in order to maintain consistency during the legislative process. Title II of the proposal concerns the specific rules applicable to contracts. The proposal is at an early stage in the legislative process and a Council Common Position is expected no earlier than June 2001.

10.1. *Public service contracts***Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts***Objective*

To coordinate procedures for the award of public service contracts in so far as such procurement is not already covered by procedures for the award of public works contracts and public supply contracts.

Content

Directive 92/50/EEC applies to public service contracts the estimated value of which is not less than EUR 200 000 net of VAT including estimated total remuneration of the service provider. The Directive covers contracts for services and goods or supplies together if the value of the services exceeds that of the goods or supplies. The Directive does not apply to contracts governed by certain international agreements or to be awarded under the specific procedure of an international organisation, to contracts declared secret or the execution of which must be accompanied by special security measures, nor to public service contracts awarded on the basis of an exclusive right enjoyed under national provisions compatible with the Treaty.

⁽¹⁾ This proposal is currently awaiting second reading by the Council of Ministers (7 February 2001).

⁽²⁾ This proposal is currently awaiting second reading by the European Parliament (7 February 2001).

⁽³⁾ OJ C 29, 30.1.2001, p. 11.

For all services, contracting authorities must define technical specifications consistent with European standards. For those services defined as priority services (Annex IA) there are additional rules that apply concerning choice of award procedures and rules governing design contests. Contracting authorities are obliged to adhere to one of three types of procedure when awarding a contract for priority services. Firstly there is the open procedure where all interested contractors may submit tenders. Alternatively there is the restricted procedure where only contractors who have been invited to submit tenders can do so. Finally there is the negotiated procedure in specified cases listed in the Directive, whereby the contracting authority consults contractors of its choice and negotiates the terms of the contract with one or more of them. A contracting authority may also decide to organise a design contest.

For priority services the Directive also sets out common advertising rules through the use of model notices. There are also common rules on participation and the award of contracts to ensure that these are awarded on the basis of stated criteria. Service providers who are bankrupt, in liquidation, having their affairs administered by the court or being wound up may be excluded from selection.

10.2. *Public works contracts*

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts

Objective

To consolidate and coordinate procedures for the award of public works contracts.

Content

Directive 93/37/EEC applies to contracts ⁽¹⁾ that have either the execution or both the execution and design, of works involving building, civil engineering, installation or building completion work, or the execution, by whatever means, of a work corresponding to the requirements specified by the contracting authority.

Member State contracting authorities financing more than 50 % of a works contract, with an estimated value net of VAT above certain thresholds ⁽²⁾ awarded by themselves or another entity, are required to ensure that such a contract must comply with the Directive.

Contracting authorities are obliged to adhere to one of three types of procedure when awarding a contract. Firstly there is the open procedure where all interested contractors may submit tenders. Alternatively there is the restricted procedure where only contractors who have been invited to submit tenders can do so. Finally there is, in specified cases listed in the Directive, the negotiated procedure whereby the contracting authority consults contractors of its choice and negotiates the terms of the contract with one or more of them.

The Directive also obliges contracting authorities to give technical specifications consistent with European standards for the works in general or contractual documents relating to each contract. There is the obligation to publish notices, in compliance with certain prescribed models and deadlines, giving certain items of information on the contract.

The Directive also lays down rules on the selection of contractors and award of contracts. An unsuccessful applicant or tender who requests reasons for the rejection of his application of tender is to be informed of this within 15 days. This is to be communicated in the form of a detailed written report on each contract awarded, identifying the contracting authority, the successful applicants or tenderers and the reason for their selection. This report must also list the unsuccessful applicants or tenders and the reason for their rejection, the successful bidder and the reason why this tender was chosen.

⁽¹⁾ Excluding those concerning the production, transport and distribution of drinking water; contracts awarded by entities whose main activity is to produce or distribute energy, and contracts relating to telecommunications. Contracts declared secret or which concern the protection of the Member State's basic interests are also exempt from this Directive. Also certain contracts governed by international agreement or the particular procedure of an international organisation are excluded.

⁽²⁾ Not less than EUR 5 million, this in national currencies is revised every two years from 1 January 1992.

10.3. *Review procedures to the award of public supply and public works contracts*

Council Directive 89/665/EEC of 21 December 1989 on the coordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts as amended by Council Directive 92/50/EEC

Objective

The Directive seeks to ensure that the review procedures are available to sufficiently interested parties having been or likely to be injured by an alleged infringement (Article 1).

Contents

In all Member States decisions of contracting authorities which are in breach of law are subject to remedies. Such remedies must include, in particular, interim measures including suspension of the award procedure in question, setting aside of the unlawful decisions and discriminatory conduct (Article 2).

ANNEX II

LIST OF INTERNATIONAL INSTRUMENTS RELATING TO SUBSTANTIAL CONTRACT LAW ISSUES

1. UNITED NATIONS CONVENTIONS

CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS adopted in New York in 1974 (as amended by the PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS of 11 April 1980)

Status:

The Convention, as amended by the Protocol, is in force (neither the Protocol nor the Convention has been signed by any EU Member State). The former German Democratic Republic was a participant by virtue of its accession on 31 August 1989 to the Protocol amending the Convention and therefore also to the Convention of 1974.

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS adopted in Vienna in 1980

Status:

Only the United Kingdom, Portugal and Ireland have not acceded to the Convention, i.e. are not contracting parties. The Convention is in force for the rest of the EU Member States.

UNCITRAL LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS adopted in 1992

Status:

Not legally binding

UNITED NATIONS CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES adopted in New York in 1988

Status:

The Convention is not in force. Ten actions are required. No EU Member State has signed.

UNCITRAL LEGAL GUIDE ON ELECTRONIC FUNDS TRANSFERS adopted in 1987

Status:

Not legally binding

UNCITRAL MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS adopted in 1992.

Status:

Binding once enacted in domestic law

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT adopted in New York in 1996

Status:

The Convention entered into force on 1 January 2000. No EU Member State has signed.

UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA adopted in Hamburg in 1978 (HAMBURG RULES)

Status:

The Convention entered into force on 1 November 1992.

Signed by Denmark (18.4.1979), Finland (18.4.1979), France (18.4.1979), Germany (31.3.1978), Portugal (31.3.1978) and Sweden (18.4.1979).

Ratified by Austria (29.7.1993).

UNITED NATIONS CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE adopted in Vienna in 1991

Status:

The Convention is not in force. Five actions are required.

Signed by France (15.10.1991) and Spain (15.4.1991).

UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT adopted in 1996, with additional Article 5 bis as adopted in 1998

Status:

Binding once enacted in domestic law

UNCITRAL LEGAL GUIDE ON DRAWING UP INTERNATIONAL CONTRACTS FOR THE CONSTRUCTION OF INDUSTRIAL WORKS adopted in New York in 1987

Status:

Not legally binding

2. UNIDROIT (THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF CONTRACT LAW) INSTRUMENTS

UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS adopted in 1994

Status:

Not legally binding

CONVENTION RELATING TO A UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS signed in the Hague in 1964

Status:

In force in the United Kingdom (ratified 31.8.1967). Denounced by Italy (11.12.1986), Germany (1.1.1990), the Netherlands (1.1.1991), Belgium (1.11.1996) and Luxembourg (20.1.1997)).

Signed by Greece (*ad referendum*, 3.8.1964) and France (31.12.1965).

CONVENTION RELATING TO A UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS signed in The Hague on 1 July 1964

Status:

In force in the United Kingdom (ratified 31.8.1967), and denounced by Italy (11.12.1986), Germany (1.1.1990), the Netherlands (1.1.1991), Belgium (1.11.1996) and Luxembourg (20.1.1998).

Signed by Greece (*ad referendum*, 3.8.1964) and France (31.12.1965).

CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS signed in Geneva on 17 February 1983

Status:

Ratified by Italy (16.6.1986) and France (7.8.1987).

Has not been signed by other EU Member States.

The Convention will only enter into force when accepted by 10 contracting States (Article 33).

UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING adopted in Ottawa on 28 May 1988

Status:

The Convention is in force.

Ratified by France (with declaration, 23.9.1991) and Italy (29.11.1993).

Signed by Finland (30.11.1990) and Belgium (21.12.1990).

UNIDROIT CONVENTION ON INTERNATIONAL FACTORING adopted in Ottawa on 28 May 1998

Status:

The Convention is in force.

Ratified by France (with declaration, 23.9.1991), Italy (29.11.1993) and Germany (20.5.1998).

Signed by Finland (30.11.1990), Belgium (21.12.1990) and the United Kingdom (31.12.1990).

3. COUNCIL OF EUROPE INSTRUMENTS

EUROPEAN CONVENTION ON COMPULSORY INSURANCE AGAINST CIVIL LIABILITY IN RESPECT OF MOTOR VEHICLES signed in Strasbourg on 20 April 1959

Status:

The Convention entered into force on 22 September 1969.

Ratified by Austria (10.4.1972), Denmark (24.6.1969), Germany (5.1.1966), Greece (29.5.1961) and Sweden (22.6.1969).

Signed by Belgium (20.4.1959), France (20.4.1959), Italy (20.4.1959) and Luxembourg (20.4.1959).

CONVENTION ON THE LIABILITY OF HOTELKEEPERS CONCERNING THE PROPERTY OF THEIR GUESTS signed in Paris on 17 December 1962

Status:

The Convention entered into force on 15 February 1967.

Ratified by Belgium (14.9.1972), France (19.9.1967), Germany (14.11.1966), Ireland (7.5.1963), Italy (11.5.1979), Luxembourg (25.1.1980) and the United Kingdom (12.7.1963).

Signed by Austria (17.12.1962), Greece (17.12.1962) and the Netherlands (17.12.1962).

CONVENTION ON THE UNIFICATION OF CERTAIN POINTS OF SUBSTANTIVE LAW ON PATENTS FOR INVENTION signed in Strasbourg on 27 November 1963

Status:

The Convention entered into force on 1 August 1980.

Ratified by Belgium (23.9.1999), Denmark (29.9.1989), France (27.2.1980), Germany (30.4.1980), Ireland (25.1.1968), Italy (17.2.1981), Luxembourg (14.9.1977), Netherlands (2.9.1987), Sweden (3.3.1978) and the United Kingdom (16.11.1977).

EUROPEAN CONVENTION ON ESTABLISHMENT OF COMPANIES signed in Strasbourg on 20 January 1966

Status:

The Convention is not in force. Five ratification actions are needed.

Signed by Belgium (20.1.1966), Germany (5.11.1968), Italy (24.3.1966) and Luxembourg (18.9.1968).

EUROPEAN CONVENTION ON FOREIGN MONEY LIABILITIES signed in Paris on 11 December 1967

Status:

The convention is not in force. Three ratification actions are needed.

Ratified by Luxembourg (9.2.1981).

Signed by Austria (11.12.1967), France (11.12.1967) and Germany (11.12.1967).

EUROPEAN AGREEMENT ON 'AU PAIR' PLACEMENT signed in Strasbourg on 24 November 1969

Status:

The agreement entered into force on 30 May 1971.

Ratified by Denmark (29.4.1971), France (5.2.1971), Italy (8.11.1973), Luxembourg (24.7.1990) and Spain (11.8.1988).

Signed by Belgium (24.11.1969), Finland (16.7.1997), Germany (2.10.1976) and Greece (22.8.1979).

EUROPEAN CONVENTION ON THE PLACE OF PAYMENT OF MONEY LIABILITIES signed in Basle on 16 May 1972

Status:

The Convention is not in force. Five ratification actions are needed.

Signed by Austria (16.5.1972), Germany (16.5.1972) and the Netherlands (16.5.1972).

EUROPEAN CONVENTION ON THE CALCULATION OF TIME LIMITS signed in Basle on 6 May 1974

Status:

The Convention entered into force on 28 April 1983.

Ratified by Austria (11.8.1977) and Luxembourg (10.10.1984).

Signed by Sweden, Portugal, Spain, Germany, Belgium, Italy and France.

EUROPEAN CONVENTION ON CIVIL LIABILITY FOR DAMAGE CAUSED BY MOTOR VEHICLES signed in Strasbourg on 14 May 1973

Status:

The Convention is not in force. Three ratification actions are needed.

Signed by Germany (14.5.1973).

EUROPEAN CONVENTION ON PRODUCTS LIABILITY IN REGARD TO PERSONAL INJURY AND DEATH signed in Strasbourg on 27 January 1977

Status:

The Convention is not in force. Three ratification actions are needed.

Signed by Austria (11.8.1977), Belgium (27.1.1977), France (27.1.1977) and Luxembourg (27.1.1977).

CONVENTION ON CIVIL LIABILITY FOR DAMAGE RESULTING FROM ACTIVITIES DANGEROUS TO THE ENVIRONMENT signed in Lugano on 21 June 1993

Status:

The Convention is not in force. Three ratification actions are needed.

Signed by Finland (21.6.1993), Greece (21.6.1993), Italy (21.6.1993), Luxembourg (22.6.1993), the Netherlands (21.6.1993) and Portugal (6.3.1997).

EUROPEAN CONVENTION RELATING TO QUESTIONS ON COPYRIGHT LAW AND NEIGHBOURING RIGHTS IN THE FRAMEWORK OF TRANSFRONTIER BROADCASTING BY SATELLITE signed in Strasbourg on 11 May 1994

Status:

The Convention is not in force. Seven ratification actions are needed.

Signed by Belgium (6.8.1998), Germany (18.4.1997), Luxembourg (11.5.1994), Spain (11.5.1994) and the United Kingdom (2.10.1996).

CIVIL LAW CONVENTION ON CORRUPTION signed in Strasbourg on 4 November 1999

Status:

The Convention is not in force. Fourteen ratification actions are needed.

Signed by Belgium (8.6.2000), Denmark (4.11.1999), Finland (8.6.2000), France (26.11.1999), Germany (4.11.1999), Greece (8.6.2000), Ireland (4.11.1999), Italy (4.11.1999), Luxembourg (4.11.1999), Sweden (8.6.2000) and the United Kingdom (8.6.2000).

CONVENTION RELATING TO STOPS ON BEARER SECURITIES IN INTERNATIONAL CIRCULATION signed in The Hague on 28 May 1970

Status:

The Convention entered into force on 11 February 1979.

Ratified by Austria (11.8.1977), Belgium (23.5.1973), France (23.5.1973) and Luxembourg (23.5.1973).

Signed by Germany (28.5.1970), Ireland (23.4.1974), the Netherlands (23.4.1974) and the United Kingdom (28.5.1970).

EUROPEAN CONVENTION ON CERTAIN INTERNATIONAL ASPECTS OF BANKRUPTCY signed in Istanbul on 5 June 1990

Status:

The Convention is not in force. Three ratification actions are needed.

Signed by Belgium (13.6.1990), France (5.6.1990), Germany (5.6.2000), Greece (5.6.1990), Italy (15.1.1991) and Luxembourg (5.6.1990).

ANNEX III

STRUCTURE OF THE ACQUIS AND RELEVANT BINDING INSTRUMENTS

1. THE CONTRACT

1.1. **General**

Directive 90/314/EEC on package travel is the only one giving a legal definition of the term 'contract': 'contract means the agreement linking the consumer to the organiser and/or the retailer' (Article 2(5)).

There are pre-formulated standard contracts and individually negotiated ones. Directive 93/13/EEC on unfair terms in consumer contracts stipulates when a contract term shall be regarded as not individually negotiated (Article 3(2)) and therefore is submitted to control according to this Directive.

Directive 2000/35/EEC on late payments, too, provides for some elements to be taken into consideration in determining whether an agreement is unfair (Article 3(3) to (5)).

As an expression of a general principle in consumer protection law, contract terms must be drafted in plain and intelligible language (see Directives 93/13/EEC on unfair terms (Article 5), 90/314/EEC on package travel (Article 3(2)), 1999/44/EC on sales of consumer goods (Article 6(2)), 97/7/EC on distance contracts (Article 4(2)) as well as the proposal for a directive on distance contracts in financial services (Article 3(2))).

Unfair terms used in a consumer contract shall not be binding on the consumer (Article 6(1) of Directive 93/13/EEC on unfair terms).

A few Directives contain provisions reflecting common principles such as the principle of good faith (see Directive 86/653/EEC on self-employed commercial agents (Article 3) and 93/13/EEC on unfair terms (Article 3)) and the principle of the most favourable interpretation of contractual provisions (see Article 5 of Directive 93/13/EEC on unfair terms).

1.2. **Conclusion of a contract: offer and acceptance**

The United Nations Convention on Contracts for the International Sales of Goods (CISG) contains provisions dealing with the formation of the contract (Articles 14 to 24).

The CISG describes the circumstances under which a proposal for concluding a contract can be regarded as an offer. Furthermore, it addresses issues of effectiveness, withdrawal and rejection of an offer as well as the issue of acceptance of an offer.

According to Article 9 of Directive 97/7/EC on distance contracts as well as Article 9 of the proposal for a directive on distance contracts in financial services, the supply of goods and services without being ordered by the consumer is prohibited (inertia selling). The absence of a response does not constitute consent.

1.3. **Form**

According to Directive 2000/31/EC on electronic commerce, Member States shall ensure that their legal systems allow contracts to be concluded by electronic means.

Directive 86/653/EEC on self-employed commercial agents stipulates that each party is entitled to receive from the other on request a signed written document. But in general, contracts might also be validly concluded only verbally (Article 13).

Other Directives in the consumer protection area prescribe the written form (see Directives 87/102/EEC on consumer credit (Articles 4 and 6(1)), 90/314/EEC on package travel (Article 4(2)(b) and 94/47/EC on time-sharing (Article 4)).

Directive 1999/93/EC on a framework for electronic signatures sets criteria for according the same status to electronic signatures as to handwritten signatures.

1.4. Termination

The CISG confirms that a contract can be terminated by agreement of the parties (Article 29).

According to Article 15 of Directive 86/653/EEC on self-employed commercial agents, each party may terminate a contract concluded for an indefinite period but only by notice (one to three months depending on the duration of the contract).

Some consumer protection Directives give a right of withdrawal without penalty and without giving any reason (see Directive 97/7/EC on distance contracts (Article 6: period of seven days) as well as in the proposal for a directive on distance contracts in financial services (period of 14 to 30 days), 85/577/EEC on contracts negotiated away from business premises (Article 5: period of seven days), and 94/47/EC on time-sharing (Article 5: period of 10 days)). Rules in this respect also can be found in Directive 90/619/EEC on life insurance (Article 15: period of 14 to 30 days).

2. PRECONTRACTUAL AND CONTRACTUAL OBLIGATIONS

2.1. Obligations of the party providing the service or the goods

2.1.1. Information requirements

2.1.1.1. General/form

Many Directives stipulate that the information has to be given in writing (see Directives 85/577/EEC on contracts negotiated away from business premises (Article 4), 87/102/EEC on consumer credit (Articles 4 and 6(1)), 90/314/EEC on package travel (Article 4(1)(a) and (b)), 94/47/EC on time-sharing (Articles 3(1) and 2(4)), 97/7/EC on distance contracts (Article 5) as well as the proposal for a directive on distance contracts in financial services (Article 3)).

The information must be given in a clear and comprehensible way (see Directives 2000/31/EC on electronic commerce (Article 10(1)), 97/7/EC on distance contracts (Article 5), 85/577/EEC on contracts negotiated away from business premises (Article 4), 90/314/EEC on package travel (Article 4(1)), 94/47/EC on time-sharing (Article 3(2))).

The information given becomes an integral part of the contract and binds the supplier of the service in the cases of Directives 94/47/EC on time-sharing (Article 3(2)) and 90/314/EEC on package travel (Article 3(2)).

There are provisions concerning modifications of the information and the communication of these to the consumer as well (see Directives 94/47/EC on time-sharing (Article 3(2)), 90/314/EEC on package travel (Article 3(2)) and 87/102/EEC on consumer credit (Article 6(2))).

2.1.1.2. Examples of information requirements and time at which the information is to be given

(aa) Prior to the conclusion of the contract

There are many directives with regard to consumer protection providing for information requirements to be given prior to the conclusion of the contract. Basically, such information, i.e., regards the main characteristics of the goods or services, price and additional costs, arrangements for payment, rights and obligations of the consumer, as well as procedures to terminate the contract and to take redress (see Directives 97/7/EC on distance contracts (Article 4; the information might also be given in good time during the performance of the contract or at the latest at the time of delivery (Article 5)), 87/102/EEC on consumer credit (Article 6; the information might also be given only at the time of the agreement), 94/47/EC on time-sharing (Article 3(1)), 90/314/EEC on package travel (Articles 3 and 4(1)(a)), 92/96/EEC on life assurance (Article 31(1) and Annex II, with specific information on benefits, surrender and paid-up values), 97/5/EC on cross-border credit transfer (Article 3, with specific information on the execution time, commission fees and charges).

According to Directive 2000/31/EC on electronic commerce, information has to be given on the different technical steps to follow to conclude a contract, how the contract will be filed, and the languages offered to conclude the contract, as well as on existing codes of conduct (Article 10(1) and (2)).

(bb) At the time of the conclusion of the contract

The Directive on legal assistance, 87/344/EEC, obliges the insurer to inform the policy holder about his right to ask for an arbitration procedure and to acknowledge him of his right of free choice of a lawyer.

Directive 90/314/EEC on package travel stipulates in Article 4(2) that certain elements listed in the Annex have to be part of the contract.

(cc) After conclusion of the contract

According to the third life assurance Directive 92/96/EEC, in a given case the insurer has to provide the insured with an update of information concerning the insurance company and the policy conditions. He has to inform the insured about benefits and bonuses (Article 31(2) and Annex II). Similar, according to Directive 87/102/EEC on consumer credit, the consumer shall be informed of any change in the annual rate of interest and other relevant charges (Article 6(2)).

The cross-border credit transfer Directive 97/5/EC stipulates that after a cross-border credit transfer has been carried out, institutions must provide information on a reference to enable the customer to identify the transfer, the actual amount of the transfer, the amount of charges, etc. (Article 4).

According to Article 12 of Directive 86/653/EEC on self-employed commercial agents, a commercial agent shall be supplied with a statement of the commission due, including components used for the calculation.

According to Directive 90/314/EEC on package travel, the consumer has to be given additional information on the journey (Article 4(1)(b)).

According to Directive 85/577/EEC on contracts negotiated away from business premises, information has to be given on the right of cancellation together with the coordinates of the person against whom the right may be exercised (Article 4).

2.1.2. *Commercial guarantees*

There is a special Directive dealing with commercial guarantees: Directive 1999/44/EC on sales of consumer goods with provisions defining a guarantee, describing the content etc. (Article 6).

2.1.3. *Execution of the obligations*

The CISG stipulates the seller's obligation to deliver the goods and provides rules on the definition of the place and time of delivery (Articles 30 and 31).

According to Article 7(1) of Directive 97/7/EC on distance contracts, the supplier must execute the order within a maximum of 30 days from the day following that on which the consumer forwarded his order.

The proposal for a directive on distance contracts in financial services provides an express consent of the consumer concerning the execution of the contract before the end of the period of notice of his right of withdrawal (Article 5). The CISG leaves it to the buyer to decide if to take delivery or refuse to take delivery if the seller delivers the goods before the date fixed.

2.1.4. *Conformity of the performance with the contract*

Directive 1999/44/EC on sales of consumer goods stipulates the seller's obligation to deliver goods in conformity with the contract and his consequent liability in the case of lacking conformity (Articles 2 and 3 as well as Articles 35 to 44 CISG).

Directive 90/314/EEC on package travel, too, requires Member States to ensure that the organiser and/or retailer are liable for the proper performance of its obligations (Article 5(2)).

2.2. **Obligations of the other party of the contract**

As far as the obligations of the buyer are concerned, the CISG stipulates that the buyer has to pay the price of the goods and take delivery of them (Articles 53 and 60). The Convention provides rules on the definition and place and time of the payment as well (Articles 55 to 59).

Directive 86/653/EEC on self-employed commercial agents distinguishes between a negotiated remuneration and a customary commission and gives rules on the entitlement to it (Articles 6 to 8) as well as on the extinction of the right (Article 11). If there is no agreement and no customary practice, the agent shall be entitled to reasonable remuneration (Article 6(1)).

3. **CONSEQUENCES OF IN-EXECUTION OF CONTRACTUAL OBLIGATIONS**

3.1. **Withdrawal, rescission and cancellation**

The relevant Directives give different options to terminate a contract.

According to Directive 90/314/EEC on package travel, the consumer has the right to withdraw from the contract without penalty in the case where the organiser of the travel arrangement alters significantly an essential term of the contract.

Some Directives expressly stipulate rights of cancellation (see Directive 94/47/EC on time-sharing (Article 5(1), period of three months, and Article 7 for contracts on credit)).

In others, provisions in this regard are missing (Directive 87/102/EEC on consumer credit).

In cases of withdrawal by the consumer as well as in cases of cancellation by the supplier for another cause than the fault of the consumer, some Directives provide for the consumer a right to be repaid all sums paid by him under the contract (see Directives 97/7/EC on distance contracts (Article 7(2)) and 90/314/EEC on package travel (Article 4(6))).

3.2. **Contract-specific rights**

Due to the specific objective of the Directive, various rights of the consumer in case of a performance being not in conformity with the contract are stipulated in the most detailed way in Directive 1999/44/EC on sales of consumer goods (see Article 3: repair or replacement, price reduction (see also Article 5 of Directive 90/314/EEC on package travel), rescission). Along the same lines Directive 2000/35/EC on late payments provides for retention of title before the delivery of the goods (Article 4).

The CISG contains a certain number of remedies for breach of contract by the seller (e.g. the buyer may require under certain conditions performance by the seller of his obligations, delivery of substitutes, or to remedy the lack of conformity by repair; he may also declare the contract void or may reduce the price (see Articles 46 to 52)).

3.3. **Compensation**

Provisions on compensation in the case of non-delivery or delivery of goods and services in a way not respecting contractual requirements can also be found in the CISG (Articles 45(1)(b), and 74 to 77), Directive 86/653/EEC on self-employed commercial agents (Article 17), the cross-border credit transfer Directive 97/5/EC, and Directive 90/314/EEC on package travel (Article 4(6) and (7)).

Specific compensation in the case of an unlawful processing operation is provided for in Directive 95/46/EC on the protection of individuals with regard to the processing of personal data (Article 23(1)). Directive 2000/35/EC on late payments provides that unless the debtor is not responsible for the delay, the creditor shall be entitled to compensation for all costs incurred due to the late payment (Article 3(1)(e)). Moreover, interest rates as a penalty are provided for in Directive 2000/35/EC on late payments in the case of a fixed date for a payment as well as in the case where the date is not fixed (Article 3).

4. EXTRA-CONTRACTUAL LIABILITY

4.1. Liability for defective products

Directive 85/374/EC on the responsibility for defective goods defines the notion of defective goods and sets common liability rules in the case of damages caused to individuals by defective goods. The producer or importer is liable to compensation whether or not he is negligent. The Directive introduces joint and several liability where several persons are liable for the same damage.

4.2. Protection of the right of privacy

Under Directive 95/46/EC concerning the protection of individuals with regard to the processing of personal data, specific requirements and conditions for the data subject's consent to the processing of the data are given (Article 7), while Directive 97/66/EC on the processing of personal data and the protection of privacy in the telecommunications sector (Article 12(1)) and Directive 97/7/EC on distance contracts (Article 10) only allow the use of automated calling systems or fax machines for the purpose of direct marketing in cases of prior consent. The latter provision also subordinates other means of distance communication which allow individual communications only where there is no clear objection from the consumer.

According to Articles 10, 11, 12 and 14 of Directive 95/46/EC, in cases of collection of data, information has to be given, *inter alia*, with regard to the purposes of the processing for which the data are collected and the data subject's right to access and rectify the data concerning him.

5. MANDATORY NATURE OF THE PROVISIONS

The consumer is not allowed to waive his rights according to most of the consumer protection Directives such as 85/577/EEC on contracts negotiated away from business premises (Article 6), 87/102/EEC on consumer credit (Article 14), 90/314/EEC on package travel (Article 5(3)), 94/47/EC on time-sharing (Article 8), 97/7/EC on distance contracts (Article 12(1)), 1999/44/EC on sales of consumer goods (Article 7), 93/13/EEC on unfair clauses, the proposal for a directive on distance contracts in financial services (Article 11), as well as Directive 85/374/EEC on the responsibility for defective goods (Article 12), and Directive 86/653/EEC on self-employed commercial agents (Article 19).

6. MINIMUM HARMONISATION

According to a number of consumer protection Directives, the Member States are allowed to introduce rules being more strict than agreed on for the Directives (see Directives 85/577/EEC on contracts negotiated away from business premises (Article 8), 87/102/EEC on consumer credit (Article 15), 90/314/EEC on package travel (Article 8), 94/47/EC on time-sharing (Article 11), 97/7/EC on distance contracts (Article 14), 1999/44/EC on sales of consumer goods (Article 8) and 93/13/EC on unfair terms (Article 8)).

Many Directives only give options for provisions, while in other Directives similar issues are regulated in a binding way (for example, for the provision on burden of proof, Directive 97/7/EC on distance contracts, on the one hand, and Directive 1999/44/EC on sales of consumer goods, on the other).
