

European Law

Implementing EC directives on consumer protection – short-term choices by the UK

by Professor Stephen Weatherill

The practical details of the implementation of EC directives are largely left for elaboration within the domestic system of the member states. According to art. 189 of the EC Treaty, a directive:

'shall be binding, as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

'BOLTING ON' LEGISLATION

The European Court has typically been unwilling to make significant inroads into the broad discretion allowed to the member states in selecting methods of implementation, contenting itself with the frequently repeated observation that the member states shall put in place 'effective' means of securing the objectives mapped out in EC directives. There is an appealing division of function inherent in the notion of the directive as an EC legal act. The Community sketches the broad objective; the member states choose the method of implementation which best suits their established institutional and legal traditions. Directives will not have the same detailed impact state by state; but they ought to be absorbed into the tried-and-trusted administrative structures of the states, fastening on to what already exists.

However two recent examples of UK practice in implementing EC directives on consumer protection illustrate the weaknesses of the process. In both instances, the UK has simply 'bolted on' implementing legislation to a pre-existing structure of legal protection. The advantage of eschewing consolidation is speed but this is exceeded by the disadvantage of intransparency. The lesson which ought to be grasped is that enduringly successful domestic implementation of EC law involves far more than the simple one-shot paper transposition on which focus is usually directed.

UNFAIR TERMS

Directive 93/13 on unfair terms in consumer contracts (OJ 1993 L95/29) was implemented in the UK by the *Unfair Terms in Consumer Contracts Regulations 1994* (SI 1994/3159). These regulations came into force six months after the deadline but the major objection goes beyond tardiness. No attempt was made to integrate the new regime drawn from the directive with the pre-existing system of control under (primarily) the *Unfair Contract Terms Act 1977* ('UCTA 1977') – so both co-exist.

The new regime instituted by the 1994 regulations is broader than UCTA 1977 in that it is capable of catching all types of contractual term, in contrast to UCTA which is restricted to terms that exclude or restrict liability (or similar – UCTA s. 13). The 1994 regulations are also broader in that they are capable of affecting some contracts which are excluded from the reach of UCTA, most notably insurance contracts. On the other hand, the 1994 regulations affect only consumer contracts, while UCTA touches (some) commercial contracts; and the 1994 regulations control only terms that have not been individually negotiated, a restriction not found in UCTA.

So understanding the state of the law now depends on a careful reading of two separate texts. It can be firmly stated that, where the new regime offers more extensive protection than UCTA, it adds to the scope of consumer protection in the UK; and, where the old regime is more extensive, it remains in place because Directive 93/13, as a minimum measure, does not pre-empt the introduction or maintenance of stricter national rules. But the law is now intransparent, which is a weakness of especial consequence in the consumer field. Consumer law needs to be clear if it is to be used – by consumers and by their legal advisers.

TIMESHARE

The choices made in implementing the EC's 1994 timeshare directive, Directive 94/47 (OJ 1994 L280/83) are more disturbing. The UK has transposed the timeshare directive into domestic law by a single piece of secondary legislation, the *Timeshare Regulations 1997* (SI 1997/1081), which came into force on 29 April 1997. The same problem confronted the UK in relation to this directive as had already been encountered in relation to Directive 93/13, in that the directive covered some ground already affected by a pre-existing UK measure, in this instance the *Timeshare Act 1992*. The *Timeshare Act 1992* was passed in response to the perceived problem that unwary consumers had been lured into contracts by skilled, high-pressure sellers and it included provision for a post-agreement 'cooling-off' period. The EC directive is similarly motivated, though with the added veneer that it aims at harmonisation of laws, but goes further in the direction of mandatory information disclosure (touching matters such as the nature of the property, the price and recurring costs and charges) and includes more extensive protection in the event of failure to meet those standards, including a longer cooling-off period.

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Once again, the solution chosen in the UK has been to implement the directive via statutory instrument to operate alongside the existing statute, instead of

seeking to consolidate the law. But, whereas the two measures dealing with unfair terms do not formally inter-relate, the *Timeshare Regulations 1997* cross-refer throughout to the *Timeshare Act 1992*. They amend stated sections of the 1992 statute and insert relevant new material into it. So whereas the 1994 regulations on unfair terms are comprehensible in their own right, but do not offer a complete statement of domestic law because of the lurking presence of UCTA 1997, the regulations on timeshare are unintelligible on their own and must be painstakingly fitted together with the *Timeshare Act 1992*.

EFFECT OF NON-CONSOLIDATION

Admittedly, the ultimate conclusion seems to be that the UK has not made errors in the detail of the law; the 1997 regulations accurately implement the directive by extending requirements of information disclosure and they provide for both civil and criminal consequences in the event of breach. And yet the exertions which await anyone attempting to ascertain the precise scope of his or her legal rights in timeshare dealing are so severe that, even though the scope of protection has been widened, it is impossible to regard this as satisfactory consumer protection law.

DANGER FOR CONSUMERS

The UK's predilection for short-term, bolt-on implementation is damaging to effective consumer protection. Lawyers may be accustomed to the practice of law reform through bolt-on statutory instruments but consumers are not. For consumer protection law, in particular, laws that are hard to understand tend to be laws that are not used (much) in practice. Consumer law needs to be simple to be effective but bolt-on transposition imperils pursuit of this objective.

The duration of the 'cooling off' period provides an example. A consumer wants to know how long he or she has to change his or her mind about an agreement to buy timeshare. It is a simple question but not one susceptible to a simple answer. The EC directive requires a minimum ten-day cooling off period, but this is already exceeded by the *Timeshare Act 1992*, which offers the consumer 14 days. The EC directive, as a measure of minimum harmonisation, does not pre-empt stricter rules, and accordingly UK consumers continue to

enjoy a 14-day window of opportunity within which they may cancel – although they need to remember that the same level of protection is not necessarily available should they buy outside the UK (what price harmonisation?).

Reflecting the directive's requirements, a new s. 5A is inserted into the *Timeshare Act 1992*. This extends the right to cancel where defined information has not been supplied to the consumer. If the agreement does not include, as terms set out in it, the information referred to in specified paragraphs of Schedule 1 to the Act, then the agreement may not be enforced against the consumer until the expiry of a period of three months and ten days, beginning with the day on which the agreement was entered into; and the consumer may cancel at any time during that period. The information, now found in Schedule 1, covers the detail required by the directive. If the relevant information is provided before three months have elapsed from the date of entry into the agreement, then the consumer has a ten-day period within which to cancel, beginning with the day on which information is received.

So, in the UK, the cooling off period may last anything between 14 days and three months plus ten days. The 1997 regulations have, in principle, extended the scope of consumer protection; but in doing so they have rendered the protective regime a great deal less intelligible to the consumer. Most consumer disputes are resolved without recourse to law, and it is far from clear that the consumer 'negotiating' with a trader is better served by generous rules that are hard to grasp than by less generous rules which are readily understood.

EUROPEANISATION

The debate about the impact of the EC directives on consumer protection draws in fascinating academic questions about the capacity of the English legal system to absorb influences from continental Europe. In particular, a large amount of attention has been devoted to the implications of the entry into English law via the *Unfair Terms in Consumer Contracts Regulations 1994* of the concept of good faith, which forms part of the assessment of unfairness under Directive 93/13. Good faith has never played an explicit role in general English contract law

(although for a judicial suggestion that English law employs legal techniques bearing different labels which may steer it towards results close to those reached by systems containing a requirement of good faith, see Bingham LJ (as he then was) in *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1988) 2 WLR 615).

Probably the unfairness/good faith control test under the regulations will be applied in a comparable manner to that of reasonableness, familiar under UCTA 1977. However even though litigation is likely to be relatively small-scale and typically inapt for involvement of the court in Luxembourg, the prospect of Europeanisation of such concepts through the fertile channel of art. 177's preliminary reference procedure cannot be discounted. For this reason the Department of Trade and Industry was wise to correct the bland comment made in its first consultation document of October 1993 on the implementation of the directive that reasonableness under UCTA and unfairness under the directive were essentially similar. It adopted a more cautious formula in its consultation document of September 1994, saying that the test drawn from the directive:

'is likely in most cases to lead to a result very similar to that of the test of reasonableness in the Act, but the two tests are not the same.'

WIDER QUESTIONS

Regulatory techniques found in EC consumer protection directives – such as mandatory pre-agreement information disclosure and post-agreement rights to withdraw – combine with the accretion of similarly motivated domestic interventions into the old laissez-faire notions of contract law rooted in the concept of freedom of contract. These trends ask some provocative questions about the fragmentation of the law of contract into a law of contracts. To what extent is there (and should there be) a consumer contract law separate from the general trends of commercial contract law, responding to consumer disadvantages flowing from potential inefficiencies and unfairness in the operation of the market? Viewed from this perspective, the EC interventions may fairly be criticised for their rather piecemeal approach to consumer protection, a problem which has its chief source in the constitutional linkage of the EC directives to internal market policy under art. 100 and, since the *Single*

European Act came into force in 1987, art. 100a.

But, in any system, the law of consumer protection is a notoriously fuzzy-edged category, drawing in public and private law. It does not seem to me to be plausible to blame the EU for disrupting the unity of contract law. Over the course of this century, a series of adjustments, statutory and common law in source, have shaped not only consumer contract law but also, for example, employment contract law and landlord-and-tenant contract law as distinct sub-species of contract law. EC-derived regulatory techniques such as pre-contractual intervention to secure information disclosure and post-agreement opportunities to withdraw from a deal may depart from rules of contract formation inspired by the principle of *caveat emptor*, in that they do not simply expect parties to rely on their own wits to wrest favourable terms; but such departure is today far from uncommon in the UK across a whole range of contracts.

THE BROADER DEBATES OBSCURED

But UK implementation practice obscures these debates about the prospects for, and the desirability of, firstly, Europeanisation of law and, secondly, the fragmentation of the law of contract. The reluctance to commit resources to consolidation impedes the structuring of a rational pattern. And, yet more concretely, the UK's predilection for short-term, bolt-on implementation is damaging to effective consumer protection. Lawyers may be accustomed to the practice of law reform through bolt-on statutory instruments but consumers are not. For consumer protection law, in particular, laws that are hard to understand tend to be laws that are not used (much) in practice. Consumer law needs to be simple to be effective but bolt-on transposition imperils pursuit of this objective. The Department of Trade and Industry produced a colourful booklet in the spring of 1997 under the title *The Timeshare Guide* which offers a summary of the law and even invites consumers to acquire a consolidated text from the DTI. This is a worthy attempt to make the best of a bad job. But the damage had already been done by the failure to achieve consolidation at a formal level.

EFFECTIVE IMPLEMENTATION'S WIDER SIGNIFICANCE

I would go further than my observation that the UK's implementation of the unfair terms directive and, a fortiori, the timeshare directive has created a complicated and intransparent system that is hard for consumers (or their advisers) to comprehend. An examination of the morass of cross-referencing in the *Timeshare Regulations 1997* and the detail of exclusions/provisos (which I have by no means portrayed in their full intricacy in this broad brush account) persuades me that, even though the text of the regulations is not in itself an inaccurate representation of the timeshare directive, the UK has fallen short of the standard required by EC law in the way the directive is implemented. For example, in *EC Commission v Federal Republic of Germany* (Case C-96/95), judgment of 20 March 1997, not yet reported, the European Court referred to the obligation on transposition to:

'guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.'

I do not think that standard is met in the case of the UK's transposition of the timeshare directive.

It is perhaps inevitable that both the Commission and the member states have a tendency to measure implementation practice by reference to the easy-to-monitor phenomenon of paper transposition. Either an implementing measure has been communicated to the Commission by the deadline stipulated in the directive or it has not. The Commission has a yes-or-no answer from the member states and the member states need not pursue the time-consuming job of consolidation of laws if they prefer to allocate scarce resources elsewhere. In this way the Commission's league tables are constructed. Neither the Commission nor the member states have any obvious short-term incentive to take the matter on to a deeper plane. But the effective absorption of EC norms into the administrative and legal culture of the member states demands a far more sophisticated awareness of the process of

implementation than is apparent in the notorious league tables. For the UK, the EC-derived rules on both unfair terms and timeshare are likely to permeate national legal consciousness only very slowly - because of the superficiality of the implementation process. The evasion of consolidation leaves a gulf between the law on paper and the law in practice which is especially damaging in the field of consumer protection.

LONG TERM DANGERS

More generally, a deeper appreciation of implementation trends is likely to become increasingly vital as the Community pursues the path of enlargement. As states with less well-developed administrative infrastructures seek to join the Community, it is all the more plausible that obligations undertaken on paper in the realms of, for example, environmental and consumer protection will have inadequate counterparts in practice. There is a risk that the process of implementation will become a sham unless more intensive possibilities evolve whereby there is an interrogation of the practical steps taken at national level to secure the meaningful application of Community law.

The distrust that failure - or suspected failure - to put in place relevant laws and administrative agencies is likely to generate among the member states is potentially damaging to the very integrity of the Community system. For this reason one can only applaud the choice of 'making the rules more effective' as the first of four strategic targets set out in the *Action Plan for the Single Market* communicated by the Commission to the European Council in Amsterdam in June 1997. And yet this can only become reality if the member states take seriously their obligations under art. 189 of the Treaty of Rome, instead of simply abusing the flexibility allowed by that provision by contenting themselves with short-term implementation choices. ⓐ

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