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## **The Consumer Rights Act 2015 – A bastion of European consumer rights?**

### Abstract:

The Consumer Rights Act 2015 seeks to consolidate in one place key consumer rights covering contracts for goods, services, and digital content and the law relating to unfair terms in consumer contracts. These are areas where there has been considerable activity at both a national and EU level. In particular, the Consumer Sales Directive 99/44/EC, the Unfair Terms in Consumer Contracts Directive 93/13/EEC and the Consumer Rights Directive 2011/83/EU have all made significant changes to Member State law, promoting the idea of the ‘informed consumer’ able to assert his or her rights in entering consumer contracts. This article will examine the extent to which the Act promotes the objectives of these Directives and the implications of the result of the June 2016 referendum that the UK should leave the EU. Does the Consumer Rights Act 2015 represent a valuable consolidation of EU and UK consumer policy? Are EU rights being absorbed into a distinctive *national* framework of consumer rights?

## **The Consumer Rights Act 2015 – A bastion of European consumer rights?**

**Professor Paula Giliker (University of Bristol)\***

‘For too long consumers and businesses have struggled to understand the complicated rules that apply when buying goods and services ... That is why the Consumer Rights Act is so important in setting out clear and updated consumer rights for goods, services and, for the first time, digital content ... Well-informed, confident consumers are vital for driving continued growth and building a stronger economy.’<sup>1</sup>

The Consumer Rights Act 2015 came into force on 1 October 2015.<sup>2</sup> It has been described by consumer organisation *Which?* as ‘the biggest shake up in consumer rights law in a generation’.<sup>3</sup> Its aims are ambitious: to simplify, strengthen and modernise UK consumer law, consolidating in one place fundamental consumer rights covering contracts for goods, services, digital content and the law relating to unfair terms in consumer contracts.<sup>4</sup> These goals are impressive and respond to genuine consumer needs. UK consumer law, prior to the Act, was unnecessarily complex, fragmented and, in places, unclear, for example where the

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<sup>1</sup> Jo Swinson (then Consumer Minister), Press Release 27 March 2015, ‘Biggest overhaul of Consumer Rights in a Generation’.

<sup>2</sup> This date applies to the main provisions of the Act, although some provisions were introduced at an earlier date. The Act applies to the United Kingdom (consumer rights are a reserved matter and not devolved to Scotland, Wales or Northern Ireland). See, generally, A Samuels, ‘The Consumer Rights Act 2015’ [2015] JBL 159.

<sup>3</sup> <http://www.which.co.uk/consumer-rights/regulation/consumer-rights-act>, accessed 24/8/2016.

<sup>4</sup> The Act further introduces easier routes for consumers and small and medium sized enterprises (‘SMEs’) to challenge anti-competitive behaviour through the Competition Appeal Tribunal (‘CAT’). These measures will not be dealt with in this article, although it should be noted that UK competition law is now heavily influenced by EU law: see A Jones and B Sufirin, *EU Competition Law: Text, Cases and Materials* (6<sup>th</sup> ed., Oxford: OUP 2016) Ch 13; R Whish and D Bailey, *Competition Law* (8<sup>th</sup> ed., Oxford: OUP 2015) pp 77ff. See, in particular, Council Regulation 1/2003.

law had not kept up with technological change, lacked precision or was couched in legalistic language.<sup>5</sup> A key reason for this complexity has been the introduction into UK law over the past 30 years of new consumer rights deriving from European directives.<sup>6</sup> Such measures have, in the main, been transposed into UK law using the ‘copy out’ approach, by which the draftsman, whenever possible, reproduces the wording of the directive usually within secondary legislation or (more rarely) by amending existing statutory provisions.<sup>7</sup> Examples of the difficulties which arise in integrating these new provisions into UK law may be found in relation to the Consumer Sales Directive 99/44/EC (CSD)<sup>8</sup> and the Unfair Terms Directive 93/13/EEC (UTD)<sup>9</sup>. These important directives introduced changes to the sale of goods, supply of services and general contracting regime, but their transposition into UK law proved to be less than smooth.<sup>10</sup> Miller describes the transposition of the CSD as bringing into UK law ‘a tortuous web of legal provisions, impenetrable to those unversed in the particular area of sales law’, leaving UK law ‘a disjointed, often incoherent, amalgam of 20<sup>th</sup> century consumer protection provisions grafted onto commercially rooted, and orientated rules.’<sup>11</sup> In particular, the decision to introduce a range of new consumer-friendly remedies *in addition* to those already existing in UK law left the consumer facing a confusing overlap of remedies.<sup>12</sup> This situation was further aggravated by the fact that the CSD is a minimum harmonisation directive, that is, it permits Member States to maintain or introduce more stringent protective measures if consistent with Treaty provisions.<sup>13</sup> While this ensures a minimum standard of protection across EU States, it inevitably leads to fragmentation, giving rise to diversity

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<sup>5</sup> As acknowledged by the Government in its Explanatory Notes to the Act, [5].

<sup>6</sup> See H Schulte-Nölke, C Twigg-Flesner and M Ebers (eds), *EC Consumer Law Compendium* (Munich: Sellier, 2008). Under Article 288(3) TFEU, the Member State has an obligation to transpose EU directives into the national legal system, although the choice of form and method of transposition is left to the national authorities.

<sup>7</sup> See UK Government’s Guiding Principles for EU Legislation, 5(c).

<sup>8</sup> 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, 07/07/1999 pp 12-16.

<sup>9</sup> Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts OJ L 095, 21/04/1993 pp 29-34.

<sup>10</sup> See, for example, C Twigg-Flesner and R Bradgate, ‘The EC Directive On Certain Aspects of the Sale of Consumer Goods and Associated Guarantees - All Talk and No Do?’ Web JCLI 2000(2) (<http://www.bailii.org/uk/other/journals/WebJCLI/2000/issue2/flesner2.html>, accessed 24/8/2016).

<sup>11</sup> L Miller, ‘After the Unfair Contract Terms Directive: Recent European Directives and English law’ (2007) 1 ERCL 88, 91.

<sup>12</sup> See Part 5A, Sale of Goods Act 1979 and similar provisions under Part 1B of the Supply of Goods and Services Act 1982. See C Willett, M Morgan-Taylor and A Naidoo, ‘The Sale and Supply of Goods to Consumers Regulations’ [2004] JBL 94.

<sup>13</sup> Notably Art. 34 TFEU. See Art 8(2), Consumer Sales Directive and, generally, S Prechal, *Directives in EC Law* (2nd rev ed, Oxford: OUP, 2005) Ch 5.

between the national laws of Member States,<sup>14</sup> and complexity at a local level where EU law is introduced alongside existing national provisions without any attempt to integrate the provisions into national law.

The transposition of the CSD received criticism from the Davidson Review in 2006,<sup>15</sup> which examined the introduction of European directives into domestic law and concluded that UK law on the sale of goods was unnecessarily complex.<sup>16</sup> Further criticisms have been raised in relation to the overlapping regimes dealing with unfair terms. Here again existing legislation (the Unfair Contract Terms Act 1977) was merely supplemented by a set of Regulations implementing the 1993 Unfair Terms Directive (again a minimum harmonisation directive).<sup>17</sup> The Law Commissions in their report of February 2005 recommended that a unified regime was needed to reduce uncertainty and confusion in this area for the benefit of consumers, businesses and enforcement authorities alike.<sup>18</sup>

In introducing the Consumer Rights Act 2015, the UK Government expressly acknowledged the difficulties which had arisen in implementing the Consumer Sales Directive 99/44/EC and the Unfair Terms Directive 93/13/EEC alongside pre-existing UK legislation.<sup>19</sup> The Act thus replaces earlier legislation which had implemented these EU Directives, responding to the concerns raised above.<sup>20</sup> It does not, perhaps surprisingly, implement the Consumer Rights

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<sup>14</sup> The Report of the European Commission on the implementation of the CSD, for example, found ‘significant diversity between national laws as a result of the use of the minimum clause and the various regulatory options provided by the Directive’: Commission Communication on the implementation of Directive 1999/44, COM (2007) 210, 24 April 2007, [12].

<sup>15</sup> *Davidson Review* (HM Treasury: November 2006). See also G Howells and C Twigg-Flesner, ‘Consolidation and simplification of UK consumer law’ (BIS, 2010). BIS consulted from July to October 2012 on proposals to clarify consumer rights in goods, services and digital content: *Enhancing Consumer Confidence by Clarifying Consumer Law* (BIS, 2012).

<sup>16</sup> See also Law Commission Report No 317/ Scottish Law Commission No.216, *Consumer Remedies for Faulty Goods* (November 2009).

<sup>17</sup> Art 8, Unfair Terms Directive.

<sup>18</sup> Law Commission Report No 292/Scottish Law Commission Report No 199, *Unfair Terms in Contracts* (2005).

<sup>19</sup> Explanatory Notes to Act, [5]-[18].

<sup>20</sup> In addition, the Act implements some provisions (in respect of enforcement) of: Regulation (EC) No. 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws; Regulation (EC) No. 765/2008 of the European Parliament and of the Council setting out the requirements for accreditation and market surveillance relating to the marketing of products; Directive 2001/95/EC of the European Parliament and of the Council on general product safety; and Directive 98/27/EC of the European Parliament and of the Council on injunctions for the protection of consumers’ interests.

Directive 2011/83/EU,<sup>21</sup> despite the unfortunate similarity in title, with the exception of certain parts of Articles 5, 6 18, 20 and 23 of the CRD which are implemented in Part 1.<sup>22</sup> The provisions of the CRD – which deal primarily with distance and off-premises contracts – may be found in earlier secondary legislation: the Consumer Rights (Payment Surcharges) Regulations 2012,<sup>23</sup> and the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.<sup>24</sup> Nevertheless the Government expressly stated that: ‘In developing proposals for the Consumer Rights Act 2015, the Government has taken into account the definitions and measures contained within the CRD and, as far as appropriate, has made the Act consistent with the CRD, with the intention of achieving overall a simple, coherent framework of consumer legislation’.<sup>25</sup>

This article will focus on Parts 1 and 2 of the Act, preceded by an initial examination of the key concepts of ‘trader’ and ‘consumer’ under the Act. It will examine the extent to which these Parts (which introduce new measures concerning consumer contracts for goods, digital content and services, and unfair terms) are likely to succeed in realising the Government’s stated goal of resolving the inconsistencies and overlaps between domestic and EU law. It will also consider the implications of ‘Brexit’ following the result of the June 2016 referendum. Does the 2015 Act present us with a valuable consolidation of EU and UK consumer law which will outlast the UK leaving the EU? To what extent, regardless of Brexit, have EU rights been absorbed into a distinctive *national* framework of consumer rights?

## **1. Bringing EU law into the fold I: Defining ‘trader’ and ‘consumer’ under section 2 of the Consumer Rights Act 2015.**

One of the policy objectives of the Act is to align, as far as possible, the definitions of certain key terms across the Act and other consumer law. Key definitions are set out in s 2.<sup>26</sup> These

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<sup>21</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC and repealing Council Directive 85/577/EEC and Directive 97/7/EC, OJ L 304/64, 22.11.2011. On the difficulties arising from not including the Consumer Rights Directive within this consolidating Act, see P Giliker, ‘The Transposition of the Consumer Rights Directive into UK Law: Implementing a Maximum Harmonization Directive’ (2015) 23 ERPL 5.

<sup>22</sup> The Consumer Contracts (Amendment) Regulations 2015/1629 amend and revoke earlier legislation which had introduced these measures into UK law.

<sup>23</sup> 2012/3110.

<sup>24</sup> 2013/3134.

<sup>25</sup> Explanatory Notes to the CRA, [13].

<sup>26</sup> See also s.59 CRA (interpretation).

include the terms ‘trader’, ‘consumer’, ‘business’, ‘goods’ and ‘digital content’.<sup>27</sup> ‘Service’ interestingly is not defined – the reason given that it was not defined in the Supply and Sale of Goods Act 1982.<sup>28</sup> These definitions apply to both Parts 1 and 2 of the Act.<sup>29</sup>

### Trader

Section 2(2) defines ‘trader’ as: *a person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf.*<sup>30</sup> This definition replaces previous terminology, including the ‘seller in the course of business’ (Sale of Goods Act 1979) or simply the ‘business’ (Unfair Contract Terms Act 1977, s.14) with a composite term ‘trader’. In opting for a definition which reflects that found at Article 2(2) of the Consumer Rights Directive 2011/83/EU (CRD),<sup>31</sup> the drafters of the Act have opted for simplicity but also an approach consistent with a maximum harmonisation Directive. It also reflects the general approach found in EU consumer directives – consider, for example, the definition of ‘seller or supplier’ found at Article 2(c) of the Unfair Terms Directive - *any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned* – and ‘seller’ at Art 1.2(c) of the Consumer Sales Directive - *any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession*. This point here is one of clarity in a statute covering a range of different types of contracts with the added benefit of providing some degree of consistency with the EU consumer framework.

### Consumer

In a piece of consumer legislation, the definition of the beneficiary of the rights provided – ‘the consumer’ – is obviously of vital importance. However, the 1988 decision of *R. & B. Customs Brokers Co. Ltd. v. United Dominions Trust Ltd.*<sup>32</sup> where the Court of Appeal had

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<sup>27</sup> Note s.2(8) sets out the definition of ‘goods’ which does derive from Article 2(3) of the CRD. The definition of digital content in s.2(9) is the same as the definition in the CRD (Art 2(11)). See also s.5 which defines ‘sales contracts’, which is consistent with the category of ‘sales contract’ under the CRD.

<sup>28</sup> Explanatory Notes to Act, [34]. Query whether this is an adequate explanation.

<sup>29</sup> See s.76 CRA (Interpretation of Part 2), notably s.76(2).

<sup>30</sup> s.2(7) states that ‘Business’ includes the activities of any government department or local or public authority.

<sup>31</sup> Art. 2(2) CRD: ‘trader’ means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.

<sup>32</sup> [1988] 1 WLR 321. McKendrick notes, however, that the decision was ‘a surprising one’ and, although followed in *Feldaroll Foundry plc v Hermes Leasing (London) Ltd* [2004] EWCA Civ 747, has been subject to

been prepared to accept that a company could be deemed to be dealing as a consumer for the sake of s.12 of the Unfair Contract Terms Act 1977 renders this definition potentially controversial. Would this case survive under the new legislation? The answer is no. Section 2(3) defines ‘consumer’ as: ‘*an individual<sup>33</sup> acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession.*’ This may be compared with the Consumer Rights Directive definition (Art. 2(1)): ‘consumer’ means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession. Recital 17, CRD adds, however, that in the case of dual purpose contracts, where the contract is concluded for purposes partly within and partly outside the person’s trade and the trade purpose is so limited as ‘not to be predominant in the overall context of the contract’, that person should also be considered as a consumer. While it may be queried whether any material difference exists between ‘wholly or mainly outside’ or ‘not to be predominant in the overall context of the contract’, it is clear that both definitions are wider than those used in the Consumer Sales Directive<sup>34</sup> and the Unfair Terms Directive.<sup>35</sup> The definition does also reflect the wording adopted by the Regulations implementing the CRD, albeit in the context (primarily) of measures relating to off-premises and distance contracts.<sup>36</sup>

The UK government has therefore chosen to rely on a wider definition of consumer than that found in the CSD and UTD. This is permissible in that these are minimum harmonisation measures (unlike the CRD). It will, however, exclude small businesses, such as those found in the *R & B Custom Brokers* case, in that they are not ‘natural’ persons. Concerns remain, however. It is submitted that despite excluding companies from the consumer definition, the dividing line between B2C and B2B contracts will remain a point of contention. Only ‘living’ consumers are covered by the Consumer Rights Act 2015 and yet it is easy to envisage demarcation issues involving, for example, whether a sole trader (a ‘natural’ person) who purchases a laptop is acting ‘mainly’ outside her trade or business in relation to this

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a considerable degree of criticism: E McKendrick, *Contract Law: Text, Cases and Materials* (6<sup>th</sup> ed., Oxford: OUP, 2014) p 435.

<sup>33</sup> Clarified as a natural person in the Explanatory Notes, [36].

<sup>34</sup> CSD Art 1.2(a): any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession.

<sup>35</sup> UTD Art 2(b): any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession. Consider, however, the recent case of Case C-110/14 *Costea v SC Volksbank România SA* ECLI:EU:C:2015:538 (3 September 2015).

<sup>36</sup> See Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013/3134, Reg 4 and The Consumer Rights (Payment Surcharges) Regulations 2012/3110 Reg 2.

particular purchase. This suggests that this definition is far from watertight in guaranteeing clarity. It also signifies that we remain far from any commonly agreed European definition of consumer. Divergence as to this key definition will continue to exist across Member States.

In introducing common definitions for both sales and unfair terms law, the aim of the government is to render these areas of law more coherent. Riefa argues that this paves the way for consumer law to be further consolidated, while evolving in a more orderly fashion.<sup>37</sup> It remains to be seen if this optimistic view is correct.

## **2. Bringing EU law into the fold II: The Consumer Sales Directive 99/44/EC**

Part 1 of the Act deals with agreements between a trader and a consumer for the trader to supply goods, digital content or services, if the agreement is a contract.<sup>38</sup> It replaces earlier legislation which had implemented the Consumer Sales Directive (CSD), namely the Sale and Supply of Goods to Consumers Regulations 2002, which are now revoked.<sup>39</sup> As indicated above, the Regulations had inserted the provisions of the Directive into existing legislation, such as the Sale of Goods Act 1979 and Supply of Goods and Services Act 1982, without making any real attempt to reconcile them with pre-existing statutory provisions. This led to confusion and disjuncture and this is what the Consumer Rights Act seeks to rectify. For business to consumer contracts, therefore, the CRA provides a statutory framework for contracts relating to goods, services and digital content.<sup>40</sup> The 1979 and 1982 Acts will still apply to business to business (B2B) and consumer to consumer (C2C) contracts. On paper, therefore, this should render the law easier to understand and provides a valuable opportunity to integrate fully EU legislation on B2C contracts into UK law. This section will examine the extent to which these goals have been achieved.

### ***(a) The aims of Part 1 of the Act***

Part 1 of the Act deals with a number of matters relating to goods, services and digital content. In terms of goods, it sets out the standards that goods must meet and consolidates

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<sup>37</sup> C Riefa, 'Codification: The Future of English Consumer Law?' (2015) 4 EuCML 12, 20. She acknowledges, however, that while the Act consolidates sales and unfair terms law, other key areas of consumer protection remain outside this instrument.

<sup>38</sup> s1(1), CRA.

<sup>39</sup> SI 2002/3045. See Schedule 1, para 53, CRA.

<sup>40</sup> Certain provisions of Sale of Goods Act 1979 will still apply, however, e.g. rules which are applicable to all contracts of sale of goods, and those regarding matters such as when property in goods passes.



and aligns the previously inconsistent remedies available to consumers for goods supplied under different contract types, such as sale, work and materials, conditional sale and hire purchase. It also establishes a time period of 30 days in which consumers can reject substandard goods and be entitled to a full refund and limits the number of repairs or replacements of substandard goods before traders must offer some money back. Limits are also placed on the extent to which traders may reduce the level of refund (where goods are not rejected initially) to take account of the use of the goods the consumer has had up to that point. For services, Part 1 introduces a new statutory right whereby if a trader provides information in relation to a service, and the consumer takes this information into account, the service must comply with that information. There are also new statutory remedies, making it clear that consumers can always request these rights and remedies when a trader supplies a service to them. Part 1 further introduces a new category of digital content with tailored quality rights and remedies if these are not met.

The influence of EU Directives runs throughout Part 1. The CSD is implemented in sections 2, 9, 10, 11, 13, 14, 15, 19, 23, 25, 30, 31, 32 and 59. In addition, cross-references are made to the Consumer Rights Directive (as transposed into the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013/3134) in sections 11(4)-(6), 12, 36(3)-(4), 37 and 50(3)-(4).<sup>41</sup> The question remains: does the Act render the law more coherent and easier to understand? For reasons of space, we will address this question in the light of the provisions relating to statutory rights and remedies relating to contracts for the sale of goods, although it should be remembered that analogous provisions exist for contracts for services and the sale of digital content.

***(b) Statutory rights under a goods contract. (ss9-18)***

Sections 9 - 11 and 13 - 15 re-transpose Article 2 of the Consumer Sales Directive, regarding conformity of goods with the contract. The original transposition was made in the Sale and Supply of Goods to Consumers Regulations 2002 which amended the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. Not all sections reflect the provisions

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<sup>41</sup> The Consumer Contracts (Amendment) Regulations 2015/1629 Regs 4-6 revoke the provisions of the 2013 Regulations insofar as they are replicated in the Act. This does not, as will be seen below, mean that consumers will not have to refer to both the Act and the 2013 Regulations in some cases. Sections 5, 28 and 29 of the CRA also replace a small number of provisions dealing with matters related to the delivery of goods and the passing of risk which had been earlier placed in the 2013 Regulations: see SI 2015/1629, Reg 8 (which repeals Part 5 of the 2013 Regulations).

of the CSD, but the aim is to integrate domestic and EU law to give a unified framework of statutory rights for consumers. This is relatively uncontroversial. The general view has always been that the Directive has had little impact on this area of law in that, prior to the Directive, UK law had already given substantial effect to the principle of conformity of goods with the contract, for example under sections 13-15 of the Sale of Goods Act 1979.<sup>42</sup> The focus of the Directive on consumers will, however, be accentuated by the implementation of these provisions in a *consumer* rights statute (in contrast to its previous transposition by legislation which covered both consumer and commercial contracts). The very title – the Consumer Rights Act – suggests an acknowledgement of the importance of a consumer-orientated approach and, more fundamentally, explicit recognition that consumers have rights.

Yet this attempt at clarity unravels somewhat in relation to sections 11(4), 11(5) and 12(2), which contain rather clumsy references to material contained in the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 in an attempt to integrate the information requirements within the statutory rights section of the Act. Any information provided by the trader, as required under these Regulations relating to the main characteristics of the goods (s.11) or other pre-contract information (s.12), is deemed part of the contract. The information in question is found, however, in paragraph (a) of Schedule 1 or 2 of the 2013 Regulations, not in the Act. If the information regarding the main characteristics is not complied with, the consumer can pursue the remedies for breach set out in section 19 of the Act.<sup>43</sup>

This overlap of statutory provisions – due wholly to the fact that the Consumer Rights Directive is not implemented by the Consumer Rights Act – lends itself to complexity and belies the aim of consolidation. The reason for implementing the CRD before the CRA was due to the Government's decision to comply with the time limit of 13 June 2014 for the

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<sup>42</sup> See S Watterson, 'Consumer Sales Directive 1999/44/EC –The impact on English law' (2001) 2 & 3 ERPL 197. Miller, however, questions whether, despite apparent similarities, common law development of ss.13-15 of the Sale of Goods Act 1979 had led to a different interpretation of key concepts such as 'description' found in s.13 SGA and Art 2(2)(a) of the Directive: L Miller, *The Emergence of EU Contract Law: Exploring Europeanisation* (Oxford: OUP, 2011), pp 98-99. See also Twigg-Flesner and Bradgate (n 10).

<sup>43</sup> Note that s.19(5) deals separately with section 12, providing that if the trader is in breach of a term that s.12 requires to be treated as included in the contract, the consumer has the right to recover from the trader the amount of any costs incurred by the consumer as a result of the breach, up to the amount of the price paid or the value of other consideration given for the goods.

application of the CRD in all Member States<sup>44</sup> when it became clear that the Consumer Rights Bill would not be passed in time to meet this deadline. While laudable, in view of the complications which have resulted, it is certainly arguable that missing this deadline might have been justifiable if it had led to the consolidation of three major EU Directives in one piece of legislation. It is not as if the UK has never failed to comply with time limits set by Directives. Article 11 of the CSD required Member States to bring into force the laws necessary to comply with this Directive not later than 1 January 2002 and yet the UK provisions came into force on 31<sup>st</sup> March 2003. Alternatively despite earlier implementation, the 2012 and 2013 Regulations could have been replaced by the statute, albeit after a very short life span which might have been deemed to lead to undesirable uncertainty. Neither option was taken with the result that consumer legislation is spread over a variety of regulations and statutes. This is unfortunate to say the least.

Without engaging in a detailed dissection of the statutory rights in this section, it can be seen that this is a technical piece of legislation which is unlikely to be immediately accessible to consumers. The sections are long and detailed. Consider, for example, section 18 which re-enacts section 14(1), Sale of Goods Act 1979, providing that unless there is an express term concerning the quality of the goods or the goods' fitness for a particular purpose, or a term implied by another enactment, the contract should not be treated as including any such terms, other than those set out in sections 9, 10, 13 and (where it applies) 16. Does such added detail give extra clarity or, in the author's view, render it even more difficult for consumers to understand?

***(c) Remedies for breach of the statutory rights under a goods contract: ss19-24***

Remedies are a vital component of granting consumers statutory rights. The Consumer Sales Directive seeks to provide a hierarchical order of remedies: defective goods will be repaired or replaced or, where this is not appropriate, consumers may obtain a suitable reduction of the price or have the contract rescinded.<sup>45</sup> Watterson commented that the CSD was likely to have its greatest impact in English law in relation to the rights of consumer buyers of non-

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<sup>44</sup> Article 28(2), CRD.

<sup>45</sup> Article 3, CSD. Article 3(3) provides that 'In the first place, the consumer may require the seller to repair the goods or he may require the seller to replace them, in either case free of charge, unless this is impossible or disproportionate.' See D Staudenmayer, 'The Directive on the Sale of Consumer Goods and Associated Guarantees – a milestone in the European Consumer and Private Law' (2000) 4 ERPL 547, who notes that contrary to the original proposal of the European Commission, the European Parliament and Council had almost unanimously opted for a two-stage solution.

conforming goods.<sup>46</sup> We may note an immediate tension between the hierarchical approach of the Directive which assumes that a consumer's first recourse will be to claim repair or replacement of the faulty goods, and the common law preference simply to let the consumer reject the goods, terminate the contract and/or pursue an award of damages.<sup>47</sup> This tension reflects civilian influence in the drafting of the Directive, having as its central remedy a right to repair and replacement akin to specific performance.<sup>48</sup> Miller argues that 'the remedy of rejection is quite different from that of specific performance (repair and replacement) – the latter concerned with continuation of, rather than release from, the contractual obligation and, as such, is out of step with common law contract ideology'.<sup>49</sup>

Despite the framework of the CSD, UK law did not relinquish its adherence to the right to reject/damages. Part 5A of the Sale of Goods Act 1979<sup>50</sup> merely inserted 'Additional rights of buyer in consumer cases'. As previously stated, this led to confusion as consumers were granted supplementary rights which co-existed uneasily with the remedial philosophy of the common law.<sup>51</sup> Nevertheless, the Law Commissions argued strongly that the right to reject should be retained in the UK as a short-term remedy of first instance, in that it provides a simple and easy-to-use remedy which inspires consumer confidence and was strongly supported by the consumer groups they had consulted.<sup>52</sup>

Under the Consumer Rights Act 2015, sections 19, 23 and 24 re-transpose Article 3 of the CSD.<sup>53</sup> On this basis, section 19(3) provides:

If the goods do not conform to the contract because of a breach of any of the terms described in sections 9, 10, 11, 13 and 14,<sup>54</sup> or if they do not conform to the contract under section 16, the consumer's rights (and the provisions about them and when they are available) are—

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<sup>46</sup> See (n 42), 209.

<sup>47</sup> 'The buyer's first and primary remedy for a breach of contract by the seller is to reject the goods, and, if appropriate, to repudiate the contract': C Twigg-Flesner, R Canavan and H Macqueen, *Atiyah and Adams' Sale of Goods* (13<sup>th</sup> ed., Harlow: Pearson, 2016) p 435. See also R Halson, *Contract Law* (2<sup>nd</sup> ed., Aldershot: Pearson, 2013) p 433.

<sup>48</sup> Miller (n 11), 92-94.

<sup>49</sup> (n 11), 102.

<sup>50</sup> Cf Part 1B of the Supply of Goods and Services Act 1982.

<sup>51</sup> See M Bridge, 'A Comment on "Toward a Universal Doctrine of Breach: The Impact of CISG" by Jürgen Basedow' (2005) 25 *International Review of Law and Economics* 501.

<sup>52</sup> (n 16), [1.17]-[1.18].

<sup>53</sup> Note that section 23(3) rectifies s.48B(3)(c) of the Sale of Goods Act 1979 which arguably incorrectly implemented the Directive: see *Atiyah and Adams' Sale of Goods* (n 47), 511.

<sup>54</sup> Breach of ss.12 and 15 are dealt with in ss.19(5) and 19(4) respectively.

- (a) the short-term right to reject (sections 20 and 22);
- (b) the right to repair or replacement (section 23); and
- (c) the right to a price reduction or the final right to reject (sections 20 and 24).

We may note immediately the combination of traditional common law remedies – notably the short-term right to reject – with those of the CSD. Indeed, sections 19(9)-(11) expressly state that this Chapter does not prevent the consumer from seeking other remedies including damages, specific performance or termination,<sup>55</sup> although section 19(10) warns that consumers cannot recover twice for the same loss. On this basis, in some cases the consumer may exercise the short-term right to reject and receive a refund, but may also claim damages for additional loss caused by the non-conformity of the goods. In other cases, a consumer may prefer to claim damages instead of pursuing one of the statutory remedies.<sup>56</sup> The result, as may be seen, is that while the Act brings together both EU and common law remedies in a structured way, the underlying tension between civilian and common law approaches to breach remains. No attempt is made to resolve this issue – the statute merely sidesteps it once again by placing the remedies side-by-side. Under the Act, a consumer may thus reject the goods and treat the contract as at an end (ss.20(4)/(5)) *or* request a repair or replacement if available (s.23) (if unavailable, the consumer is left with the options of the short-term right to reject or to request a reduction in price or the ‘final’ right to reject under s.24). This tension is also self-evident from the fact that only sections 19, 23 and 24 implement the CSD, which means, in essence, that the other sections do not.

What we do see is section 19 acting as a sign-post, indicating the relevant sections that detail these remedies which are now placed in the same section of the Act. There is also a welcome clarification of the (common law) short term right to reject; section 22 setting a minimum time period of 30 days in which consumers can reject substandard goods and receive a full refund.<sup>57</sup> Nevertheless, the fundamental question of the correct remedial approach towards defective products remains unresolved.

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<sup>55</sup> s.19(12) does provide, however, that it is not open to the consumer to treat the contract as at an end for breach of a term that this Chapter requires to be treated as included in the contract except as provided by subsections (3), (4) and (6). This overrides any common law right to terminate the contract for breach of the terms which these sections require to be treated as included in the contract.

<sup>56</sup> Explanatory Notes to Act, [93].

<sup>57</sup> The one exception (established under subsection (4)) is that for perishable goods which would not be reasonably expected to last longer than 30 days, the period for exercising the short-term right to reject lasts only as long as it would be reasonable to expect those goods to last. In 2009 the Law Commission and the Scottish Law Commission recommended that more certainty was needed over how long the short term right to reject

It may be argued, of course, that under a minimum harmonisation directive such as the CSD this is unnecessary. While there is truth in this argument, what we see again is a focus on the domestic rather than the European. The CSD provisions are integrated into a national system of remedies in which they play only a part. The resultant legislation is again technical and remains complex in nature, reflecting an approach to drafting in which detail is deemed beneficial to consumers, but at least a signpost exists. While here is not the place for a detailed dissection of the remedies awarded,<sup>58</sup> the measures do highlight the ongoing decision of the UK government to continue its policy of granting consumers a free choice of remedies as permitted under a minimum harmonisation directive.<sup>59</sup> What we see is a consolidation and restructuring of domestic consumer law with the minimum necessary adherence to EU directives.

Looking at Part 1 of the Act, while EU law has brought some changes to consumer rights, notably in the context of remedies, the introduction of the Consumer Sales Directive has not marked, as Dirk Staudenmayer had hoped, ‘an important step towards a future private European law’.<sup>60</sup> Rather the UK government has concentrated on ensuring that the minimum necessary adjustment to national law is achieved. The measures contained in the Consumer Rights Directive are relegated to low profile secondary legislation and we might further reflect on the wisdom of not including all the provisions of a maximum harmonisation directive focussed on consumer rights in a major UK statute dealing with ... consumer rights. We might question also to what extent the EU measures, despite the restructuring process, continue to act as what Teubner would term ‘legal irritants’,<sup>61</sup> fitting uncomfortably with existing measures. Signposting does not signify that the different directions make sense collectively. The fact that the insertion of the CSD into the CRA is described by the

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lasted and recommended that, to give certainty, in normal circumstances, a consumer should have 30 days to return faulty goods and receive a refund: (n 16). This is accepted in the CRA 2015, which also accepts the Commissions’ recommendation that to prevent consumers from being locked into a cycle of failed repairs, consumers should be entitled to escape a contract after one failed repair or one failed replacement: s.24(5)(a).

<sup>58</sup> See, for example, *Atiyah and Adams’ Sale of Goods* (n 47) pp 506-512; D Barry et al, *Blackstone’s Guide to the Consumer Rights Act 2015* (Oxford: OUP, 2016) 3.78-3.133.

<sup>59</sup> T Krummel and RM D’Sa, ‘Sale of consumer goods and associated guarantees: A minimalist approach to harmonised European Union consumer protection’ (2001) 26 EL Rev 312, 329.

<sup>60</sup> (n 45), 564. Staudenmayer was, at the time, assistant to the Director-General, Directorate-General Health and Consumer Protection. He is now Head of Unit – Contract Law, DG Justice, European Commission. See, generally, U Magnus, ‘Consumer sales and associated guarantees’ in C Twigg-Flesner (ed), *The Cambridge Companion to European Union Private Law* (Cambridge: CUP, 2010).

<sup>61</sup> G Teubner, ‘Legal irritants: Good faith in British law and how unifying law ends up in new divergences’ (1998) 61 MLR 11.

Government itself as ‘adequate’<sup>62</sup> suggests that this is not an overwhelming endorsement of EU consumer policy. What we see is a consolidation of (some) UK consumer law, taking into account EU directives, in a manner that does little to advance the cause for harmonising consumer rights and remedies across the EU. On this basis, it is unlikely that post-Brexit the UK government will engage in the time and effort to excise the provisions of the CSD from UK law, denying consumers rights and remedies with which they are now familiar. This suggests that Part 1 of the Act is likely to continue in its current form. The real focus of Part 1 is the creation of a domestically coherent framework for UK consumer rights.

### **3. Bringing EU law into the fold III: The Unfair Terms in Consumer Contracts Directive 93/13/EEC**

The influence of EU law seems, however, to be stronger in relation to Part 2 of the Act. Here, it can be argued that the decision of the UK to leave the EU may have some impact in the future interpretation of the Act. UK lawyers have long been familiar with the fact that ‘unfair terms’ have their own regime originating with the transposition of the Unfair Terms Directive 93/13/EEC (UTD) into the Unfair Terms in Consumer Contracts Regulations 1994,<sup>63</sup> then 1999 (UTCCR).<sup>64</sup> Weatherill has commented that ‘Directive 93/13 is properly regarded as the first incursion of EU law into the heartland of national contract law thinking. This makes it a challenge for national private lawyers, expected to adapt to EU law method after decades of perceiving EU law as, more or less, an enterprise engaged in creating new or extended patterns of public law.’<sup>65</sup> EU law, he further notes, is not simply setting a common rule, it is determining what shall be the content, style and technique of that common rule.<sup>66</sup> The UTCCR, however, were forced to co-exist somewhat uneasily with overlapping provisions of the Unfair Contract Terms Act 1977 (UCTA) and, as noted in the introduction, commentators were quick to point out the difficulties this raised for consumers trying to navigate two distinct pieces of legislation. The UTCCR also introduced into English law concepts such as ‘good faith’ and ‘significant imbalance’ which were far from self-explanatory to a common law audience,<sup>67</sup> and reflected civil law influences relating to good

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<sup>62</sup> Explanatory Notes to Act, [521].

<sup>63</sup> SI 1994/3159.

<sup>64</sup> SI 1999/ 2083.

<sup>65</sup> S Weatherill, *EU Consumer Law and Policy* (2<sup>nd</sup> ed., Cheltenham: Edward Elgar, 2013) p 145.

<sup>66</sup> *Ibid.*, p 308.

<sup>67</sup> See Reg 5(1) of the 1999 Regulations. One might consider also the use of the rather clumsy phrase ‘not individually negotiated’.

faith in contracting.<sup>68</sup> By simply copying out the Directive into secondary legislation, the UK government made no attempt to bridge this cultural gap or integrate the Directive into domestic law – the UTCCR merely stood alongside UCTA 1977.

The Consumer Rights Act 2015, Part 2, responds to calls to merge the UTCCR and UCTA into one consolidated piece of legislation. Suggestions that the government would be willing to contemplate such a step may be traced back to January 2001 when the Law Commission and the Scottish Law Commission first received from the Parliamentary Under Secretary of State for Consumers and Corporate Affairs a request to consider the desirability and feasibility of replacing UCTA 1977 and the UTCCR 1999 with a unified regime. In their report of 2005, the Commissions found that the co-existence of two overlapping schemes gave rise to complexity and inconsistency and should be replaced by a unified regime for consumers with improved protection for small businesses.<sup>69</sup> When asked by the Department for Business, Innovation & Skills (BIS) in May 2012 to review and update the 2005 recommendations in relation to B2C contracts, the Commissions re-iterated their view that UCTA 1977 and the 1999 Regulations should be consolidated.<sup>70</sup>

On this basis, the Act revokes the UTCCR 1999<sup>71</sup> and amends UCTA 1977 to remove B2C contracts from its scope.<sup>72</sup> UCTA 1977 will continue to apply to B2B and C2C contracts. In this section, we will examine the nature of the merger between domestic legislation and the provisions of the EU Directive, noting, in particular, the extent to which the (minimum harmonisation) provisions of the Directive have influenced the shape of the resultant legislation. In this area of law at least, could it be said that UK law *does* reflect EU consumer norms?

### ***(a) The aim of Part 2 of the Act***

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<sup>68</sup> See H. Collins, 'Good Faith in European Contract Law' (1994) 14 OJLS 229. For a study of the differences in relation to good faith in contracting across the European Union, see R Zimmermann and S Whittaker (eds), *Good Faith in European Contract Law* (Cambridge: CUP 2000).

<sup>69</sup> *Unfair Terms in Contracts* (Law Com No 292) (Scot Law Com No 199) (Cm 6464, 2005).

<sup>70</sup> Law Commission and Scottish Law Commission, *Unfair Terms in Consumer Contracts: A new approach? Issues Paper* (2012).

<sup>71</sup> Schedule 4, para 34, Consumer Rights Act 2015.

<sup>72</sup> The Consumer Rights Act 2015 also covers notices to the extent that they relate to rights or obligations between traders and consumers or purports to exclude or restrict a trader's liability to a consumer: s.61(4). It does not cover contracts of employment or apprenticeship: s.61(2).



The aim of Part 2 of the Act is straightforward: to consolidate in one place the legislation governing unfair contract terms in relation to consumer contracts, which was previously found in two separate pieces of legislation, removing anomalies and overlapping provisions. Sections 62- 69 establish the general rules about fairness. Section 64, in particular, seeks to make it clearer when the price or subject matter of the contract cannot be considered for fairness, introducing the new condition of prominence in addition to that of transparency. Section 63 and Schedule 2 also clarify the role of, and extend the indicative list of, terms which may be regarded as unfair (the so-called ‘grey list’).

The influence of the UTD runs throughout Part 2. The Directive is implemented in sections 61, 62, 63, 64, 67, 68, 69, 70, 72, 73, 74, 76 and Schedules 2, 3 and 5.<sup>73</sup> It is hard, therefore, to deny the prominence of the Directive in shaping these new provisions of UK law. In this section, we will focus on four key statutory provisions which have been chosen for the insight they provide into the extent to which EU law has influenced Part 2 of the Act. We will also consider the influence of recent case-law of the CJEU on the 1993 Directive.<sup>74</sup> In examining, in turn, section 62 (requirement for contract terms and notices to be fair), section 61 (contracts and notices covered by Part 2), section 71 (duty of the court to consider fairness of term) and section 64 (exclusion from assessment of fairness), a number of trends may be identified. It is clear, in particular, that a considerable effort has been made to ensure that these provisions are consistent with EU law. Nevertheless, an ongoing focus on domestic concerns may also be identified, arguably to the detriment of ensuring a common European approach to unfair terms. These provisions will be examined below.

***(b) Four key sections: ss 62, 61, 71 and 64***

*(i) Section 62 (Requirement for contract terms and notices to be fair)*

Section 62(4) implements Art. 3.1 of the Directive which requires that ‘A contractual term ... shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.’ By copying its wording, there is no question of incorrect transposition.<sup>75</sup> A

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<sup>73</sup> See also s.2 (key definitions).

<sup>74</sup> See N Gavrilovic, ‘The Unfair Contract Terms Directive through the practice of the Court of Justice of the European Union: Interpretation or something more?’ (2013) 9 ERCL 163.

<sup>75</sup> s.62(4): ‘A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations under the contract to the detriment of the consumer.’ This was also the policy of

corresponding test for unfair notices exists:<sup>76</sup> the Act, by covering both contract terms and notices in order to absorb the consumer provisions of the Unfair Contract Terms Act 1977 has impact, therefore, on both the law of contract and tort. An unfair term or consumer notice will not be binding on the consumer, although this does not prevent the consumer from relying on the term or notice if the consumer chooses to do so.<sup>77</sup> Whether a term is fair will be determined by taking into account the nature of the subject matter of the contract, and by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.<sup>78</sup>

We therefore see a test based on that of the 1993 Directive. Although it covers contracts and notices previously governed by UCTA 1977, the language is that of the Directive. This potentially gives rise, however, to difficulties arising from the distinct terminology used in the Directive, as discussed above. If a common law court is likely to find ‘good faith’ and ‘significant imbalance’ difficult to interpret, is the Act recreating these difficulties? The Law Commissions in 2005 argued that the UTD should be rewritten in a clear way, using terminology familiar to a UK audience. The draft Bill which accompanied the Report suggested a number of changes to the Directive’s wording which would make it easier to understand. As late as 2012 in their Issues Paper,<sup>79</sup> the Commissions favoured a test which focused not on good faith, but on whether the term was ‘fair and reasonable’, fearing that a reference to ‘good faith’ might be confusing to a UK audience. Their opinion changed, however, in 2013 when the Commissions announced that:

‘We have been persuaded by the strong arguments put to us that the words of the UTD should be changed only if there is a good reason to do so. We therefore recommend that the fairness test set out in articles 3(1) and 4(1) of the UTD should be replicated in the new legislation.’<sup>80</sup>

This change is attributed to the fact that the test is now more familiar to a UK audience, and has acquired a significant body of domestic and European case law to help interpret it. The Commissions therefore concluded that: ‘It no longer appears to give rise to much confusion.

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the UTCCR, see Reg 5(1), 1999 Regulations. However, s.62(4), unlike Art. 3.1 UTD, makes no reference to ‘non individually negotiated’ terms – this will be dealt with below.

<sup>76</sup> ss.62(6) and (7).

<sup>77</sup> ss.62(1)-(3), implementing Art 6.1 of the Directive.

<sup>78</sup> ss.62(5), implementing Art. 4.1 of the Directive.

<sup>79</sup> (n 70) [9.50].

<sup>80</sup> English and Scottish Law Commissions, *Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills* (March 2013), s.32.

We have been persuaded that the benefits of changing the formulation do not outweigh the risks of introducing new uncertainties.’<sup>81</sup>

What conclusions may be drawn from this change of heart? Those favouring Europeanisation might argue that the legal transplant has finally worked and that UK lawyers have come to accept good faith as an appropriate standard of behaviour, but it should be noted that the Commissions’ Advice does not go this far. Their reasons are primarily pragmatic. The decision to copy out the wording of the Directive in the 1994 and 1999 UTCCR led to UK lawyers being forced to utilise this new terminology, with the assistance of guidance from the CJEU and Office of Fair Trading. Having gone to the effort to master these new provisions, many consultees were perhaps understandably reluctant to start again with yet another statutory test. The choice is, therefore, predicated on the need to avoid the uncertainty likely to ensue if a new statutory test were introduced, supplemented by concern of a potential clash with the CJEU. ‘Better the devil you know’ is hardly the strongest reason to adopt a test based on a European Directive, but nevertheless the wording of Article 3.1 of the UTD is placed at the heart of Part 2 of the CRA.

It remains to be seen whether the Commissions’ confidence is justified. The Supreme Court in November 2015 described the Article 3.1 test as ‘rather opaque’ which suggests that some uncertainty does still exist.<sup>82</sup> It should also be borne in mind that UCTA 1977 will continue to rule on what is ‘fair and reasonable’ albeit not in relation to B2C contracts. The guidance on the fairness test provided by the Competition and Markets Authority (CMA)<sup>83</sup> in July 2015 is 10 pages long and covers not only UK case-law, such as *Director-General of Fair Trading v First National Bank plc*,<sup>84</sup> but also acknowledges the role to be played by the CJEU in providing guidance on the meaning of ‘good faith’ and ‘significant imbalance’.<sup>85</sup> This is significant. It is a well-established principle of EU law that certain words or phrases in a directive may have their own autonomous and uniform meaning. Member States are

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<sup>81</sup> *Ibid.*, [6.42].

<sup>82</sup> *Cavendish Square Holding BV v Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67, [2015] 3 W.L.R. 1373, [105] per Lords Neuberger and Sumption (Lord Carnwath agreeing).

<sup>83</sup> CMA, *Unfair Contract Terms Guidance* CMA 37 (2015).

<sup>84</sup> [2001] UKHL 52, [2002] 1 AC 481.

<sup>85</sup> Reference is made to Case C-415/11 *Aziz v Caixa D’Estalvis de Catalunya* [2013] All ER (EC) 770, [44]-[45] and [68]-[69] (Spanish procedural rules which prevented borrowers in arrears from effectively contesting the fairness of their mortgage agreements were contrary to EU law). The Supreme Court recently described *Aziz* as ‘the leading case on the topic’: *Cavendish Square Holding* (n 82), [105]. Lord Toulson, however, in this case disputed the majority’s interpretation of *Aziz* which he found to water down the test adopted by the CJEU: [315].

expected to adopt this meaning, taking into account the context of that provision and the purpose of the legislation in question.<sup>86</sup> CJEU case-law indicates that its jurisdiction does extend to the interpretation of ‘unfair terms’ and, as such, its guidance should be taken into account by national courts. In *Penzugyi v Schneider (C-137/08)*,<sup>87</sup> for example, the Grand Chamber of the CJEU ruled that although it was for the national court to determine whether a particular contractual term actually satisfied the fairness test, the jurisdiction of the CJEU extended to the interpretation of the concept of ‘unfair term’ and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the Directive.

In choosing to copy out the Directive, the Act gives European terminology greater prominence in this area of law, but this does signify that the determination of the content of the ‘fairness’ test requires consideration of both national and EU case-law, albeit applied to the particular facts of each case. This was accepted by the CMA and is a logical consequence of the wording of section 62. Brexit, however, does render this more contentious. While the UK remains in the EU, the decisions of the CJEU remain binding, including those interpreting the UTD. Post-Brexit, this will no longer be the case. Will such decisions become, however, *persuasive* authority (similar to that of the Privy Council?)<sup>88</sup> in interpreting section 62 or will the UK courts seek to develop its own autonomous common law interpretation of the test? Much, as with Brexit itself, remains unclear.

(ii) *Section 61 (Contracts and notices covered by Part 2)*

Section 61(1) simply states that: ‘This Part applies to a contract between a trader and a consumer’. No provision is made that the term in question be ‘not individually negotiated’ as previously required by the 1994 and 1999 UTCCR and stated in Article 3.1 of the Directive. On this basis, the CRA provides that a term can be deemed to be unfair even if it has been individually negotiated with the consumer. The UTD as a minimum harmonisation directive permits such divergence which goes beyond the protection required by the Directive, but it is

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<sup>86</sup> This does not apply, however, if the Directive expressly refers to the law of the Member States. See Case C-279/12 *Fish Legal and Shirley* [2014] QB 521, [42]; Case C-204/09 *Flachglas Torgau* [2013] QB 212, [37]. This is necessary to ensure the uniform application of EU law across Member States and to comply with the principle of equality

<sup>87</sup> Case 137/08 *VB Penzugyi Lizing Zrt v Ferenc Schneider* [2011] 2 CMLR 1, [44] (exclusive territorial jurisdiction clause). See also C-26/13 *Kásler v OTP Jelzálogbank Zrt* [2014] 2 All ER (Comm) 443.

<sup>88</sup> Consider, however, *Willers v Gubay* [2016] UKSC 44, [2016] 3 W.L.R. 534.

an interesting question as to why the Government has chosen this path. In their 2012 Issue Paper, the Law Commissions argued that the distinction between negotiated and non-negotiated terms raised complexity and stated their belief that the legislation would be simpler if the exclusion of negotiated terms were removed. The key issue here, of course, is that in merging UCTA and the UTCCR, the former did cover negotiated consumer contracts and to confine the Act to standard terms would reduce the protection previously granted by UCTA. In its 2013 Advice, the Commissions went further and argued that ‘the current exemption for negotiated terms in the UTCCR encourages unnecessary argument and litigation. The legislation will be simpler and more easily enforced if the distinction between standard terms and negotiated terms is removed.’<sup>89</sup>

This represents a positive step for consumers, focussing on the potential for exploitation rather than form. It is, however, unlikely to make real difference in practice given that very few consumer contracts can, in reality, be said to be individually negotiated – a factor which influenced the Law Commissions<sup>90</sup> and no doubt the Government. In going beyond the Directive, therefore, we see a pragmatic approach which responds to the challenges of consolidating domestic and EU legislation. Extending the provisions of the Directive to all contract terms will benefit the consumer, but highlights the fact that even pre-Brexit divergence existed in relation to the transposition of the Directive in EU Member States.<sup>91</sup>

*(iii) Section 71(2) (Duty of court to consider fairness of term)*

The CRA, section 71(2) provides that the court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it. This obligation is new and is found not in the 1993 Directive, but in the case-law of the CJEU. On this basis, section 71 is introduced to comply with EU law, notably the ruling of the CJEU in *Mostaza Claro* that ‘the nature and importance of the public interest underlying the protection which the Directive confers on consumers justify, moreover, the national court being required to assess of its own motion whether a contractual term is unfair, compensating in this way for the imbalance which exists between the consumer and the seller or supplier.’<sup>92</sup>

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<sup>89</sup> *Law Commission Advice* (2013) (n 80), s.40.

<sup>90</sup> (n 70), at [9.31-9.35], finding that the reform would affect very few cases in that it is rare for a consumer to negotiate about any term except the price or main subject matter.

<sup>91</sup> It should be noted, however, that not all Member States have implemented the requirement for ‘non individually negotiated’ terms e.g. Austria, Czech Republic, France, Finland and Sweden.

<sup>92</sup> Case C-168/05 *Mostaza Claro v Centro Movil Milenium SL* [2006] ECR I-10421, [38].

This obligation is justified on the grounds that the system of protection introduced by the Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both her bargaining power and her level of knowledge, and, therefore, to guarantee the protection intended by the Directive, such imbalance of power may only be corrected by positive action unconnected with the actual parties to the contract.<sup>93</sup> It is necessary, therefore, to ensure that the consumer enjoys effective protection, in view of the real risk that she is unaware of her rights or encounters difficulties in enforcing them.<sup>94</sup> Where the court considers such a term to be unfair it must not apply it, unless the consumer opposes that non-application.<sup>95</sup>

Prior to the Act, despite a clear line of authority at CJEU level and criticism from a number of commentators,<sup>96</sup> there was little evidence that the English courts had appreciated the impact of CJEU case-law. Micklitz and Reich argue that this was problematic:

‘... the insistence of the ECJ on this ex officio obligation has put Member State law on trial and seems to contradict the well-established principle of “procedural autonomy”. But this “procedural autonomy” ... is not without limits and has to be balanced with the principle of “effectiveness”, which has a long tradition in EU law.’<sup>97</sup>

The Law Commissions in their Issues Paper acknowledged that this is an area where the CJEU had provided a definitive ruling, namely that a national court is obliged to raise the unfairness of a term of its own motion whether or not a consumer has raised the issue.<sup>98</sup>

The Government, therefore, had little option but to acknowledge this procedural change in drafting the legislation, but it is not without a caveat. S.71(3) states that s.71(2) does not apply unless the court considers that it has before it sufficient legal and factual material to

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<sup>93</sup> *Penzugyi* (n 87), [46]-[48]; Joined cases C-240/98 to C-244/98 *Océano Grupo Editorial SA v Quintero* [2000] ECR I-4941, [25]-[27].

<sup>94</sup> Case C-473/00 *Cofidis v Fredout* [2002] ECR I-10875 at [33]; *Océano Grupo* (n 93), [26].

<sup>95</sup> Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Gyórfi* [2009] ECR I-04713, [35].

<sup>96</sup> See, for example, S Whittaker, ‘Judicial intervention and consumer contracts’ (2001) 117 LQR 215 and V Trstenjak and E Beysen, ‘European consumer protection law: Curia semper dabit remedium?’ (2011) 48 CML Rev 95, 121, who argue that case-law had implicitly raised the effectiveness threshold which national procedural rules for the enforcement of EU rights must meet.

<sup>97</sup> H-W Micklitz and N Reich, ‘The court and Sleeping Beauty: the revival of the Unfair Contract Terms Directive’ (2014) 51 CML Rev 771, 802. See also V Trstenjak, ‘Procedural aspects of European consumer protection law and the case law of the CJEU’ (2013) 21 ERPL 451.

<sup>98</sup> (n 70), [7.7].

enable it to consider the fairness of the term. This reflects the view of the CJEU in *Pannon*.<sup>99</sup> The Explanatory Notes to the Act also recognise that the courts would only have to look at the term or terms in question, not the entire contract.<sup>100</sup>

This change will lead to contract terms coming under increasing scrutiny by the courts. A term may be held to be unfair even when the consumer has not complained of unfairness. We may speculate, however, how often this will occur. At a basic level, who will raise the court's duty to consider the fairness of a particular term where neither litigating party has appreciated that this is an issue in the first place? Further, the common law has generally adopted a model of civil procedure based on the notion of the parties themselves presenting legal arguments in their favour to a neutral judge. In spite of the changes to civil procedure introduced under the Woolf reforms,<sup>101</sup> it remains the case that the idea of a judge raising points of law of his or her motion bears a closer resemblance to the civilian 'managerial' judge who is responsible for fact-finding and establishing the truth than that of the traditional common law judge.<sup>102</sup> We might also question to what extent section 71(3) will provide a fall-back for courts when a failure to comply with this duty is raised at a later stage of proceedings. Commentators have speculated that the court will be expected to refer to the case file, but it is unclear to what extent it should extend beyond that.<sup>103</sup>

Nevertheless, the introduction of section 71 is significant in that it marks a rare occasion where a new procedural rule has been introduced into UK private law as a result of judicial activity by the CJEU. As such, its future remains uncertain post-Brexit. Will it be excised as indicative of a civilian approach to civil procedure or survive as a measure helping UK consumers and overcoming their ignorance of UK consumer law? Or will simply lethargy allow it to survive as a legacy of the UK's membership of the EU? Only time will tell.

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<sup>99</sup> *Pannon* (n 95).

<sup>100</sup> Explanatory Notes to Act, [341], relying on *Penzugyi* (n 87).

<sup>101</sup> See Lord Woolf, *Access to Justice, Final Report* (HMSO, 1996) which precipitated the Civil Procedure Rules (CPR), which came into force in England and Wales on 26 April 1999.

<sup>102</sup> M Siems, *Comparative Law* (Cambridge: CUP, 2014) pp 52-55. See also CH Van Rhee and R Verkerk, 'Civil procedure' in JM Smits (ed), *Elgar Encyclopedia of Comparative Law* (2<sup>nd</sup> ed., Cheltenham: Edward Elgar, 2012).

<sup>103</sup> A Ancery and M Wissink, Case-note on *Pannon* (2010) 18 ERPL 307, 314. AG Trstenjak in *Penzugyi* (n 87) argued, however, that in many cases the court would be unlikely to encounter any particular practical difficulties in ascertaining the relevant facts: [113].

(iv) *Section 64 (Exclusion from assessment of fairness)*

The UTD does controversially make limited provision for certain core terms to be excluded from the fairness test, although there is clear authority that any exception to the rules which seek to come to the aid of consumers who are weak vis-à-vis sellers or suppliers, both in bargaining power and level of knowledge, should be interpreted narrowly.<sup>104</sup> Added late in the legislative process,<sup>105</sup> Article 4.2 of the UTD provides that:

‘Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.’

This seeks to ensure the inviolability of the core bargain: provided the terms expressing it are plain and intelligible, then this should remain an area controlled by the parties, not the courts. On this basis, as the CJEU stated in *Caja de Madrid*, ‘the terms referred to in Article 4(2), while they come within the area covered by the Directive, escape the assessment as to whether they are unfair only in so far as the national court having jurisdiction should form the view, following a case-by-case examination, that they were drafted by the seller or supplier in plain, intelligible language.’<sup>106</sup> The key question therefore is the scope of these terms which relate to the ‘definition of the main subject matter of the contract’ and ‘the adequacy of the price and remuneration as against the services or goods supplied in exchange’.<sup>107</sup> As is well known, the UK courts have struggled to determine the breadth of these exceptions, most notably in the litigation over bank charges, which culminated in the 2009 Supreme Court decision: *Office of Fair Trading v Abbey National plc*.<sup>108</sup> This was a test case in which the

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<sup>104</sup> *Kásler* (n 87), [42]; *Office of Fair Trading v Abbey National plc* [2009] UKSC 6, [43] per Lord Walker; *Director General of Fair Trading v First National Bank plc* [2001] UKHL 52, [34] per Lord Steyn and [12] per Lord Bingham.

<sup>105</sup> See Collins (n 68), 238, who notes that even at a late stage in the negotiations, the draft Directive had envisaged the introduction of a general principle against substantive unfairness in consumer contract. Note also the influential article of HE Brandner and P Ulmer, ‘The Community Directive on Unfair Terms in Consumer Contracts: Some Critical Remarks on the Proposal Submitted by the EC Commission’ (1991) 28 CML Rev 647, who argued at 652 that some limits were needed to avoid ‘a drastic restriction of the autonomy of the individual.’

<sup>106</sup> Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, [32].

<sup>107</sup> Transposed originally under Reg 3(2) UTCCR 1994 and then Reg 6(2) of the UTCCR 1999.

<sup>108</sup> [2009] UKSC 6, [2010] 1 AC 696. For criticism, see M Chen-Wishart, ‘Transparency and fairness in bank charges’ (2010) 126 LQR 157; P Davies, ‘Bank charges in the Supreme Court’ [2010] CLJ 21. The potential for difficulty had been recognised from the time of transposition of the Directive: see E Macdonald, ‘Mapping the Unfair Contract Terms Act 1977 and the Directive on unfair terms in consumer contracts’ [1994] JBL 441, 459-462.



OFT challenged whether charges for unauthorised overdrafts fell within the Article 4.2 exemption. Reversing the decision of the Court of Appeal, the Supreme Court found in favour of the banks. The bank charges, in its view, constituted part of the price or remuneration for the bank services provided and there was no reason to read into the provisions a distinction between the main and incidental price. On this basis, provided they were in plain and intelligible language, the banks' overdraft charges could not be assessed for fairness.

The decision of a UK court to adopt a broad interpretation of Article 4.2 was controversial, not least in view of the fact that the Supreme Court disagreed with the decisions of the Court of Appeal and High Court and yet refused to refer the question to the CJEU under the Article 267 TFEU preliminary reference procedure, noting that there was a strong public interest in resolving the matter without further delay.<sup>109</sup> The Law Commissions in their Issues Paper of 2012 highlighted the uncertainty which followed this decision for both consumers and traders and recommended changes to the existing regime.<sup>110</sup> They also noted the possibility, flagged by academics,<sup>111</sup> that the decision might find itself in conflict with the jurisprudence of the CJEU. They suggested, therefore, that to ensure the UK's implementation of Article 4.2 was certain enough to withstand any decisions of the CJEU, a 'slightly higher' level of consumer protection was needed which would narrow the scope of the exemption.<sup>112</sup> Following their recommendation, section 64 of the CRA provides that:

- (1) A term of a consumer contract<sup>113</sup> may not be assessed for fairness under section 62 to the extent that—
- (a) it specifies the main subject matter of the contract,<sup>114</sup> or
  - (b) the assessment is of the appropriateness<sup>115</sup> of the price payable under the contract by comparison with the goods, digital content or services supplied under it.
- (2) Subsection (1) excludes a term from an assessment under section 62 only if it is transparent and prominent.

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<sup>109</sup> Ibid., [50] per Lord Walker. For criticism, see M Schillig, 'Directive 93/13 and the "price term exemption": A comparative analysis in the light of the "market for lemons" rationale' (2011) 60 ICLQ 933, who notes, however, that this reluctance is shared by other European national courts.

<sup>110</sup> (n 70) Part 6.

<sup>111</sup> S Whittaker, 'Unfair contract terms, unfair prices and bank charges' (2011) 74 MLR 106, M Kenny (2011) 19 ERPL 43 who compares the 'Europeanized' approach in *First National Bank* with the more traditional and formalistic approach of the Supreme Court in *Abbey National*.

<sup>112</sup> (n 70) [8.13].

<sup>113</sup> Not a consumer notice.

<sup>114</sup> Previously: 'the definition of the main subject matter of the contract'.

<sup>115</sup> Previously: 'adequacy of the price or remuneration'. Lord Mance in *Abbey National* [2009] UKSC 6, [94] commented that 'Adequacy of the price or remuneration (the word also used in the Directive) means appropriateness or reasonableness (in amount).'

(3) A term is transparent for the purposes of this Part if it is expressed in plain and intelligible language and (in the case of a written term) is legible.

(4) A term is prominent for the purposes of this section if it is brought to the consumer's attention in such a way that an average consumer would be aware of the term.

(5) In subsection (4) "average consumer" means a consumer who is reasonably well-informed, observant and circumspect.

(6) This section does not apply to a term of a contract listed in Part 1 of Schedule 2 (grey list).

The key feature is the addition of the 'prominence' requirement to the pre-existing requirement of transparency (or 'plain and intelligible language' in the Directive). This was recommended by the Law Commissions and signifies that the wording of the term is brought to the consumer's attention in such a way that the 'average consumer' – who is reasonably well informed, observant and circumspect - would be aware of it. The exemptions are also redefined to render them clearer. One notable development is the clarification that the price exemption is confined to 'the appropriateness' of the price and will not extend to other price-related issues such as price variation clauses (which are included, in any event, in the grey list found in Part 1, Schedule 2).<sup>116</sup> The Explanatory Notes give the example of an individual who contracts with a catering company to provide a buffet lunch, and the contract includes a term that the individual will pay £100 for a three course meal. Here, the court cannot look at whether it is fair to pay £100 for three courses, but it may look at other things, such as the rights of the company and the individual to cancel the lunch, and when the price is due to be paid.<sup>117</sup>

The aim is greater clarity, but a number of questions remain. The most obvious issue is what the prominence test adds to the test of 'plain and intelligible language'. The Explanatory Notes to the Act give the example of a term in the small print.<sup>118</sup> Prominence, it is submitted, will require the trader to make efforts to ensure that the reasonable consumer would notice the terms in question. In their 2012 Issues Paper, the Law Commissions speculate that the more unusual or onerous the term, the more prominent it needs to be.<sup>119</sup> This is indeed in line with common law authority such as *Interfoto v Stiletto*<sup>120</sup> but does give the courts considerable discretion on the facts of each particular case. It remains to be seen just how

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<sup>116</sup> Section 64(6) provides that this section does not apply to a term of a contract listed in Part 1 of Schedule 2.

<sup>117</sup> Explanatory Notes to Act, [317].

<sup>118</sup> Explanatory Notes to Act, [313].

<sup>119</sup> (n 70), [8.27].

<sup>120</sup> *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 1 QB 433.

demanding a test of ‘prominence’ will be in practice. It is clear that the underlying justification is that of presenting traders with a choice – either to fail the test of transparency and prominence and run the risk of a finding of unfairness, or to present the terms in a way that the average consumer would be aware of their existence.

The ‘average consumer’ in sections 64(4) and (5) is a key component of the prominence requirement and here the Act relies upon a concept found in European private law. There is no explicit reference to this concept in the UTD, but it has arisen in other contexts and sets an objective standard of the reasonably well informed, reasonably observant and circumspect consumer.<sup>121</sup> It is not without criticism, however, both from EU<sup>122</sup> and common lawyers.<sup>123</sup> Hondius, for example, juxtaposes the ‘weak’ consumer who is hardly able to read a contract and in need of information about every conceivable item, with the ‘EU’ consumer who is the well-advised citizen who wishes to make full use of the internal market.<sup>124</sup> In choosing to adopt this standard based on EU internal market policy, the Act thus introduces a European concept, albeit one which does not seem out of kilter with current UK law.<sup>125</sup> It should not be assumed, however, that the idea of the EU consumer is either used consistently across EU law,<sup>126</sup> or is static. Recent case-law suggests that the objective consumer must not only be presented with a term which is grammatically intelligible, but also that the consumer should be in a position to evaluate, on the basis of clear, intelligible criteria, the economic

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<sup>121</sup> This concept developed in the free movement case-law of the CJEU but has since been applied more broadly, notably in the Unfair Commercial Practice Directive 2005/29/EC OJ L 149, 11.6.2005, pp 22–39 (see recital 18 and Art 5). The UK Consumer Protection from Unfair Trading Regulations 2008 SI 2008/1277, Reg 2(2) on this basis mirror the CJEU’s approach in Case C-210/96 *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt-Amt für Lebensmittelüberwachung* [1998] ECR I-4657 (on egg labelling). See, generally, V Mak, ‘The “Average Consumer” of EU Law in Domestic and European Litigation’ in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Oxford: Hart 2013).

<sup>122</sup> T Wilhelmsson, ‘The abuse of the Confident Consumer as Justification for EC Consumer Law’ (2004) 27 J Consum Policy 317; MBM Loos, ‘Transparency of standard terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law’ (2015) 23 ERPL 179, 188-189; P Hacker, ‘The behavioural divide: A Critique of the Differential Implementation of Behavioral Law and Economics in the US and the EU’ (2015) 11 ERCL 299.

<sup>123</sup> Lord Denning, for example, found this paradigm to be ‘a fiction. No customer in a thousand ever read the conditions’: *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 169. See also M Kenny, ‘The Law Commissions’ 2012 issues paper on unfair terms: subverting the system of “Europeanized” private law?’ (2013) 21 ERPL 871.

<sup>124</sup> E Hondius, ‘The notion of consumer: European Union vs. Member States’ (2006) 28 Sydney L Rev 89, 94. See also S Weatherill, ‘The role of the informed consumer in EC Law and Policy’ (1994) 2 Consumer Law Journal 49.

<sup>125</sup> See *Thompson v London, Midland and Scottish Railway Co Ltd* [1930] 1 KB 41.

<sup>126</sup> See, for example, recently in relation to the 1993 Directive, Case C-537/13, *Šiba v Devėnas* ECLI:EU:C:2015:14, [22] and Case C-488/11 *Asbeek Brusse and de Man Garabito* EU:C:2013:341, [31]. See also D Leczykiewicz and S Weatherill (eds), *The Images of the Consumer in EU Law* (Oxford: Hart, 2016).

consequences for her which derive from the term, given the level of attention to be expected of the average consumer.<sup>127</sup> Is this a more onerous test than that stated in section 64? The problem with importing a European standard is that its meaning will evolve according to decisions of the CJEU, Brexit or no Brexit. This signifies that decisions of the CJEU on the ‘average consumer’ will remain relevant, even if no longer binding on the UK courts post-Brexit, and places an onus on national courts to monitor the evolution of this concept beyond the 2015 Act.

There remains also the issue of the scope of the exemptions themselves: a term specifying the main subject matter of the contract, or raising the issue of the appropriateness of the price payable under the contract. In relation to the main subject matter of the contract, there is clear European authority that the exemption *should* be limited to terms which describe the essential obligations of contracts concluded between a seller or supplier and a consumer.<sup>128</sup> The CJEU in *Kásler*<sup>129</sup> provides useful guidance. The case concerned a dispute relating to the terms of a mortgage, whereby the outstanding amount was calculated according to the buying rate of Swiss Francs (on the day when the contract was concluded), but the instalments were based on the currency's selling rate, which is usually higher. The CJEU drew a clear distinction between terms which ‘lay down the essential obligations of the contract and, as such, characterise it’ and ‘terms ancillary to those that define the very essence of the contractual relationship’.<sup>130</sup> The latter cannot fall within the notion of the ‘main subject-matter of the contract’ within the meaning of Article 4(2) of the Directive. Such a distinction should logically be read into section 64(1)(a).

Section 64(1)(b), in contrast, does not introduce any division between main and ancillary price terms; rather the issue is the *nature* of the term – does the complaint relate to the appropriateness of the price in question or other concerns? Again *Kásler* is helpful here in highlighting that the exclusion is limited to the adequacy of the price and cannot apply where there is a challenge (as in this case) to terms which merely determine the conversion rate of the foreign currency to which the loan agreement is denominated.<sup>131</sup>

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<sup>127</sup> *Kásler* (n 87), [75]; *Matei v SC Volksbank Romania SA* (C-143/13) [2015] 1 WLR 2385, [74]-[75].

<sup>128</sup> Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid* [2010] ECR I-4785, [34].

<sup>129</sup> *Kásler* (n 87).

<sup>130</sup> *Ibid.*, [49]-[50].

<sup>131</sup> *Ibid.*, [58]. See also *Matei* (n 127).

The interface between EU and UK law is of particular interest in this context. In favouring a test of the ‘average consumer’ and framing the base level of consumer protection on concepts such as transparency and prominence, the Act is supporting a market-led approach which expects consumers to be self-reliant and protect their own interests.<sup>132</sup> The goal is to prevent consumers from being unfairly surprised by contract terms of whose existence they could not reasonably be expected to be aware. This will, it is assumed, encourage consumers to be more confident in making transactions, increase consumer choice and thereby raise the level of consumer protection. This is indeed consistent with one of the goals of the Directive in removing market disparities and distortions in competition,<sup>133</sup> together with its constitutional base of Art 114 TFEU, which is a measure ‘for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.’ Further, the Commission’s 2012 Consumer Agenda was stated to be one of promoting measures which *empower* consumers, enabling them actively to participate in the market.<sup>134</sup> While this has not prevented academics such as Willett from asserting that it is still possible to develop the ‘average consumer’ concept in relatively protective ways, he concedes that this would require regulators and national governments to play a key role in maximising this level of protection.<sup>135</sup> This is not, however, the intention of section 64. In framing the exemptions within a framework in which both traders and consumers make informed choices, the intention of the Government is clear - the trader’s duty is solely to ensure that terms covered in section 64(1) are clearly brought to the consumer’s attention. Section 64, it is anticipated, will remove the uncertainty created by the *Abbey National* decision and avoid any clash with the CJEU. The aim of this section is therefore not to overturn the *Abbey National* case, but render its application as a precedent more straight-forward, responding to the concern of the Law Commissions that the case might give traders a false sense of security, whilst discouraging consumers from challenging similar terms. Section 64 seeks, therefore, to restate the Article 4.2 exemption in more ‘user friendly’ language, making clear that other

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<sup>132</sup> See C Willett, ‘General clauses and the competing ethics of European consumer law in the UK’ [2012] CLJ 412.

<sup>133</sup> Recital 2, UTD.

<sup>134</sup> European Commission, ‘A European Consumer agenda – Boosting confidence and growth’ COM (2012) 225 p 2. Straetmans comments that ‘the internal market-building process had (and still has) a strong bearing on the development of the European consumer concept’: G Straetmans, ‘Some thoughts on the future European consumer acquis’ [2009] EBLR 423.

<sup>135</sup> C Willett, ‘Fairness and consumer decision making under the Unfair Commercial Practices Directive’ (2010) 33 J Consum Policy 247, 271.

aspects of the price other than the amount e.g. timing of payment *can* be assessed for fairness. It will remain the case, however, that if the traders are vigilant in satisfying the tests of transparency and prominence, there is no reason why the core exemptions should not continue to operate successfully in UK law.

## **Conclusion**

The Consumer Rights Act 2015 is an important piece of legislation, both for consumers and contract lawyers generally. It seeks to simplify, strengthen and modernise UK consumer law and to resolve inconsistencies and overlaps caused by the implementation of EU legislation in domestic law. The decision to absorb and consolidate a number of EU directives must, however, now be considered in the light of the decision in the June 2016 referendum that the UK should withdraw from the EU. Embedding EU consumer law in a landmark piece of national legislation marks the successful transplantation of EU law into the heart of the common law system of law. In consolidating domestic law with selected EU directives, Parliament has engaged in a process which Gerstenberg recently described as ‘an alignment of national law with the EU’s shared fundamental values and principles.’<sup>136</sup> This, he argues, requires a non-hierarchical, participatory dialogue between national and European Courts. It is not therefore simply a matter of tidying up inconsistent pieces of legislation, but involves the introduction of distinct forms of reasoning and conceptual frameworks into UK law.<sup>137</sup>

Yet this article has argued that the impact of EU law on the provisions of the Act should not be exaggerated. The Act does not implement the Consumer Rights Directive and Part 1 – which transposes the 1999 Consumer Sales Directive (CSD) – absorbs the CSD into a wider framework of (common law) statutory rights and remedies. This diminishes not only the visibility of these instruments, but also their impact. No attempt has been made to tackle the conceptual divide between the common law and civil law idea of remedies. This ideological gulf is papered over, with a sign-post erected to point the consumer to a *free* choice of

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<sup>136</sup> O Gerstenberg, ‘Constitutional reasoning in private law: the role of the CJEU in adjudicating unfair terms in consumer contracts’ (2015) 21 ELJ 599, 621.

<sup>137</sup> M Van Hoecke and M Warrington, ‘Legal cultures, legal paradigms and legal doctrine: Towards a new model for comparative law’ (1998) 47 ICLQ 495, 533.

remedies. This reflects the dominant concerns of UK lawyers, as identified by the Law Commissions in their 2009 Report.<sup>138</sup>

Part 2, in contrast, does reflect to a much greater degree the influence of EU law. It is clear that sections 62, 64 and 71 were introduced not only to resolve uncertainty in the law, but to avoid a potential clash with the CJEU made apparent in the reports of the Law Commissions and in the reaction to the *Abbey National* decision. Indeed, the adoption of the Article 3.1 UTD test for unfairness for all consumer contracts, be they standard term or not, appears to be a strong step towards a common European standard of protection across Member States. Regardless of the reasons for this step, which it has been suggested may be based more on convenience than ideology, UK law has accepted a test previously described as a ‘legal irritant’ by one learned writer.<sup>139</sup> Equally, section 71 indicates recognition by the UK government that decisions at CJEU level have led to procedural changes in UK private law. Section 64 seeks to solve the ‘*Abbey National* problem’ by bringing UK law more in line with decisions of the CJEU, albeit by adopting a market-led approach based on the reasonably well-informed, observant and circumspect consumer. What this means in practice is that, pre-Brexit, UK courts must ensure that they follow the interpretative guidance of the CJEU when deciding matters relating to transposed EU law. Post-Brexit, this indicates that certain key decisions will need to be made. First, it must be resolved which, if any, of the EU-sourced provisions of the Act should be repealed. In view of the long-standing influence of the provisions of the 1993 Unfair Terms Directive and 1999 Consumer Sales Directive on UK law and the destabilising effect of change, it seems very unlikely that any government will engage in the effort needed to amend an Act which only came into force in October 2015. A more pertinent question, therefore, is how the courts will interpret such provisions post-Brexit. I have suggested that the decisions of the CJEU should continue to be considered as persuasive authority, although this may weaken over time if the text of the directives change. The 1993 and 1999 Directives, for example, are currently subject to the Commission’s Regulatory Fitness and Performance Programme (REFIT) which is currently evaluating if they remain fit for purpose. The 2011 Directive is also subject to review. EU consumer law is also far from static. It is often unsettled and subject to change both in terms

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<sup>138</sup> It is noticeable that the focus of the Law Commissions’ 2009 report on *Consumer Remedies* (n 16) was that of retaining the common law right to reject *despite* the provisions of the 1999 Directive rather than critically assessing the transposition of the 1999 Directive into UK law.

<sup>139</sup> Teubner (n 61).

of new judgments of the CJEU, but also alterations of policy and fresh initiatives at the Commission level.<sup>140</sup> The European Commission is, for example, currently putting forward two proposals for new consumer directives on contracts for the supply of digital content<sup>141</sup> and contracts for the online and other distance sales of goods.<sup>142</sup> There is a chance, therefore, that the Consumer Rights Act 2015 will embody a version of the directives which gradually becomes dated over time, rendering EU law of diminishing relevance.

Where, therefore, does this leave the aim of the Consumer Rights Act 2015 to remove obvious signs of tension between EU and UK consumer legislation? The Act is an ambitious and landmark piece of legislation. Nevertheless, problems of interpretation remain, not least for the poor consumer who faces a complex piece of legislation which does not even consolidate all UK consumer rights legislation. This article has argued that the tensions between EU and UK consumer legislation have not been fully resolved, but that certain policy decisions have been made, some of which make express reference to EU law and principles. Pre-Brexit, this means that the courts need to appreciate that in applying this new domestic statute, they will have to refer to CJEU case-law and monitor future developments, notably in the area of unfair terms. Should the CJEU, for example, continue in its more dynamic approach to the Unfair Terms Directive,<sup>143</sup> this will be relevant to the application of Part 2 of the Act. Post-Brexit, the courts will need to resolve how to interpret provisions introduced into UK law by EU directives. It is submitted that EU law should continue to have some influence on the development of UK consumer law in the same way that the donor system of a legal transplant might prove a reference point for its future interpretation.<sup>144</sup> This may prove to be controversial but, in reflecting changes made to UK consumer law by EU directives for over 20 years, the Consumer Rights Act 2015 highlights the difficulty, perhaps impossibility, of reverting back to a purely common law form of consumer law.

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<sup>140</sup> See R Zimmermann, 'Contract Law reform: The German Experience' in S Vogenauer and S Weatherill (eds), *The Harmonisation of European Contract Law* (Oxford: Hart, 2006), pp 86-87.

<sup>141</sup> Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the supply of digital content, Brussels 9.12.2015 COM (2015) 634 final.

<sup>142</sup> Proposal for a directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, Brussels 9.12.2015 COM (2015) 635 final.

<sup>143</sup> See Micklitz and Reich (n 97).

<sup>144</sup> cf M Amos, 'Transplanting human rights norms: The case of the United Kingdom's Human Rights Act' (2013) 35 HRQ 386.