

### **Part 3. Common structures in the Directives**

#### **A. The notion of “consumer”**

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#### **I. Introduction**

#### **1. European Community law**

##### **Notion of consumer in Community law**

<b>Directive</b>	<b>Notion of consumer</b>
Directive 85/577, Art. 2	“consumer” means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession
Directive 90/314, Art. 2(4)	“consumer” means the person who takes or agrees to take the package ('the principal contractor'), or any person on whose behalf the principal contractor agrees to purchase the package ('the other beneficiaries') or any person to whom the principal contractor or any of the other beneficiaries transfers the package ('the transferee')
Directive 93/13, Art. 2(b)	“consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession
Directive 94/47, Art. 2	“purchaser” shall mean any natural person who, acting in transactions covered by this

	Directive, for purposes which may be regarded as being outwith [sic!] his professional capacity, has the right which is the subject of the contract transferred to him or for whom the right which is the subject of the contract is established
Directive 97/7, Art. 2(2)	“consumer” means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession
Directive 98/6, Art. 2(e)	consumer shall mean any natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional activity
Directive 99/44, Art. 1(2)(a)	consumer: shall mean 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

**Notion of consumer in Directives not covered by this study**

<b>Directive</b>	<b>Notion of consumer</b>
Directive 87/102, Art. 1(2)(a)	“consumer” means a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession
Directive 2000/31, Art. 2(e)	“consumer”: any natural person who is acting for purposes which are outside his or her trade, business or profession
Directive 2002/65, Art. 2(d)	“consumer” means any natural person who, in distance contracts covered by this Directive, is acting for purposes which are

	outside his trade, business or profession
Directive 2005/29, Art. 2(a)	“consumer” means any natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession

According to the English version of Directive 85/577, a consumer is “a natural person who, in transactions covered by this Directive, is acting for purposes which can be regarded as outside his trade or profession”. Directive 87/102 uses literally the same definition.

Slightly deviating from this are; Directives 93/13, 97/7, 99/44, 2000/31 and 2002/65, which define a consumer as a natural person who is acting for purposes which are outside his “trade, *business* and/or profession”. Also Directive 94/47 follows this definition, even though it does not use the term “consumer”, but instead mentions “purchaser”, defined as a natural person acting “for purposes which may be regarded as being outside his professional capacity”. Finally, Directive 98/6 also defines consumer as a “natural person who buys a product for purposes that do not fall within the sphere of his commercial or professional capacity”.

In other language versions of the Directives, the notion of consumer is likewise defined using deviating terms. However, they all share a common core, as they all provide that a consumer is:

- a natural person;
- who is acting for purposes which are outside some kind of business, commercial or trade activity.

These common features can be found not only in most consumer protection EC directives but also in European procedural law (Art. 13-15 of the Brussels I Convention, now Arts. 15-17 Brussels I Regulation No. 44/2001) and European rules on conflict of laws (Art. 5 of the Rome I Convention).

Directive 90/314 by contrast contains a very different definition. It describes a consumer as a person “who takes or agrees to take the package (‘the principal contractor’), or any person on whose behalf the principal contractor agrees to purchase the package (‘the other

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beneficiaries’) or any person to whom the principal contractor or any of the other beneficiaries transfers the package (‘the transferee’). Directive 90/314, accordingly, also protects those who conclude package travel contracts for business related purposes. Business trips are thus also within the scope of the directive.

## **2. Overview**

The following observations address the question of how the notion of “consumer” has been defined in the member states in transposing Directives 85/577, 93/13, 97/7, 94/47, 98/6 and 99/44.

The transposition of Directive 90/314, on the other hand, will not be addressed further here. Since this Directive uses a different notion of consumer from the other directives, many member states have declined to use the term “consumer” and opted instead for the term “traveller” or “purchaser”.<sup>1</sup>

The following expositions initially give an overview of the legislative techniques used by the member states to transpose the notion of consumer and pay particular attention to the question of which member states have implemented a general definition of consumer, being applicable for several consumer contracts (II.). Attention will then turn to the issue of the extent to which the consumer definitions chosen in the member states differ from European law. A series of member states have not transposed the notion of consumer in the aforementioned directives literally, but rather based their notion of consumer on deviating concepts, which extend the protection of the directives to further groups of persons. This concerns above all the notion of the final addressee which is employed in some member states (III.1.), the extension to businesspersons concluding atypical contracts (III.2.), the extension to legal persons (III.3.) as well as the incorporation of employees into the sphere of protection of the Community law provisions (III.4.). Finally, the question of how “dual-use” contracts are treated in Community law and the member states will be addressed (IV.) and whether activities associated with founding a business are covered by the notion of consumer (V.). The study shows that the member state definitions of consumer are in accordance with the minimum requirements of

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<sup>1</sup> See the detailed report on the transposition of Directive 90/314, in this study, Part 2 B.II.1.

Community law. Many member states go beyond the minimum level of protection required by Community law by adopting a wide definition of consumer and extending the protection to other groups of persons. Nevertheless, at Community level a series of individual questions remain unanswered. In the context of the acquis consumer law review the different definitions of consumer should be harmonised and important issues addressed (VI).

## **II. Legislative techniques in member states**

Many member states have harmonised the notion of consumer found in the various directives and established a definition in national law, which is equally applicable in various consumer protection acts. A systematic overview produces the following picture:

### **Overarching consumer definitions in member states’ law**

<b>Member state</b>	<b>Consumer definitions in member states’ law</b>	<b>Transposed consumer definition of directive</b>
Austria	Art. 1(1) no. 2 in conjunction with (2) of the Consumer Protection Act	85/577; 93/13; 94/47; 97/7; 99/44
Belgium	Art. 1 No. 7 of the Act of 14 July 1991 on trade practices and consumer information and protection	85/577; 93/13; 97/7; 98/6
	Art. 2 No. 2 of the Act of 2 August 2002 on misleading and comparative advertising, unfair contract terms and distance marketing in respect of liberal professions	93/13; 97/7
Bulgaria	Law on Consumer Protection of 9 December 2005, Additional Provision, § 13 no. 1	85/577; 93/13; 98/6; 97/7; 99/44

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Czech Republic	Art. 52(3) Civil Code as amended by Act 367/2000	85/577; 93/13; 94/47; 97/7; 99/44
Denmark	Art. 3 (1) of the Act No. 451 of 9 June 2004 on certain consumer contracts	85/577; 97/7
Estonia	Art. 2 No. 1 of the Consumer Protection Act	93/13; 97/7, 98/6; 99/44
	Art. 34 of the Law of Obligations Act	85/577; 93/13; 94/47; 97/7; 99/44
Finland	Chapter 1 Art. 4 of the Consumer Protection Act 20.1.1978/38	85/577; 93/13; 94/47; 97/7; 98/6; 99/44
Germany	CC § 13	85/577; 93/13; 94/47; 97/7; 99/44
Greece	Art. 1(4) lit. (α) of the Consumer Protection Act 2251/94	85/577; 93/13; 97/7; 99/44
Italy	Art. 3(1) lit. (a) and (b) of the Consumer code	85/577; 93/13; 97/7; 98/6; 99/44
Latvia	Art. 1(1) sec. 3 of the Consumer Rights Protection Law	85/577; 93/13; 94/47; 97/7; 98/6; 99/44
Lithuania	Art. 2(1) of the Law on Consumer	85/577; 93/13; 94/47; 97/7; 98/6; 99/44
	CC Art. 6.350(1)	85/577; 93/13; 94/47; 97/7; 98/6; 99/44
Malta	Art. 2 of the Consumer Affairs Act	93/13; 97/7; 99/44
Netherlands	CC Book 7 Art. 5(1)	97/7; 99/44
Poland	CC Art. 22 <sup>1</sup>	85/577; 93/13; 97/7
Portugal	Art. 2(1) of the Consumer Protection Act No. 24/96	93/13; 98/6; 99/44

	Art. 1(3)(a) of the Decree-Law 143/2001 of April 26	85/577; 97/7
Slovakia	Art. 1, 2nd part of the Act No. 108/2000 on consumer protection in doorstep selling and in distance selling	85/577; 97/7
	CC Art. 52	93/13; 94/47
Slovenia	Art. 1(2) of the Consumer Protection Act	85/577; 93/13; 94/47; 97/7; 98/6; 99/44
Spain	Art. 1(2)-(3) of the Law 26/1984 of July 19 on Consumer Protection	85/577; 93/13; 97/7; 99/44
Sweden	Art. 2 of the Law on Consumer Protection on Distance Contracts and Doorstep Selling Contracts	85/577; 97/7

The above overview not only makes it clear that many countries recognise a general consumer definition, equally applicable to various consumer protecting legislative acts, but also that in certain countries (BELGIUM, ESTONIA, LITHUANIA, PORTUGAL, SLOVAKIA) several overarching consumer definitions exist. In some countries (DENMARK, PORTUGAL, SLOVAKIA and SWEDEN) a general notion of consumer has emerged from a combined regulation of doorstep and distance selling in a single statute.

The countries not listed in the table (CYPRUS, FRANCE, HUNGARY, IRELAND, LUXEMBOURG, ROMANIA, UNITED KINGDOM), on the other hand, do not recognise any overarching legal definition of consumer within the directives, rather they either define the consumer separately in every transposing act and/or abstain from such a definition in whole or in part. In FRANCE the term consumer is not defined in legislation at all, but case-law has developed a notion of

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consumer. The French legislator meanwhile explicitly abstains from defining the term consumer, as in this way better account can be taken of different situations.<sup>2</sup>

In MALTA, any other class or category of persons whether natural or legal may, from time to time, be designated as "consumers" for all or any of the purposes of the Consumer Affairs Act by the Minister responsible for consumer affairs after consulting the Consumer Affairs Council.

So long as the term consumer is defined in different legal acts in the member states, this does not necessarily mean that these definitions differ from each other in substance. On the contrary, it can be stated that in most member states, in spite of the scattered rules in separate legislative acts, the definitions by and large accord, as they are orientated on Community law and Community law, for its own part, exhibits a common core. Difficulties in applying consumer protection legislative acts do of course arise when a member state uses differing definitions of consumer and it is not clear whether one or the other is applicable in each individual case. Generally, however, this does not affect the proper transposition of the relevant directives, since those member states go beyond the minimum level of protection. In HUNGARY, the notion of consumer is regulated differently in the CC, the Consumer Protection Act, the Government Decree on Doorstep Selling, the Hungarian Competition Act and the Business Advertising Activity Act, and it is often not clear which definition is applicable. However, the planned modifications of the Hungarian CC could clear up these ambiguities.

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<sup>2</sup> E.g. most recently, in transposition of the Consumer Sales Directive, the Rapport au Président de la République relatif à l'ordonnance n° 2005-136 du 17 février 2005 relative à la garantie de la conformité du bien au contrat due par le vendeur au consommateur, Journal Officiel n° 41 du 18 février 2005, 2777.

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### **III. Extension of the notion of consumer in member states**

#### **Overview: Extension of the notion of consumer in member states**

Notion of the final addressee	ES, EL, HU, LU ( <b>4</b> )
Protection of businesspersons concluding atypical contracts	BG, FR, LU, LV, PL, (UK) ( <b>6</b> )
Protection of certain legal persons	AT, BE, CZ, DK, EL, ES, FR, HU, SK ( <b>9</b> )
Protection of employees	DE ( <b>1</b> )
Protection of business founding activities	AT ( <b>1</b> )

#### **1. Notion of the final addressee**

In SPAIN it is an essential prerequisite that the consumer or user “acquires, uses or enjoys *as final addressee* some goods”, and without “the aim of integrating them in production, transformation, commercialisation processes”.<sup>3</sup> A comparable notion exists in GREECE, although with the difference that Greek law does not have any limitation for private purpose. According to Art. 1(4)(a) of the Consumer Protection Act 2251/1994 a consumer is every “natural or legal person, at whom products or services on a market are aimed, and who makes use of such products and services, so long as the person is the end recipient.” Also in HUNGARY the notion of end recipient is applied; according to Art. 2 lit. (i) of the Consumer Protection Act a “consumer transaction” is the supply of goods or the provision of services and, furthermore, the supply of free samples of goods directly to the consumer as final recipient.<sup>4</sup> The LUXEMBOURG Consumer Protection Act uses the term final addressee (*consommateur final privé*) in some cases as well<sup>5</sup>, without defining what this term means.

The notion of “final addressee” in SPAIN and GREECE is wider than the term “consumer” established in the directives, since it also includes atypical transactions which are not related

<sup>3</sup> See Art. 1(2) and (3) of the Law 26/1984 of July 19 on Consumer Protection.

<sup>4</sup> See thereto the decision of the *Magyar Köztársaság Legfelsőbb Bíróság*, Legf. Bír. Kfv. III. 37.675/2003 in the database.

<sup>5</sup> As for example in Art. 1-2 and Art. 2 No. 20 in relation to the control of unfair terms.

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to a further transfer. However, in both countries it is acknowledged that in practice such a broad definition of “consumer” can lead to difficulties in applying the law. In SPAIN, the “Motives Explanation” of the Law 7/1998 on Standard Terms in Contracts, which in Spain is a non-binding part of the Law, mentions that the consumer is “any natural person who (...) is acting for purposes which are outside his trade, business or profession”. Against this background, it is supposed that the General Law for the Protection of Consumers and Users should be interpreted according to those sentences in the Preamble.

Also in GREECE the need for a teleological reduction is stressed in academic literature and the view is propounded that the regulations should not apply to every final addressee. Rather, in each case it should be verified that the relevant person or entity is in need of protection. In order to qualify as being in need of protection, the end consumer must not be acting within a business or commercial capacity in concluding the transactions in question.

## **2. Extension to businesspersons concluding atypical contracts**

In FRANCE, according to well-established case-law, a consumer is a (natural or legal) person concluding contracts which are not directly related (*qui n'ont pas de rapport direct*) with his or her profession. The leading decision in this regard was that of the Cass. civ. of 28 April 1987.<sup>6</sup> In the case under dispute an estate agency purchased an alarm system for its business premises, which was not in good working order. A clause in the general conditions of business however declared that the buyer may not rescind the contract or claim damages. In the view of the Cass. civ. the French Consumer Code was nonetheless applicable, because the subject matter of the contract did not bear any direct relation to the substance of the business activity and because the technical expertise of an estate agency did not encompass the technology of alarm systems, by reason of which the buyer must be treated just as any other consumer. In later decisions the Cass. civ. has distanced itself from its wide interpretation and pointed out that the decisive criterion for the applicability of the Consumer Code is not the technical competence of the “professional”, but rather whether the contract is directly related to the business activity.<sup>7</sup> This case-law has been affirmed in numerous decisions.<sup>8</sup>

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<sup>6</sup> Cass. Civ. of 28 April 1987 (JCP 1987. II. 20893 Juris-classeur periodique).

<sup>7</sup> Cass. Civ. 24 January 1995, Recueil Dalloz Sirey 1995, 327-329.

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Protection for businesses which conclude contracts outside of their usual field of business also exists in BULGARIA,<sup>9</sup> POLAND and LATVIA. This thinking underlies the LUXEMBOURG Consumer Sales Act; according to its Art. 2 No. 2 a “consommateur” is “une personne physique qui agit à des fins qui n'ont pas de rapport direct avec son activité professionnelle ou commerciale”. The practical relevance of this group of persons depends on the respective interpretation of the notion of “usual field of business”. If this is limited to elementary core activities, then businesses will frequently profit from consumer protection rules. Conversely, if “usual field of business” comprises all transactions which are not completely atypical, businesses will rarely be considered as consumers.

In the UNITED KINGDOM under section 12(1) of the Unfair Contract Terms Act (UCTA) 1977 businesses engaged in a transaction outside their normal business purposes can claim to be “dealing as a consumer” since the decision in *R & B Customs Brokers Ltd v United Dominions Trust Ltd*.<sup>10</sup> In this case, the plaintiff, a shipping brokerage, purchased a second-hand car for the personal and business use of the company’s directors. Several similar purchases had been made before. The contract excluded liability for breach of certain statutory implied terms. According to UCTA sec. 6 (2)(b), where a business sells to a consumer, terms as to quality and fitness for purpose implied by statute (namely sec.13-15 of the Sale of Goods Act 1979) cannot be excluded or restricted by reference to any contract term. Therefore, it was to be decided whether the buyer was “dealing as a consumer”. The CA held that no sufficient degree of regularity had been shown by the defendant so as to establish that the activity was an integral part of the plaintiff’s business. Rather, the purchase was only incidental to the company’s business activity. The plaintiff was therefore dealing as a consumer within the terms of UCTA sec. 12(1). Thus the defendant could not exclude liability for breach of the implied term. Whether this wide definition of consumer can be applied beyond the context of UCTA for other consumer protection legal acts, is questionable however. Firstly it must be noted that UCTA only partly serves the implementation of directive law (namely in relation to the Consumer Sales Directive) and UK otherwise uses a notion of consumer which is closely orientated towards Community law. Secondly, the cited

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<sup>8</sup> Cf. Cass. Civ. 23 November 1999, *Jurisclasser*, *Contrats-Concurrence-Consommation* 2000, commentaires, 25; Cass. Civ. 23 February 1999, D. 1999, *informations rapides*, 82.

<sup>9</sup> Law on Consumer Protection, Additional Provisions, § 13 no. 1.

<sup>10</sup> *R & B Customs Brokers Ltd v United Dominions Trust Ltd*. [1988] 1 WLR 321.

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decision has in the meantime been placed in doubt, as in *Stevenson v Rogers* the CA held that for the purposes of the Sale of Goods Act 1979 sec. 14 any sale by a business is “in the course of a business”.<sup>11</sup> Thus a solicitor selling off a computer no longer needed in his office would, for this purpose, be selling the computer in the course of business.

In ITALY some courts similarly propounded the view for a time, that a person should be protected as a consumer, if the relevant transaction does not belong to his core business activities.<sup>12</sup> The Cass. on the other hand rejected this view and established a narrow definition of consumer.<sup>13</sup> This view is consistent with the case-law of the ECJ.

The ECJ has narrowly construed the notion of consumer under Directive 85/577 in C-361/89 - *Di Pinto*.<sup>14</sup> The ECJ regarded the French notion of consumer as permissible; but at the same time highlighted that Community law does not “draw a distinction between normal acts and those which are exceptional in nature”.<sup>15</sup> This view is also confirmed by the preparatory work for Directive 99/44: whereas the original proposal for Directive 99/44 of 18 June 1996<sup>16</sup> regarded a consumer as a person who “is acting for purposes which are *not directly related to his trade, business or profession*”, the amended directive proposal<sup>17</sup> omitted the words “not directly”.

### **3. Protection of certain legal persons**

Under the above-mentioned directives only natural persons are regarded as consumers. In the joined cases C-541/99 and C-542/99 - *Idealservice*<sup>18</sup> the ECJ expressly stated (concerning the consumer definition of Art. 2 of the Directive 93/13) that Community law in this respect is not to be given a wider interpretation:

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<sup>11</sup> *Stevenson v Rogers* [1999] 1 All ER 613.

<sup>12</sup> Tribunale Roma, 20 of October 1999, Giustizia civile 2000, I, 2117.

<sup>13</sup> Cass., 25 July 2001, No. 10127, I Contratti 2002, 338.

<sup>14</sup> ECJ judgment of 14 March 2003, C-361/89 - *Criminal proceedings v Patrice Di Pinto* [1991] ECR I-01189.

<sup>15</sup> *Ibid*, para. 15.

<sup>16</sup> COM 95, 520 final.

<sup>17</sup> COM 1998, 217 final.

<sup>18</sup> ECJ judgment of 22 November 2001, joined cases C-541/99 and C-542/99 - *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl* [2001], ECR I-9049, para 16.

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“It is thus clear from the wording of Article 2 of the Directive that a person other than a natural person who concludes a contract with a seller or supplier cannot be regarded as a consumer within the meaning of that provision.”

A number of member states follow this concept and expressly limit the scope of consumer protection provisions to natural persons: BULGARIA, CYPRUS, GERMANY, ESTONIA, FINLAND, IRELAND, ITALY, LATVIA, LITHUANIA, LUXEMBOURG, MALTA, the NETHERLANDS, POLAND, SLOVENIA and SWEDEN. In ITALY the Italian constitutional court clarified in its judgment of 22 November 2002 that an extension of protection to legal persons is not provided for in Italian constitutional law either.<sup>19</sup> In LATVIA, there has recently been a reform, so that from now on legal persons are excluded from the notion of consumer.<sup>20</sup> In the UNITED KINGDOM, by contrast, the law varies: whereas the case-law has declared that a company may “deal as a consumer” within the meaning of UCTA,<sup>21</sup> in other consumer protection instruments only a natural person can be a consumer.

In ROMANIA the notion of consumer is extended in certain cases to groups of natural persons established in associations.<sup>22</sup>

Through the limitation to natural persons, small and medium sized enterprises and charitable associations e.g. sporting associations or church parishes, are without protection. Thus there are norms in AUSTRIA, BELGIUM,<sup>23</sup> CZECH REPUBLIC, DENMARK, FRANCE, GREECE, HUNGARY, SLOVAKIA (with some exceptions) and SPAIN,<sup>24</sup> which treat legal persons as

<sup>19</sup> *Corte Costituzionale* 22 November 2002, No. 469, *Giustizia civile* 2003, 290 et seq.

<sup>20</sup> Amendment of the Consumer Protection Law, which came into force on 11 November 2005.

<sup>21</sup> E.g. *R & B Customs*, above.

<sup>22</sup> E.g. Law 193/2000 implementing Directive 93/13, Government Ordinance 130/2000 implementing Directive 97/7.

<sup>23</sup> See Art. 1 No. 7 of the Act of 14 July 1991 on Trade Practices and Consumer Protection (TPA): « Consommateur: toute personne physique ou morale qui acquiert ou utilise à des fins excluant tout caractère professionnel des produits ou des services mis sur le marché » and Art. 2 No 2 of the Act of 2 August 2002 on misleading and comparative advertising, unfair contract terms and distance marketing in respect of liberal professions (LPA): « toute personne physique ou morale qui, dans les contrats visés par la présente loi, agit à des fins qui n'entrent pas dans le cadre de son activité professionnelle ». By contrast, under Art. 2 No. 5 of the Act of 11 April 1999 on the purchase of the right to use immovable properties on a time-share basis only natural persons are protected: « acquéreur : toute personne physique qui, agissant dans les transactions visées au point 1, à des fins dont on peut considérer qu'elles n'entrent pas dans le cadre de son activité professionnelle, soit se voit transférer le droit objet du contrat, soit voit créé à son bénéfice le droit objet du contrat. »

<sup>24</sup> In SPAIN, however, the “Motives Explanation” of the Law 7/1998 on Standard Terms in Contracts mentions that the consumer is “any natural person”. Against this background, it is supposed that the General Law for the Protection of Consumers and Users should be interpreted according to this.

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consumers, providing the purchase is for private use (or in Greece, Hungary and Spain the legal person is the final addressee). In FRANCE the Cass. Civ. with judgment of 15 March 2005 has clarified, that the notion of “consumer” (*consommateur*) according to the ECJ decision in *Idealservice* cannot be carried over to legal persons, whereas on the other hand, the notion “*non-professionnel*” (used in the context of the articles concerning unfair contract terms; vid. Art. L 132-1 Consumer Code) can also be a legal person under French law.<sup>25</sup> HUNGARY is currently planning to limit the notion of consumer to natural persons. In PORTUGAL, it is unclear whether legal persons can be protected as “consumers”, however, a draft of a new Consumer Code acknowledges that legal persons may, in certain circumstances, benefit from the protection conferred to consumers.

#### **4. Protection of employees**

A peculiarity of GERMAN law is that it generally regards an employee, who is also acting within his professional capacity as a “consumer”. According to CC § 13 “consumers” are those persons who “enter into a transaction which can be attributed neither to their business nor their *self-employed* capacity”. Accordingly, the German Federal Labour Court considered an employee to be a consumer.<sup>26</sup>

This does not however mean that all consumer laws in Germany can automatically be applied to the protection of the employee. Rather, case-law makes the following distinction: whereas standard business terms in contracts of employment are in principle subject to the controls of provisions which serve the transposition of Directive 93/13<sup>27</sup>, an agreement concluded at the place of work to end an employer-employee relationship is not subject to the withdrawal provisions of doorstep sales. In the view of the Federal Labour Court, such an agreement does not represent a doorstep selling situation within the meaning of CC § 312.<sup>28</sup> The right of withdrawal in doorstep selling situations is – according to the court – a consumer protection right related to the type of contract and encompasses only “particular forms of marketing”. Accordingly, the right of withdrawal provided by law does not apply to contracts which are

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<sup>25</sup> Cass. Civ., 15 March 2005, No. de pourvoi: 02-13285 Syndicat départemental de contrôle laitier de la Mayenne.

<sup>26</sup> BAG, judgment of 25 May 2005, 5 AZR 572/04, NJW 2005, 3305.

<sup>27</sup> See the judgment of the BAG of 25 May 2005, cited above.

<sup>28</sup> BAG, judgment of 27 November 2003, 2 AZR 135/03, NJW 2004, 2401.

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not a form of marketing, such as a contract of employment or contract to terminate employment. Therefore, the employee does not enjoy the right of withdrawal in these situations. Whether the European notion of consumer also includes employed persons is contentious in German literature.<sup>29</sup>

#### **IV. “Mixed” purpose transactions**

##### **1. Community law**

For contracts that serve both a private and business purpose (e.g. the acquisition of a motor vehicle for a freelancer), the directives at issue contain no express rule, in contrast to Directive 85/374 (see Art. 9 lit. (b) ii: “used by the injured person *mainly* for his own private use or consumption”). The judgment of the ECJ in C-464/01 – *Gruber*<sup>30</sup> has brought no clarification in this regard. The Court stressed in this decision that a person can invoke the special rules of jurisdiction of Art. 13-15 of the Brussels I Convention (now Art. 15-17 Brussels I Regulation No. 44/2001) in respect of dual use contracts only if the trade or professional purpose is so limited as to be negligible in the overall context of the transaction (para. 54). However, this decision relates only to European procedural, not substantive law. One might nevertheless wonder whether the procedural notion of consumer can be useful for substantive consumer protection law. Whereas in procedural law terms it can be completely justified on grounds of legal certainty to give standing only in respect of contracts concluded entirely for use for private purposes, in substantive law terms it could be thoroughly justified in the interests of consumer protection to concentrate on the primary use purpose.<sup>31</sup> Thus for the directives at issue it remains open, as to how dual use cases are to be treated.

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<sup>29</sup> In favour thereof: *Faber*, ZEuP 1998, 854 at 873 et seq.; against: *Mohr*, AcP 204 (2004), 660 at 671.

<sup>30</sup> ECJ judgment of 20 January 2005, C-464/01 – *Johann Gruber v Bay Wa AG* [2005] ECR I-00439.

<sup>31</sup> See on this *Ebers*, in: Ajani/Ebers (eds), *Uniform Terminology for European Contract Law*, 115-126 = (2006) *Anuario de Derecho Civil (ADC)*, 229-238.

## 2. Classification in member states

### “Mixed” purpose transactions as consumer contract

Purely private purpose	AT, BE (2)
Also “mixed” purpose, preponderant purpose prevails	DE, DK, FI, SE (4)
Also “mixed” purpose – unclear whether private purpose must preponderate	IT (1)
No clear rule on “mixed” purpose transactions discernible	BG, CY, CZ, EE, EL, ES, FR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SL, SK, UK (20)

Member states found different solutions for classifying mixed purpose transactions. The differentiation according to the criteria of the primary use purpose is expressly stated in the DANISH, FINNISH<sup>32</sup> and SWEDISH<sup>33</sup> provisions. GERMAN courts also focus on the question of whether the private or business use is predominant.<sup>34</sup> In ITALY, recent case-law tends towards the same direction, so that a small tobacconist was regarded as a consumer when concluding a contract for the hire of a vehicle which was for both private and business use. However, it is not clear from this judgment whether the private use was predominant.<sup>35</sup> In AUSTRIA<sup>36</sup> and BELGIUM<sup>37</sup>, on the other hand, only contracts concluded exclusively for private purposes are considered consumer transactions.

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<sup>32</sup> Chapter 1 § 4 of the Consumer Protection Act.

<sup>33</sup> Chapter 1 sec. 2 of the Law 2005:59 on Consumer Protection on Distance Contracts and Doorstep Selling Contracts.

<sup>34</sup> OLG Naumburg judgment of 11 December 1997, NJW-RR 1998, 1351, on the applicability of the consumer credit act in relation to motor vehicle leasing.

<sup>35</sup> Giudice di pace Civitanova Marche 4 December 2001, Gius 2002, 1188.

<sup>36</sup> Article 1 (1) of the Consumer Protection Act.

<sup>37</sup> Article 1 (7) of the Trade Practice Act of 14 July 1991.

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## **V. Protection of founding activities**

### **1. Community law**

Whether a person who makes transactions in the course of preparing professional activity (founding activities) is likewise a “consumer”, is not expressly regulated in the directives at issue.

The ECJ decided in C-269/95 - *Benincasa*<sup>38</sup> that Art. 13 Brussels I Convention (now Art. 15 of the Brussels I Regulation No. 44/2001) is not applicable if a party has concluded a contract for future professional or business activity. In its reasoning the ECJ stated that “[t]he specific protection sought to be afforded by those provisions is unwarranted in the case of contracts for the purpose of trade or professional activity, even if that activity is only planned for the future, since the fact that an activity is in the nature of a future activity does not divest it in any way of its trade or professional character” (para. 17).

Thus, for Community law the predominant view is that transactions which serve the founding of a business are also generally not to be regarded as consumer contracts. This view is confirmed by Directive 2002/65. In recital (29) of this Directive it is stated that “[t]his Directive is without prejudice to extension by member states, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and *persons making use of financial services in order to become entrepreneurs.*”

### **2. Member states’ law**

In most countries the issue of founding activities is not addressed either in legal acts or by case-law. AUSTRIA alone regulates the matter in a legislative act. Art. 1(3) of the Consumer Protection Act provides that transactions by which a natural person, prior to commencing a business, obtains the necessary goods or services do not qualify as business transactions.

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<sup>38</sup> ECJ judgment of 3 July 1997, C-269/95 - *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-3767.

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Founders of new businesses therefore enjoy the protection of consumer laws. In GERMANY, by contrast, courts have regarded founders of businesses not as consumers, but as businesses.<sup>39</sup>

## **VI. Final conclusions**

### **1. Issues to be considered for a review of the acquis**

The above remarks show that while the member state consumer definitions at times considerably diverge from one another, they are nevertheless by and large in accordance with the minimum requirements of Community law. Difficulties in application of the consumer protection norms in practice arise above all from the unclear requirements of Community law. In the context of the review therefore the following aspects should be considered:

- Although the consumer definitions in European law exhibit a common core, the wording of the directives uses different definitions, which furthermore diverge in the individual language formulations. Therefore, a harmonised definition for all consumer protecting directives should be found.
- The definition of consumer used in Directive 90/314 is confusing, as according to this definition people who book business trips are also protected. The Community legislator should therefore either avoid the term consumer or restrict the scope of application of the directive to consumer travel services.
- How should mixed contracts be treated? Is a person to be protected as a consumer where the good or service is purchased *predominantly* for private use? Or only if the business use is so limited as to be negligible in the overall context of the transaction?
- Is the employed person to be considered a “consumer”?
- Must a person also be protected as a “consumer” if, on conclusion of the contract, he is represented by a person who is to be considered a “business”?
- Must the consumer prove that he is acting for purposes which are outside of his trade, business or profession? What are the requirements for such proof?

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<sup>39</sup> BGH, decision of 24 February 2005, III ZB 36/04, NJW 2005, 1273-1275 on the Directive 93/13.

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## **2. Maximum harmonisation?**

If the Community legislator decides to regulate consumer protecting norms wholly or in part according to the concept of maximum harmonisation, special care with the definition of consumer is necessary. The first experiences with Directive 2002/65 are vivid proof of this. According to recital (13) the Directive aims at maximum harmonisation:

“Member States should not be able to adopt provisions other than those laid down in this Directive in the fields it harmonises, unless otherwise specifically indicated.”

Recital (29) furthermore emphasises that “This Directive is without prejudice to extension by member states, in accordance with Community law, of the protection provided by this Directive to non-profit organisations and persons making use of financial services in order to become entrepreneurs.”

From this, one could draw the conclusion that the directive is conclusive in respect of the question of who comes within its scope of protection. Recital (29) would otherwise be superfluous. If one takes this view, then the member states would be prohibited from using a wide consumer definition and extending the protection to other groups of persons (for example, to businesspersons concluding atypical contracts). Ultimately, the Community legislator probably did not wish such a far reaching specification.<sup>40</sup> However, this example clearly shows that with a full harmonisation it must be clear whether the member states are allowed to extend the protection to further groups of persons.

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<sup>40</sup> This view is also taken by *Schinkels*, GPR 2005, 109 at 110.

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