

**B. The notion of “business”**

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**I. European Community law**

**Notion of business in Community Law**

<b>Directive</b>	<b>Notion of Business</b>
Directive 85/577, Art. 2	“trader” means a natural or legal person who, for the transaction in question, acts in his commercial or professional capacity, and anyone acting in the name or on behalf of a trader.
Directive 90/314, Art. 2(2) and (3)	“organizer” means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer; “retailer” means the person who sells or offers for sale the package put together by the organizer;
Directive 93/13, Art. 2 lit. (c)	“seller or supplier” means 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
Directive 94/47, Art. 2	“vendor” shall mean any natural or legal person who, acting in transactions covered by this Directive and in his professional capacity, establishes, transfers or undertakes to transfer the right which is the subject of

	the contract
Directive 97/7, Art. 2(3)	“supplier” means any natural or legal person who, in contracts covered by this Directive, is acting in his commercial or professional capacity
Directive 98/6, Art. 2 lit. (d)	trader shall mean any natural or legal person who sells or offers for sale products which fall within his commercial or professional activity
Directive 99/44, Art. 1(2) lit. (c)	“seller”: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession

#### **Notion of business in directives not covered by this study**

<b>Directive</b>	<b>Notion of business</b>
Directive 87/102, Art. 1(2)(b)	“creditor” means a natural or legal person who grants credit in the course of his trade, business or profession, or a group of such persons
Directive 2000/31, Art. 2(b)	“service provider”: any natural or legal person providing an information society service
Directive 2002/65, Art. 2(c)	“supplier” means any natural or legal person, public or private, who, acting in his commercial or professional capacity, is the contractual provider of services subject to distance contracts
Directive 2005/29, Art. 2(b)	“trader” means any natural or legal person who, in commercial practices covered by this

	Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader
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### **1. Common features**

Unlike for “consumer”, Community law does not use a uniform term for the other party to a consumer contract. That party (hereinafter: business) is variously described as “trader” (Directive 85/577; 98/6; 2005/29), “supplier” (Directive 93/13; 97/7; 2002/65), “seller” (Directive 93/13; 99/44), “vendor” (Directive 94/47), “service provider” (Directive 2000/31) or “creditor” (Directive 87/102). A common feature of these directives, however, is that the business

- can be either a natural or a legal person,
- who is acting for purposes relating to this person’s self-employed trade, work or profession.

### **2. Intention of the business to make a profit (animo lucri)**

Whether the Directives at issue additionally require the intention of the business to make a profit is questionable however. Several reasons support the view that a profit motive is irrelevant.<sup>1</sup> The intention to make a profit relates to an internal business factor, which in some circumstances can be proven only with difficulty and which businesses can manipulate (for example, by transferring profits within a corporate group). Directive 93/13 also supports the view that a profit motive is immaterial, since this Directive relates to public bodies (see below, 4.). Internal factors of the business should therefore have no bearing on whether consumers are protected. Rather, objective factors should decide whether a person is acting in their commercial or professional capacity. However, legal certainty in this issue can ultimately only be achieved by the ECJ or the *acquis* review.

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<sup>1</sup> See also Micklitz, *MüKo*<sup>4</sup>, § 14 para 16.

<i>Consumer Law Compendium</i>	<i>Comparative Analysis</i> B. The notion of “business”	735
--------------------------------	--	-----

### **3. “Acting in the name or on behalf of a trader”**

Community law sometimes contains an extended definition of “business”. Thus a “trader” in doorstep sales is also a person who is “acting in the name or on behalf of a trader” (Art. 2 of Directive 85/577). In the same way Directive 2005/29 provides that “trader” is also anyone acting in the name of or on behalf of a trader”. Also the first proposal for Directive 97/7 contained such a definition<sup>2</sup>, however, the amended proposal of 7 October 1993<sup>3</sup> by contrast refused an express inclusion of auxiliary agents; the reasons for that exclusion being unapparent. Finally, according to Art. 1(2) lit. (b) of Directive 87/102 a “creditor” is not only a person who grants credit in the course of his trade, business or profession, but also “a group of such persons”.

When a person is acting “in the name or on behalf of a trader” has not hitherto been clarified by the ECJ. In *C-229/04 - Crailsheimer Volksbank*<sup>4</sup> the Court of Justice did at least clarify that Directive 85/577 “must be interpreted as meaning that when a third party intervenes in the name of or on behalf of a trader in the negotiation or conclusion of a contract, the application of the Directive cannot be made subject to the condition that the trader was or should have been aware that the contract was concluded in a doorstep-selling situation” (para. 45).

### **4. Inclusion of legal persons/bodies of public law**

Some directives (such as Directive 93/13 and Directive 2002/65) make explicitly clear that public bodies can also be “businesses”. Directive 93/13 emphasises in recital 14 that the Directive also applies to trades, businesses or professions of a public nature. Additionally, Art. 2 lit. (c) of the Directive makes it clear in the English language version that the nature of ownership of the “trader or supplier” is immaterial (Art. 2 lit. (c): „'seller or supplier' means 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.“). In

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<sup>2</sup> COM(92) 11 final.

<sup>3</sup> COM(93) 396 final.

<sup>4</sup> ECJ judgment of 25 November 2005, *C-229/04 - Crailsheimer Volksbank eG v Klaus Conrads, Frank Schulzke and Petra Schulzke-Lösche, Joachim Nitschke* [2005] ECR I-9273.

the German language version, on the other hand, it has been underlined that the Directive is also applicable if the business or professional activity is attributable to the area of public law, (“*dem öffentlich-rechtlichen Bereich zuzurechnen ist*”), whereas the French version speaks of the professional activity, whether public or private (“*activité professionnelle, qu’elle soit publique ou privée*”). In view of these formulations it must be assumed that the Directive in any event extends to private law contracts between consumers and public legal persons/bodies. Whether in addition not only private law, but also public law contracts are encompassed, is by contrast uncertain. In support of this is the fact that the public/private divide is drawn differently in each country and therefore it cannot be at the discretion of the national legislator whether contractual clauses are subject to Directive 93/13 or not. Legal certainty can in turn only be achieved if the ECJ decides the issue, or the Community legislator in the context of the *acquis* review undertakes a corresponding clarification.

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

Most member states have used the terms “trader”, “supplier”, “seller”, “vendor”, “service provider” or other terms (like “*Unternehmer*” in AUSTRIA and GERMANY or “*professionista*” in ITALY) in accordance with the Directives at issue; for more detail see Part 2 of this study.

Some member states have introduced a uniform definition for the counterpart of the consumer, in particular AUSTRIA<sup>5</sup>, CZECH REPUBLIC<sup>6</sup>, FINLAND<sup>7</sup>, GERMANY<sup>8</sup>, ITALY<sup>9</sup> and SLOVENIA.<sup>10</sup> In BULGARIA, the Law on Consumer Protection distinguishes between three types of consumer contracts depending on the consumer’s party (trader, producer or supplier)<sup>11</sup> and hence applies different rules. LATVIA and LITHUANIA define the terms “seller” and “service provider” generally for all kinds of consumer contracts.<sup>12</sup> SLOVAKIA introduced general definitions for “seller” and “supplier” in its Consumer Protection Act.<sup>13</sup>

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<sup>5</sup> Article 1(2) of the Consumer Protection Act.

<sup>6</sup> CC Art. 52(2).

<sup>7</sup> Chapter 1 Art. 5 of the Consumer Protection Act.

<sup>8</sup> CC Art. 14.

<sup>9</sup> Article 3(1) lit. (c) of the Consumer Code.

<sup>10</sup> Article 1(3) of the Consumer Protection Act.

<sup>11</sup> Law on Consumer Protection, Additional Provisions, § 13 no. (2)-(4).

<sup>12</sup> Article 1(1) sec. 4-5 of the Latvian Consumer Protection Act; Art. 2(2) and (3) of the Lithuanian Consumer Protection Act.

<sup>13</sup> Article 2(1) lit. (b) and (e).

<i>Consumer Law Compendium</i>	<i>Comparative Analysis</i> B. The notion of “business”	737
--------------------------------	--	-----

Other member states by contrast (above all FRANCE) abstain from express definitions, relying instead on their case-law.

In MALTA any category or class of persons can be designated as a “trader” by Order of the Minister responsible for consumer affairs after consulting the Consumer Affairs Council, and publication in the Gazette.

### **III. Content of the definitions in member states**

The notion of business is in many member states defined in more concrete terms than in the relevant directives. Many member states have tried to clarify details or give examples.

#### **1. Intention of the business to make a profit (animo lucri)**

Some member states have regulated the issue not addressed in the directives, of whether a person who does not intend to make a profit is included in the notion of business. In AUSTRIA business is described in Art. 1(2) of the Consumer Protection Act as “every organisation on a continuing basis of independent economic activity”, even if this organisation does not intend to make a profit. In GERMANY, the BGH (judgment of 29 March 2006) clarified for consumer goods sales, that the only relevant factors for qualifying as business are whether the seller offers products on the market against payment, normally over a certain period of time. The court stated expressly that it does not matter whether the seller pursues his business activity with the intention of making a profit.<sup>14</sup> In BULGARIA the definitions of the terms “trader”,<sup>15</sup> “producer”,<sup>16</sup> “supplier”,<sup>17</sup> and “importer”<sup>18</sup> do not contain an explicit rule that excludes non-profit organizations from the scope of the regulations. However, this is seen as an exception to the general rule that non-profit organizations only have idealistic aims. Furthermore, the definitions of “trader” and “supplier” expressly state that it is irrelevant whether the business is publicly or privately owned. In GREECE, it is likewise recognised that non-profit-making organisations or institutions as well as public corporations and local authorities can act as

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<sup>14</sup> BGH judgment of 29 March 2006, VIII ZR 173/05.

<sup>15</sup> Law on Consumer Protection, Additional Provisions, § 13 no. (2).

<sup>16</sup> Law on Consumer Protection, Additional Provisions, § 13 no. (3).

<sup>17</sup> Law on Consumer Protection, Additional Provisions, § 13 no. (4).

<sup>18</sup> Law on Consumer Protection, Additional Provisions, § 13 no. (5).

<i>Consumer Law Compendium</i>	<i>Comparative Analysis</i> B. The notion of “business”	738
--------------------------------	--	-----

suppliers. In the NETHERLANDS and SWEDEN the notion business/corporation also includes those enterprises which have no profit motive.

The position is different, however, in FINLAND, SLOVENIA and SPAIN. According to Art. 1:5 of the FINNISH Consumer Protection Act the trader has to act “in order to gain income or with another economic interest.” According to Art. 1(3) of the SLOVENIAN Consumer Protection Act, a “trader” is defined as a legal or natural person, who is “engaged in a profitable activity” regardless of its legal form or ownership. SPAIN uses the term “retail trade” in transposition of Directive 97/7, which is defined in Art. 1(2) of the Law 7/1996 on retail trade as “the activity professionally undertaken with the will to earn” (*ánimo de lucro*).

## **2. “Acting in the name or on behalf of a trader”**

The issue addressed in Community law in some directives of whether a person acting in the name or on behalf of a trader is to be regarded as a business, is partly regulated in the member states generally for all or several consumer protecting acts. The BELGIAN Trade Practices Act refers to the term “seller” which is defined in Art. 1.6° as “any other person, whether acting in their own name or on behalf of a third party”. The CYPRIOT notion of “supplier” clarifies as well, that the supplier acts “either personally or through his representative”. The LATVIAN Consumer Protection Act defines as a “seller” any natural or legal person who offers or sells goods to consumers by means of entrepreneurial activity, as well as a person who acts in the name of the seller or on his or her instruction. A similar provision can be found in the BULGARIAN Law on Consumer Protection which defines “trader” as any natural or legal person selling or offering products for sale, or providing services to a consumer or concluding a contract with a consumer within his commercial or professional capacity, whether publicly or privately owned – just as any person acting under the name of that person or for the benefit of that person.

ROMANIAN Government Ordinance No. 106/1999 regarding consumers contracts negotiated away from business premises implementing Directive 85/577, expressly refers to the representative acting in the name of the trader. Otherwise, the Romanian laws implementing the directives provide no special rules in this respect.

<i>Consumer Law Compendium</i>	<i>Comparative Analysis</i> B. The notion of “business”	739
--------------------------------	--	-----

In other legal systems this issue is not expressly regulated, but it does however follow from the general definition of consumer and the rules on agency conducted by a third party is attributed to the business and that a business does not lose its character as such by engaging a representative, who himself would be classed as a consumer (in particular for Austrian law).<sup>19</sup>

By contrast the legal situation in GREECE and POLAND is unclear. In GREECE - in contrast to Directive 85/577 – no person acting in the name of and on behalf of a trader is viewed as a trader. The same applies for POLISH law. According to CC Art. 43 the nature of the activity of the trader must be exercised in the person’s “own name”. This seems to be a narrower definition than the one provided in Art. 2 of Directive 85/577.

Furthermore, the issue of whether consumer protection laws apply if a private person is represented by a business is addressed differently. In AUSTRIA and GERMANY it generally depends on the identity of the contractual partner. A contract between two private persons does not therefore fall within the ambit of consumer protection provisions if it is brokered by a person acting in a business or professional capacity. By contrast in DENMARK, ITALY and PORTUGAL it is clarified that for timeshare contracts, if the vendor is not a professional, but the contract is concluded for the vendor by a professional, then it is regarded as a contract covered by the act as well.<sup>20</sup>

### **3. Inclusion of legal persons/bodies of public law**

In some member states it is additionally (beyond the scope of application of Directive 93/13) and expressly regulated that “business” includes legal persons under public law. In AUSTRIA legal persons under public law always qualify as businesses.<sup>21</sup> In BELGIUM, the term “seller” (used in the Trade Practices Act for doorstep and distance selling and price indication) includes governmental institutions that pursue commercial, financial or industrial activity and sell or offer for sale products or services. BULGARIAN law expressly states that the terms “trader” and “supplier” include legal persons whether publicly or privately owned.<sup>22</sup> In

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<sup>19</sup> OGH judgment of 5 August 2003, 7 Ob 155/03z.

<sup>20</sup> Cf. Part 2 D.II.1.b.

<sup>21</sup> Article 1 (2), sent. 2 of the Consumer Protection Act.

<sup>22</sup> Law on Consumer Protection, Additional Provisions, § 13 no. (2) and (4).

CYPRUS, according to Art. 2 of the Consumer Protection Act the word “business” includes “a trade or profession and the activities of any government department or local or public authority”, “courts” and “directors”. GREEK law also emphasises in Art. 1(3) of the Consumer Protection Act that public sector suppliers qualify as businesses. ITALIAN law includes (for sales contracts) under the definition of “seller” every natural or legal person of private and public law.<sup>23</sup> In SLOVENIA, a “trader” is defined as a legal or natural person “regardless of their legal form or ownership”.<sup>24</sup> Similarly in the UNITED KINGDOM in the context of transposing the Consumer Sales Directive it is clarified that “business” includes the profession and activity of any government department (including a Northern Ireland department) or local or public authority.<sup>25</sup> In other member states such as GERMANY it follows from the general definition of legal person that public bodies are also included.

#### **IV. Final conclusions**

Most member states do not have a uniform definition for the contractual partner of the consumer (business). It might nevertheless be useful to bear in mind that the main purpose of the notion of business is merely to make clear that the directives apply to B2C transactions, not to C2C relationships. Variations in the notion of business between the member states do not therefore have a great bearing on the correct transposition of the directives, so long as the definition of consumer is precise and the definition of business is not such as to fail to provide protection in transactions where the directives intended the consumer to be protected. This study only shows a deviation from Community law requirements in this respect in GREECE and POLAND with their transpositions of Directive 85/577, as in both countries no person acting in the name of and on behalf of a trader is viewed as a business.<sup>26</sup>

In the context of the review the following aspects, above all, should be considered:

- Although the definitions of business in European law exhibit a common core, the respective wordings of the directives use different definitions, which furthermore

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<sup>23</sup> Article 128(2)(b) of the Consumer Code.

<sup>24</sup> Article 1(3) of the Consumer Protection Act.

<sup>25</sup> Section 61(1)(b) of the Sale of Goods Act 1979.

<sup>26</sup> See *ante*, Part 3.B.III.2.

diverge in the individual language versions. Therefore, a uniform definition of business for all consumer protecting definitions should be found.

- In so doing, it should be clarified if the criterion of whether the relevant transaction is made “in the course of a person’s profession” should be defined objectively, or more subjectively as being made for purposes relating to the profession.
- Is a person/entity without profit motive included in the notion of business?
- How are cases in which the business is acting for or on behalf of a third person to be treated?
- Besides the Unfair Contract Terms Directive, are legal persons/bodies of public law also covered by the scope of the directives?
- Who has the burden of proving that the contractual partner of the consumer was acting in their commercial or professional capacity? What are the requirements for discharging this burden?

<i>Consumer Law Compendium</i>	<i>Comparative Analysis</i>	742
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