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# The Impact of EU Unfair Contract Terms Law on U.S. Business-to-Consumer Internet Merchants

By Jane K. Winn and Mark Webber\*

*It is in acquiring, using and exchanging things that individuals come to have social lives.*<sup>1</sup>

## 1. INTRODUCTION

When the Court of Appeals for Versailles issued its decision in *AOL France v. UFC Que Choisir*<sup>2</sup> in September 2005, it sent the message to U.S. Internet businesses that even contractual boilerplate localized for European markets may be invalid in European consumer transactions. In that case, a French consumer advocacy group challenged the terms AOL offered its French customers after AOL had made extensive revisions to its standard form contracts to respond to the concerns regarding those terms expressed in an advisory opinion by a French consumer protection agency. In 2004, a trial court invalidated nearly every term in the revised agreement; the appeals court affirmed on all counts. Subsequently, in July 2006 following concerns raised by the Office of Fair Trading (“OFT”), a United Kingdom government agency charged with “making sure markets work well for consumers,”<sup>3</sup> Dell Corporation Limited changed its online terms and conditions to make them fairer to consumers.<sup>4</sup> European consumer contract law had an impact in both cases. At issue for AOL France and Dell Corporation Limited was the application of France’s and the UK’s consumer contract law which is based on the Unfair Contract Terms Directive of 1994<sup>5</sup> and calls into question the validity of many of the terms that U.S. courts routinely enforce in transactions involving American consumers and merchants.

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1. CELIA LURY, *CONSUMER CULTURE* 12 (1996).

2. *AOL France v. UFC Que Choisir*, R.G. N° 04/05564, Cour d’appel [CA][regional court of appeal] Versailles, 1e ch., Sept. 15, 2005, J.C.P. IV 150905, available at <http://www.clauses-abusives.fr/juris/cav150905.pdf>; see *infra* Part 4 for a detailed discussion of the case.

3. See OFT—About the Office of Fair Trading, available at <http://www.of.gov.uk/About/default.htm>.

4. See Press Release, Office of Fair Trading, *Dell to improve terms and conditions for consumers* (July 6, 2006) (U.K.), available at <http://www.of.gov.uk/News/Press+releases/2006/111-06.htm>.

5. Council Directive 93/13, 1993 O.J. (L 95) 29 (EEC) [hereinafter “UCT Directive”], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:EN:NOT>.

In 2005, the OFT published a guide for UK merchants regarding the application of the UK's unfair contract terms law to Internet transactions.<sup>6</sup> That Guidance, *IT Consumer Contracts Made at a Distance*, may also be valuable to U.S. Internet merchants doing business with European consumers who are trying to understand the broad scope of EU unfair contract terms law and its application to their businesses. Since the mid-1990s, the OFT has published hundreds of "case reports" explaining its interpretations of individual contract terms in light of UK contract law.<sup>7</sup> The 2005 Guidance provides a helpful summary of the OFT's decisions in the area of Internet transactions. The OFT specifically references the 2005 Guidance in its press release on Dell Corporation Limited. The OFT reinforces its message that the Guidance is "to help distance sales businesses ensure their terms and conditions comply with the relevant regulations."<sup>8</sup>

This article focuses on the application of EU unfair contract terms law to retail Internet transactions that U.S. businesses might engage in with European consumers. It compares attitudes toward consumer protection regulation in the U.S. and the EU to provide some context within which the specific provisions of unfair contract terms law can be understood. While many lawyers and legal academics in the U.S. who study the development of online markets are aware of the profound differences in U.S. and EU information privacy laws,<sup>9</sup> the magnitude of the divergence in consumer electronic contracting law is not as widely recognized. The development of contract law on unfair terms in Europe over the last 25 years is an important change in EU contract law that has no direct counterpart in U.S. contract law. The application of contract law on unfair terms to online transactions is not at all surprising to lawyers in the EU, but may come as quite a surprise to U.S. businesses and the lawyers who advise them if they have mistakenly assumed that cross-border variations in consumer contract law are not great.<sup>10</sup> As some have learned to their detriment, it is not sufficient for businesses to simply deploy U.S. versions of their online terms and conditions in their European operations.

## 2. DIVERGING PERSPECTIVES ON THE AIMS OF CONSUMER PROTECTION

Although there is some debate about the conventional wisdom that regulators in Europe adopt a more "precautionary" approach while U.S. regulators are pre-

6. See OFFICE OF FAIR TRADING, PUBL'N NO. 672, *IT CONSUMER CONTRACTS MADE AT A DISTANCE—GUIDANCE ON COMPLIANCE WITH THE DISTANCE SELLING AND UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS (2005)* (U.K.) [hereinafter "the Guidance"], available at <http://www.of.gov.uk/NR/rdonlyres/F0F8ED8F-CEFO-4C06-A500-F7C915DEEBD7/0/of672.pdf>.

7. Most copies of the Unfair Contract Terms Bulletin can be downloaded from the OFT Publications Web page at <http://www.of.gov.uk/News/Publications/Leaflet+Ordering.htm>. Reports of undertakings by firms to settle charges brought by the OFT under the UK unfair contract terms legislation can be found at <http://www.crw.gov.uk/Undertakings+and+court+action>.

8. See Press Release, Office of Fair Trading, *supra* note 4.

9. See, e.g., DOROTHEE HEISENBERG, *NEGOTIATING PRIVACY: THE EUROPEAN UNION, THE UNITED STATES, AND PERSONAL DATA PROTECTION* (2005).

10. On differences between U.S. and EU approaches to consumer protection law, see generally A. Brooke Overby, *An Institutional Analysis of Consumer Law*, 34 *VAND. J. TRANSNAT'L L.* 1219 (2001); Jane K. Winn & Brian H. Bix, *Diverging Perspectives on Electronic Contracting in the U.S. and EU*, 54 *CLEV. ST. L. REV.* 175 (2006).

pared to tolerate more risk,<sup>11</sup> the wisdom appears to reflect the trends in recent years in the area of consumer protection law. Through the development of unfair contract terms law, EU regulators have been expanding their oversight of consumer markets and expanding the role of administrative agencies in enforcement, at precisely the time that U.S. contract law has turned away from public regulatory models. The growing gap in contract law doctrine with regard to unfair contract terms appears to be yet another example of diverging long-term trends in political culture and economic regulation on either side of the Atlantic.<sup>12</sup> The U.S. was very active in enacting consumer protection laws during the 1960s and 1970s while there was relatively little activity in this area in Europe. The trends reversed during the 1980s, when the U.S. embraced more market-oriented approaches that required individuals to bear more risk in consumer transactions, while the EU embarked on a sweeping program of legislation to protect consumers from many of those risks.<sup>13</sup>

Political scientists and economists distinguish between “economic regulation” aimed at supporting competition in markets and “social regulation” aimed at protecting health and safety.<sup>14</sup> Consumer protection laws are now treated as a form of economic regulation in the U.S.; government intervention is appropriate only when it is clear that competition is not doing an adequate job of meeting consumer needs.<sup>15</sup> EU lawmakers appear to be skeptical that mere economic regulation provides enough support for online consumer markets in Europe.<sup>16</sup> In the “eEurope 2002 Action Plan,”<sup>17</sup> the European Commission noted that “[c]onsumer confidence needs to be enhanced if e-commerce is to achieve its full potential,” acknowledging that consumers in the EU have been slower to embrace online commerce than their counterparts in the U.S. The Commission was already implementing legislation that tackled the consumer confidence problem on several fronts, including enacting strong data protection legislation, which is a form of social regulation in the EU,<sup>18</sup> and regulating consumer markets to make them safe for less sophisticated consumers, which has turned consumer contract law into

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11. See, e.g., Jonathan B. Wiener, *Whose Precaution After All? A Comment on the Comparison and Evolution of Risk Regulatory Systems*, 13 DUKE J. COMP. & INT'L. L. 207 (2003) (suggesting that comparisons are often based on stereotypes and a limited number of examples of regulation that may not be representative of a more complex reality).

12. See, e.g., Ragnar E. Löfstedt & David Vogel, *The Changing Character of Regulation: A Comparison of Europe and the United States*, 21 RISK ANALYSIS 399 (2001).

13. *Id.*

14. See, e.g., Peter J. May, *Social Regulation*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., 2002).

15. See, e.g., Richard A. Epstein, *Contract, not Regulation: UCITA [Uniform Computer Information Transactions Act] and High-Tech Consumers Meet Their Consumer Protection Critics*, in *CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY'* (Jane K. Winn ed., forthcoming 2006).

16. A complete description of recent consumer protection legislation passed in the EU can be found on the Directorate General for Health and Consumer Affairs Web site for Consumer Affairs issues at [http://www.europa.eu.int/comm/consumers/index\\_en.htm](http://www.europa.eu.int/comm/consumers/index_en.htm) (last visited July 20, 2006).

17. Now succeeded by *eEurope 2005: An Information Society for All*, see COM (2002) 263 final (May 28, 2002), available at [http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002\\_0263en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0263en01.pdf) (last visited November 14, 2006).

18. See generally CHRISTOPHER KUNER, *EUROPEAN DATA PRIVACY LAW AND ONLINE BUSINESS* (2003).

another form of social regulation.<sup>19</sup> The EU social regulation approach to consumer markets is closer to the approaches taken in Canada,<sup>20</sup> Australia,<sup>21</sup> New Zealand,<sup>22</sup> Japan,<sup>23</sup> and other developed economies<sup>24</sup> than the U.S. competition-oriented approach.<sup>25</sup>

Many elements of EU consumer protection policy appear to be motivated by a desire to level the playing field among consumers to ensure that social rather than economic policy objectives are met.<sup>26</sup> By mandating a high minimum level of protection, EU online consumer contract law forces all merchants to internalize high compliance costs and constrains the range of possible innovation<sup>27</sup> in marketing channels.<sup>28</sup> By contrast, U.S. online consumer contract law sets a much lower mandatory minimum level of protection,<sup>29</sup> which appears to have opened the door to more rapid growth and greater innovation in online retail marketing.<sup>30</sup> If the U.S. approach has allowed more of the costs associated with innovation to be borne by individual consumers than the EU approach, then it would not be the first time that changes in the interpretation of American contract law have had the effect of subsidizing the growth of new markets.<sup>31</sup>

19. For example, within the Commission, consumer protection matters are handled by the Health and Consumer Protection Directorate General, which also oversees health and food safety regulations. See [http://ec.europa.eu/dgs/health\\_consumer/index\\_en.htm](http://ec.europa.eu/dgs/health_consumer/index_en.htm).

20. See, e.g., INDUSTRY CANADA, INTERNET SALES CONTRACT HARMONIZATION TEMPLATE (2001), available at [http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwajp/Sales\\_Template.pdf/\\$FILE/Sales\\_Template.pdf](http://strategis.ic.gc.ca/epic/internet/inoca-bc.nsf/vwajp/Sales_Template.pdf/$FILE/Sales_Template.pdf).

21. See, e.g., Trade Practices Act, 1974 (Austl.), available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/tpa1974149/](http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/).

22. See, e.g., NEW ZEALAND MODEL CODE FOR CONSUMER PROTECTION IN ELECTRONIC COMMERCE (2000), available at [http://www.consumeraffairs.govt.nz/policylawresearch/pdfpapers/model\\_code.pdf](http://www.consumeraffairs.govt.nz/policylawresearch/pdfpapers/model_code.pdf).

23. See, e.g., Shōhisha keiyakuhō [Consumer Contract Act], Law No. 61 of 2000, available at <http://www.cas.go.jp/jp/seisaku/hourei/data/CCA.pdf>.

24. See, e.g., Unfair Contract Terms Act, Cap. 396 (1994) (Sing.), available at <http://statutes.agc.gov.sg/>.

25. The two different approaches need not necessarily be opposed to each other. Since it came to power in the UK in 1997, the Labour government has tried to find a "third way" that uses strong consumer protection laws as a mechanism to push UK industries to become more responsive to customer demands and thus more globally competitive. See DEPARTMENT OF TRADE AND INDUSTRY, MODERN MARKETS: CONFIDENT CONSUMERS, 1999, CM. 4410 (U.K.); DEPARTMENT OF TRADE AND INDUSTRY, EXTENDING COMPETITIVE MARKETS: EMPOWERED CONSUMERS, SUCCESSFUL BUSINESS (2005) (U.K.), available at <http://www.dti.gov.uk/files/file23787.pdf>.

26. GERAINT HOWELLS & STEPHEN WEATHERILL, CONSUMER PROTECTION LAW 3 (2d ed. 2005).

27. The UK government's official policy tries to embrace both protection and innovation: "[The government] want[s] a consumer regime that is fit for purpose for the 21st Century. A regime that will empower and protect consumers, support open, competitive and innovative markets, that is as fair to business as it is to consumers and that has the minimum regulation necessary to achieve these goals." See <http://www.dti.gov.uk/consumers/policy/index.html>.

28. This result can be thought of as "taxation by regulation." See generally Richard A. Posner, *Taxation by Regulation*, 2 BELL J. ECON. & MGMT. SCI. 22, 50 (1971).

29. For a summary of recent judicial decisions involving consumer complaints against online merchants, see Jane K. Winn, *Contracting Spyware by Contract*, 20 BERKELEY TECH. L.J. 1345 (2005).

30. Of course, many of these innovations ultimately fail. See, e.g., Kent German, *Top 10 Dot-com Flops*, CNET.com, available at [http://www.cnet.com/4520-11136\\_1-6278387-1.html](http://www.cnet.com/4520-11136_1-6278387-1.html).

31. See generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1760-1860 (1977).

U.S. and EU protections for online consumers diverge not only in substance but also in how they are interpreted and enforced. The U.S. approach relies heavily on litigation as an enforcement mechanism, and the most frequently litigated issue has been whether the merchant has the right to reduce its own dispute resolution costs by limiting the consumer's access to the courts.<sup>32</sup> U.S. merchants engaged in Internet commerce with consumers routinely include an arbitration<sup>33</sup> or a choice-of-forum term in their standard form contracts to limit their exposure to litigation in remote forums, class action lawsuits, and punitive damage awards. Judicial decisions analyzing the effectiveness of various online contract formation mechanisms and the enforceability of various terms contained in standard form contracts often focus on these procedural provisions, and provide fragmentary or contradictory guidance with regard to other contract terms.<sup>34</sup> In Europe, consumers face fewer obstacles to bringing a lawsuit in a local forum against a remote vendor because standard form contract terms that impede consumers' rights of redress are invalidated as unfair.<sup>35</sup> However, litigation between individual consumers and merchants has become a less significant source of law even in a common law jurisdiction such as England because regulatory agencies play a greater role than courts in providing authoritative guidance regarding the application of consumer protection laws to online transactions.<sup>36</sup> Regulatory agencies also play a greater role in enforcing online consumer contract law protections, and in publicizing their efforts, than do their counterparts in the U.S.<sup>37</sup>

32. See *infra* text at notes 113–18.

33. Contrast the U.S. approach to the UK position where under Section 91 of the Arbitration Act of 1996, available at <http://www.opsi.gov.uk/ACTS/acts1996/1996023.htm>, a compulsory arbitration clause is automatically unfair if it relates to claims of GBP£5,000 or less. Unfair Arbitration Agreements (Specified Amount) Order 1999, available at [http://www.opsi.gov.uk/si/si1999/uksi\\_19992167\\_en.pdf](http://www.opsi.gov.uk/si/si1999/uksi_19992167_en.pdf). Inclusion of such a term is always “unfair.”

34. For recent attempts to make sense of the case law developing in this area, see generally Christina L. Kunz, Maureen F. Del Duca, Heather Thayer & Jennifer C. Debrow, *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, 57 BUS. LAW. 401 (2001); Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter & Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279 (2003).

35. See, e.g., Card No. IT001105 of the European Database on Case Law Concerning Unfair Contract Terms, available at <https://adns.cec.eu.int/CLAB/SilverStream/Pages/pgHomeCLAB.html>, discussed *infra* text at note 98; see generally Christopher R. Drahozal & Raymond J. Friel, *Consumer Arbitration in the European Union and the United States*, 28 N.C. J. INT'L L. & COM. REG. 357 (2002).

36. For example, the UK's Office of Fair Trading (“OFT”) publishes case reports in Unfair Contract Terms Bulletins detailing cases where the OFT has obtained significant changes in consumer contract terms. See, e.g., OFFICE OF FAIR TRADING, PUBL'N NO. 768, UNFAIR CONTRACT TERMS BULLETIN 29 (2005) (U.K.), available at <http://www.ofc.gov.uk/NR/rdonlyres/7E28C309-9E11-45C5-A3A7-07630B9876AD/0/ofc768.pdf> and published at <http://www.crw.gov.uk>.

37. See *infra* text accompanying notes 75–76 for discussion of UK OFT enforcement authority. While the U.S. Federal Trade Commission (“FTC”) may have the authority to regulate overreaching by merchants in business to consumer contracts because contract terms are unfair, it is unlikely to do so in light of the current FTC Policy Statement on Unfairness (Letter from the Federal Trade Commission to Hon. Wendell Ford and Hon. John Danforth, Committee on Commerce, Science, and Transportation, United States Senate (Dec. 17, 1980), reprinted in *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1073 (1984), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>). See J. Howard Beales, III, *The FTC's Use of Unfairness Authority: Its Rise, Fall and Resurrection*, available at <http://www.ftc.gov/speeches/beales/unfair0603.htm>.

Some of the most significant differences between EU and U.S. consumer contract law are attributable to the Unfair Contract Terms Directive,<sup>38</sup> which regulates form contracts offered by merchants to consumers whether online or offline. In addition, the Distance Selling Directive,<sup>39</sup> which regulates transactions between remote merchants and consumers, whether by means of television, telemarketing, the Internet, or other electronic communications media, and the Electronic Commerce Directive,<sup>40</sup> which promotes transparency and accountability in online commerce, have had a significant impact on business to consumer transactions. This article provides an overview of the provisions of these relevant directives and principles of EU law drawn from other sources, supplemented by examples of how national laws implementing them work in particular member states such as the UK and France.<sup>41</sup>

### 3. EU CONSUMER PROTECTION LAW AND POLICY

EU consumer protection law has expanded in recent years as part of the ongoing effort to overcome barriers to the integration of European markets and to promote fair and vigorous competition in national consumer markets. In addition, as well as citing the goal of harmonization of the laws across Europe, EU consumer protection law also strives to provide legal certainty to help drive forward the development of ecommerce.<sup>42</sup> The Single European Act of 1986<sup>43</sup> and the push to complete the internal European market by 1992 were strongly oriented toward the liberalization and strengthening of market mechanisms. The European commitment to strengthening consumer protection laws as an integral part of strengthening the internal European market was made explicit in the Treaty of Maastricht,<sup>44</sup> and strengthened in the Treaty of Amsterdam.<sup>45</sup> In addition, in 1997, the European Commission announced its intention to create a coherent legal frame-

38. UCT Directive, *supra* note 5.

39. Council Directive 97/7, 1997 O.J. (L 144) 19 (EC) [hereinafter "DS Directive"], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML>.

40. Council Directive 00/31, 2000 O.J. (L 178) 1 (EC) [hereinafter "EC Directive"], available at [http://europa.eu/eur-lex/pri/en/oj/dat/2000/l\\_178/l\\_17820000717en00010016.pdf](http://europa.eu/eur-lex/pri/en/oj/dat/2000/l_178/l_17820000717en00010016.pdf).

41. As a general rule, EU Directives do not affect the rights and obligations of individuals until the directive has been transformed into national law, so it is necessary to consider legislation transforming the terms of directives into national law to get a full and accurate impression of the relevant law. There are limited exceptions. *See, e.g.,* Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337 (ECJ held that only directives that establish clear and unconditional legal norms and do not leave normative discretion to the member states have direct effect; however direct effects are normally effective against governments, not private parties); Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135 (national law must be interpreted in light of directives even if they have not yet been transformed into national law).

42. *See* Recital to EC Directive, *supra* note 40.

43. Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

44. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html>.

45. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1, available at <http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html>; Comprehensive Guide to the Treaty of Amsterdam, available at <http://europa.eu/scadplus/leg/en/s50000.htm>.

work within Europe for electronic commerce by the year 2000.<sup>46</sup> In recent years, the volume of new EU consumer protection legislation has slowed, but new legislation has not altogether stopped.<sup>47</sup>

The definition of consumer differs under EU and U.S. law. Under U.S. law, a consumer transaction is commonly defined as one undertaken by a natural person for goods or services for personal, family, or household use.<sup>48</sup> By contrast, most European countries define a consumer as someone acting outside her trade or profession.<sup>49</sup> Consequently, even merchants and professionals acting outside their professions may be protected by European law.<sup>50</sup> The European Court of Justice ("ECJ") has set limits on the ability of merchants in some countries to use the technicalities of consumer protection law to invalidate contracts with other merchants. For example, the ECJ held that a merchant who contacted other merchants to offer advertising for the sale of their businesses was not required to give notice of a right to rescind the contracts within a certain number of days, even though the French government, the European Commission, and the Advocate General of the ECJ all argued that those protections should apply.<sup>51</sup> The ECJ similarly held that a son who had provided a personal guarantee on the business debts of his father was not entitled to challenge the validity of the guarantee on the ground that he had not been given any notice of a right to rescind.<sup>52</sup> The focus of the court was on the fact that the debts secured by the guarantee were incurred in the operation of a business, even though the guarantor was acting in an individual capacity.

Greater harmonization in Europe might be helpful in preventing some countries, notably Germany, from establishing too low a standard of competence for consumers and, as a result, significantly raising the compliance burdens on merchants. When trade associations representing established merchants allege unfair competition law violations by upstart competitors, a common ploy has been to ask courts to require all merchants to treat consumers as simpletons. The German Supreme Court upheld a German agency's ban on Lands' End advertising in Germany that included an "unconditional guarantee" on the ground that adver-

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46. *A European Initiative in Electronic Commerce*, COM (1997) 157 final (June 16, 1997), available at <http://cordis.europa.eu/esprit/src/ecomcom.htm>.

47. For example, in 2005, the EU passed the Unfair Commercial Practices Directive, harmonizing and updating the law of unfair and deceptive trade practices in member states. See Giuseppe Abbamonte, *The Unfair Commercial Practices Directive: an example of the new European consumer protection approach*, COLUM. J. EUR. L. (forthcoming 2006) (on file with *The Business Lawyer*).

48. See 15 U.S.C. § 1602(h) (2000).

49. Brussels Convention 13(1) states that a consumer contract is one engaged in by a person outside his or her trade or profession, *Case 150/77, Société Bertrand v. Paul Ott KG*, 1978 E.C.R. 1431; Article 2(b) of the Unfair Contract Terms Directive defines a consumer as "any natural person who . . . is acting for purposes which are outside his trade, business or profession," UCT Directive, *supra* note 5, at art. 2(b).

50. HOWELLS & WEATHERILL, *supra* note 26, at 270.

51. *Case C-361/89, Criminal Proceedings against Patrice Di Pinto*, 1991 E.C.R. I-1189.

52. *Case C-45/96, Bayerische Hypotheken-und Wechselbank AG v. Edgar Dietzinger*, 1998 E.C.R. I-1199.



tising such a term violated German trade practices law.<sup>53</sup> An agency that monitors unfair advertising successfully sued the Lands' End catalog merchant for its unconditional money back guarantee, arguing that its offer amounted to "unfair competition."<sup>54</sup> The court outlawed the advertisements, which had met no resistance in Japan or England.<sup>55</sup> Other U.S. merchants in Germany have suffered similar indignities: Tupperware and Zippo have been banned from offering lifetime guarantees in Germany, while, also in Germany, Wal-Mart was not allowed to compensate customers who found better prices on the same products in competitors' stores.<sup>56</sup>

The ECJ has held that merchants are entitled to assume that they are dealing with a "reasonably well-informed, reasonably observant, and circumspect" consumer.<sup>57</sup> In other words, the ECJ expects that consumers take some responsibility to protect their own interests. The ECJ consequently has been skeptical regarding claims that advertisements are deceptive. In a case involving advertisements for Nissan cars, the ECJ held that an advertisement is misleading only if it is shown that a significant number of consumers to whom the advertisement is addressed are actually misled by it, or that if an additional fact had been made known to them, they would not have entered into a transaction with the advertiser.<sup>58</sup> The German Trade Protection Society Against Bad Commercial Practices tried to stop a French cosmetics company from distributing a brochure stating that consumers could "save up to 50 percent and more on 99 of your favorite Yves Rocher products" with the old price crossed out and a new lower price printed alongside in large red characters.<sup>59</sup> The Society argued that the brochure violated a German trade practices law prohibiting price comparisons that were "eye-catching," and the EJC struck down the German law. It held that German law unduly restricted free movement of goods in the common European market because the law was not proportionate to goals pursued—to protect consumers from the special lure of advertisements containing price comparisons.

53. Peggy Hollinger & Jeremy Grant, *Lands' End to contest German ban in EU court*, FINANCIAL TIMES (LONDON), Sept. 6, 1999, at 2.

54. The argument was based on the premise that consumers are induced to pay higher prices when offered a "money back guarantee." Michael S. Greve, *New Insights from the Old Continent*, FEDERALIST OUTLOOK, Jan. 1, 2002, available at [http://www.aei.org/publications/pubID.13528/pub\\_detail.asp](http://www.aei.org/publications/pubID.13528/pub_detail.asp).

55. John Schmid, *Germans Feel Tough New Climate of Competition*, THE TOCQUEVILLE CONNECTION (Nov. 5, 1999), available at <http://www.adetocqueville.com/cgi-bin/loc/searchTTC.cgi?displayZop+2542>.

56. Doris Hajewski, *Lands' End learns that, in Germany, good service is guaranteed trouble*, MILWAUKEE J. SENTINEL (Wis.), Sept. 8, 1999, at 1.

57. REINER SCHULZE, HANS SCHULTE-NOLKE & JACKIE JONES, A CASEBOOK ON EUROPEAN CONSUMER LAW 226 (2002); Case C-210/96, Gut Springenheide, 1998 E.C.R. I-4657, ¶ 31.

58. Case C-373/90, Criminal Proceedings against X (Nissan), 1992 E.C.R. I-131, ¶¶ 15, 16, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61990J0373:EN:HTML>; see also Case C-470/93, Verein gegen Unwesen in Handel und Gewerbe Köln e.V. (association for combating unfair competition) v. Mars GmbH, 1995 E.C.R. I-1923, ¶ 24, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61993J0470:EN:HTML> (challenged Mars ice cream bar promotion indicating "+ 10%" in colored part of wrapping, but colored part describing the promotion occupied more than 10% of wrapper; held not misleading to reasonably circumspect consumer).

59. Case C-126/91, Schutzverband gegen Unwesen in der Wirtschaft e.V. v. Yves Rocher GmbH, 1993 E.C.R. I-2396, ¶¶ 12, 14, available at <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:61991J0126:EN:HTML>.

#### 4. UNFAIR CONTRACT TERMS LAW

Several European countries have enacted laws regulating “unfair” terms in standard form contracts used in consumer transactions. For example, in 1977 the UK had enacted the Unfair Contract Terms Act (“UCTA”), which limits the extent to which breach of contract, negligence, or other breaches of duty can be excluded by contract.<sup>60</sup> The UCTA therefore limits the enforcement of “exclusion clauses” (which are generally equivalent to “disclaimers” under U.S. law) in some instances altogether and in others to the extent they are not “fair and reasonable.”<sup>61</sup> The UCTA applies not only to consumer transactions but also to certain business transactions.<sup>62</sup> However, not all EU member states enacted similar laws, so the Directorate General (DG) for Health and Consumer Affairs developed a directive, enacted in 1993, to harmonize consumer unfair contract terms laws in Europe.<sup>63</sup> The Directive goes far beyond the scope of the UCTA as it regulates terms which are generally seen as “unfair.” The fundamental premise of the Directive is that general contract law is not adequate to protect consumers from overreaching by merchants, and that member states should adopt laws reflecting the consensus embodied in the Directive with regard to what constitutes “unfairness” in such situations where there is an inherent inequality of bargaining power.<sup>64</sup> This proposed regulation of unfair contract terms establishes a much lower threshold for intervention by courts and regulators than unconscionability under U.S. contract law or federal and state regulation of unfair and deceptive trade practices.<sup>65</sup> The Directive provides that contract terms not individually negotiated are unfair if they create a significant imbalance, to the consumer’s detriment, between the rights and obligations of the contracting parties.<sup>66</sup> If a contract term is drafted in advance and the consumer has no influence over the substance of the term, then it is not individually negotiated, and hence subject to review based on substantive fairness.<sup>67</sup> Annex 1 to the Directive contains a non-exclusive list of terms that may be deemed unfair.<sup>68</sup>

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60. See [http://statutes.agc.gov.sg/non\\_version/cgi-bin/cgi\\_retrieve.pl?&actno = Reved-396&date = latest&method = part](http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?&actno = Reved-396&date = latest&method = part).

61. This test is referred to as the “reasonableness test,” which is defined in Section 11 of UCTA.

62. *Id.* UCTA sections 2–7 apply to transactions carried out in the “course of business” so they do not apply to private contracts between individuals.

63. UCT Directive, *supra* note 5. Member States were expected to pass laws implementing its provisions by the end of 1994.

64. This focus on overreaching by merchants is in direct conflict with the general English law concept of “freedom of contract.” See generally HOWELLS & WEATHERILL, *supra* note 26, at 261.

65. Unconscionability generally requires a showing of both serious procedural misconduct and substantive overreaching. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); U.C.C. § 2-302 (2002); see generally E. ALAN FARNSWORTH, CONTRACTS § 4.28 (4th ed. 2004).

66. UCT Directive, *supra* note 5, at art. 3.

67. *Id.* at art. 2.

68. The Annex provides examples of unfair terms, including limiting liability for death or personal injury resulting from an act or omission by the seller; disclaiming liability for total or partial non-performance or inadequate performance by the seller; binding the consumer while making the obligations of the seller conditional or optional; providing for excessive liquidated damages to be paid by the consumer in the event of breach; allowing the seller to terminate its obligations without giving the consumer the same right; allowing the seller to terminate a contract of indefinite term without

Under the Directive, the nature of the goods or services covered by the contract, the circumstances surrounding the formation of the contract, and the other terms in the contract or in another contract to which it relates are taken into account in assessing the unfairness of a term.<sup>69</sup> Contract terms offered to consumers in writing must always be drafted in plain language and where there is doubt as to the meaning of a term, the interpretation most favorable to the consumer prevails.<sup>70</sup> On their face, the plain language rules appear to have little substantive effect; however, the extent of their practical application is significant. Terms that may mislead or not be understood by consumers are open to challenge as unfair. In the UK, the OFT has made clear that consumers must be capable of understanding terms without resort to legal advice.<sup>71</sup> The OFT confirms that consumer contracts should use “ordinary words” to the extent possible and with their “normal meaning.” Further, sentences should be short, and the text broken up with easily understandable subheadings “covering recognizably similar issues.”<sup>72</sup> In France the Directive is built upon further by domestic legislation which stipulates that the use of the French language is mandatory.<sup>73</sup> In the event terms in a consumer contract are found to be unfair, those terms are not binding on consumers, although the remainder of the contract is enforceable.<sup>74</sup>

Under the UK’s implementation of the Directive,<sup>75</sup> a consumer is not bound by a standard term in a contract with a seller or supplier if that term is unfair. As such, an unfair term does not form a part of the contract and the contract is potentially voidable. If a business refuses to accept that a term is unfair and unenforceable, then the consumer can seek an injunction from a court or other recognized body to not be bound by the term or to void the contract. In the UK, the Office of Fair Trading (“OFT”) and other regulatory bodies such as the Trading Standards Services are granted the authority to enjoin in the courts businesses

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reasonable notice or adequate grounds; requiring an action by the consumer to avoid liability; irrevocably binding the consumer to terms he or she had no real opportunity to review before the contract was formed; allowing the seller to alter the terms of the contract unilaterally without reference to conditions specified in the contract; allowing the seller to change delivery or price terms without giving the consumer the right to opt out of the modified contract; allowing the seller the exclusive right to interpret the contract; requiring the consumer to fulfill all of his or her obligations even if the seller has not fulfilled its obligations; and limiting the consumer’s access to legal process by, for example, requiring arbitration.

69. UCT Directive, *supra* note 5, at art. 4.

70. *Id.*, at art. 5.

71. In the Guidance, the OFT confirms that “[i]t is our view that technical jargon such as references to ‘indemnity’ can have onerous implications of which consumers are not likely to be aware without such [legal] advice.” See the Guidance, *supra* note 6, § C.10, at 68–69.

72. *Id.*, § C.8, at 68.

73. Law No. 94-665 of August 4, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], August 4, 1994 (known as Loi Toubon for the Minister of Culture at the time it was enacted), available at <http://www.culture.gouv.fr/culture/dglf/lois/loi-fr.htm>.

74. *Id.*, at art 6.

75. Unfair Terms in Consumer Contracts Regulations 1994, S.I. 1994/3159 (U.K.), available at [http://www.opsi.gov.uk/si/si1994/Uksi\\_19943159\\_en\\_1.htm](http://www.opsi.gov.uk/si/si1994/Uksi_19943159_en_1.htm), as subsequently amended by the 1999 Regulations of the same name (S.I. 1999/2083) [hereinafter “the Regulations”], available at <http://www.opsi.gov.uk/si/si1999/19992083.htm>.

that continue to use terms that are unfair. That is coupled with an obligation on the OFT to give reasons as to its decision regarding the fairness of the term.<sup>76</sup>

In the UK, the test of unfairness is not whether the contractual term is deceitful. A standard term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract.<sup>77</sup> Recent case law has confirmed that the "requirement of good faith . . . is one of fair and open dealing."<sup>78</sup>

Unfair Terms in Consumer Contracts Regulations 1999 illustrates the test of unfairness and lists some types of terms that can be unfair.<sup>79</sup> The Regulations contain 17 categories of terms that can be unfair. This is a "grey" list. The OFT Guidance states that "terms are under suspicion of unfairness if they have the same purpose or can produce the same result as terms on the 'grey' list. They do not have to have the same form or mechanism."<sup>80</sup> Terms that may be unfair are summarized by the OFT in its guidance for consumers<sup>81</sup> along the following lines:

- Consumers being misled about a contract or their legal rights;
- Consumers being denied full redress if the contract is breached;
- Consumers being bound by a contract unfairly;
- The business not having to perform obligations;
- Consumers unfairly losing pre-payments if the contract is cancelled;
- The business varying the terms after contract formation; and
- Consumers being subject to unfair penalties.

English legal commentators have criticized the implementation of the Directive because the UCTA was not repealed when the Regulations were enacted, which has had the effect of leaving in place two somewhat incompatible sets of laws governing unfair contract terms.<sup>82</sup> At some point in the future, a single unified regime in the UK is likely, although in 2006 nothing specific has of yet been proposed by Parliament.

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76. *Id.*, Regulations 12(1), 10(2).

77. *Id.*, Regulation 5(1).

78. Director General of Fair Trading v. First National Bank Plc [2002] 1 A.C. 481, 494 (Eng.).

79. See Schedule 2 to the Regulations, *supra* note 75.

80. See the Guidance, *supra* note 6, § C.5.

81. See generally Guidance for Consumer Advisers on the Unfair Terms in Consumer Contracts Regulations 1999, Sept. 8, 2000, available at <http://www.offt.gov.uk/NR/rdonlyres/720A136C-9435-40C4-8549-7BDFCCF85B70/0/oft143.pdf>.

82. See, e.g., RICHARD CHRISTOU, BOILERPLATE PRACTICAL CLAUSES 151 (4th ed. 2005), on the differences in scope between the 1977 Act (UCTA) and the 1999 Regulations. At the request of the UK's Department of Trade and Industry, the Law Commission for England and Wales and the Scottish Law Commission (the "Law Commissions") recently examined the two regimes to consider harmonization in regard to their application in relation to consumers. The Law Commissions have published a report that concludes that although UCTA and the 1999 Regulations have similar effects, they are not consistent and some provisions overlap, making their combined application unnecessarily complex and contradictory. LAW COMMISSION, UNFAIR TERMS IN CONTRACT, 2005, Cm. 6464 (U.K.) (jointly with SCOTTISH LAW COMMISSION), available at [http://www.lawcom.gov.uk/docs/lc292\(1\).pdf](http://www.lawcom.gov.uk/docs/lc292(1).pdf).

After the Directive was enacted in 1993, the Health and Consumer Affairs Directorate of the Commission created the European Database on Case Law Concerning Unfair Contract Terms ("CLAB database"), which is accessible to the public on the Internet.<sup>83</sup> The CLAB database was launched to assist the Commission in monitoring national case law developments based on the Directive and to provide information on judicial and administrative proceedings, including settlements and arbitration awards. Many of the cases in the database were brought by consumer protection advocacy groups in "group litigation" or "representative proceedings," which EU standing rules generally authorize for the redress of consumer grievances rather than U.S.-style class action litigation.<sup>84</sup> Cases in the database dealing with claims against Internet merchants include:

- On the ground of unfairness generally, an Austrian consumer protection group blocked the use by an Internet service provider of a contract term that required the consumer to agree to be bound by the terms of software licenses when he or she had not yet been given access to those terms,<sup>85</sup> and by a term that treated the contract as formed at the moment the online access started, while reserving the service provider's right to withdraw from the contract within 14 days for any reason;<sup>86</sup>
- On the ground of unfairness of the type described in Annex 1(q) of the Directive,<sup>87</sup> an Austrian consumer protection group blocked the use by an Internet service provider of a term making a consumer liable for 20% of the amount due under the contract for early termination even with cause;<sup>88</sup>
- On the ground of unfairness of the type described in Annex 1(b),<sup>89</sup> an

83. European Database on Case Law Concerning Unfair Contract Terms, available at <https://adns.cec.eu.int/CLAB/SilverStream/Pages/pgHomeCLAB.html> [hereinafter "CLAB database"].

84. See generally Edward F. Sherman, *American Class Actions: Significant Features and Developing Alternatives in Foreign Legal Systems*, 215 F.R.D. 130 (2003).

85. Card No. AT000794, CLAB database, *supra* note 83. The clause was also held to be unenforceable because it was grossly disadvantageous to the consumer under section 879, paragraph 3 of the Austrian Civil Code (ABGB); non-transparent under section 6, paragraph 3 of the Consumer Protection Law (KSchG); and so surprising that a consumer would not expect it to be in the contract under section 864a of the ABGB.

86. Card No. AT001387, CLAB database, *supra* note 83. The clause was also held to violate section 6, paragraph 2, subparagraph 1 of the Consumer Protection Act (KSchG) because it purported to give the internet service provider authority to terminate the contract without justification. Such a clause would only be enforceable if it had been individually negotiated by the merchant and the consumer, not contained in a standard form contract.

87. UCT Directive, *supra* note 5. Annex (q) prohibits "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract." *Id.*

88. Card No. AT001396, CLAB database, *supra* note 83. The clause was also held to be unenforceable because it was grossly disadvantageous under section 1336 of the ABGB because it purported to limit the authority of a court to modify the amount of liquidated damages.

89. Annex 1(b) prohibits "inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him." UCT Directive, *supra* note 5.

Austrian consumer protection group stopped an Internet service provider from disclaiming warranty liability for its services;<sup>90</sup>

- On the ground of unfairness of the type described in Annex 1(o),<sup>91</sup> an Austrian consumer protection group prevented an Internet service provider from denying consumers the right to withhold payments for its failure to provide services or for breach of warranty claims;<sup>92</sup>
- On the ground of unfairness of the type described in Annex 1(j),<sup>93</sup> a French consumer protection group prevented an Internet merchant from using a term that purported to allow it to change its general sales terms at any time;<sup>94</sup>
- On the ground of unfairness generally, a French consumer group caused an Internet merchant to accept returns of merchandise during the period of the consumer's right of return without regard to whether the goods had been used after the merchant had tried to limit returns during that period to unused merchandise only;<sup>95</sup>
- On the ground of unfairness of the type described in Annex 1(q), a French consumer group stopped an Internet merchant from requiring a consumer to note clearly on the delivery slip why the product was defective as a condition to the consumer's right to return the product for a refund;<sup>96</sup>
- On the ground of unfairness of the type described in Annex 1(b), a French consumer protection group prevented an Internet merchant from disclaiming liability for late delivery of goods;<sup>97</sup> and

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90. Card No. AT001738, CLAB database, *supra* note 83. The clause was also held to violate Section 9 of the KSchG, which prohibits disclaimers of certain warranties implied in law; *see also* Card Nos. AT001740, AT002242, AT002243, AT002248, and AT002250, CLAB database, *supra* note 83 (finding contract terms unenforceable with reference to Annex 1(b) and Austrian warranty law).

91. UCT Directive, *supra* note 5. Annex 1(o) prohibits "obliging the consumer to fulfill all his obligations where the seller or supplier does not perform his." *Id.*

92. Card No. AT001738, CLAB database, *supra* note 83. The clause was also held to violate Section 6 of the KSchG, which preserves a consumer's right to withhold payments if a merchant fails to perform its duties under a contract.

93. UCT Directive, *supra* note 5. Annex 1(j) prohibits "enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract." *Id.*

94. Card No. FR001081, CLAB database, *supra* note 83. The clause was also held to violate section L 132-1 of the French Consumer Code, which prohibits a merchant from modifying the terms of a contract unilaterally without a valid justification. However, in Card No. FR1080, CLAB database, *supra* note 83, a French court held that a contract term used by the same Internet merchant informing consumers that they would be bound by its standard terms and providing an opportunity to review those terms was not unfair; and in Card No. FR1082, CLAB database, *supra* note 83, the same merchant was allowed to disclaim liability if goods sold had slight variations from the photographs of them provided on its Web site.

95. Card No. FR001084, CLAB database, *supra* note 83. The term was also invalid because it failed to recognize the consumer's seven-day right to return goods purchased from a distance seller. *See infra* text at notes 121–33 for a discussion of the DS Directive.

96. Card No. FR001085, CLAB database, *supra* note 83. The term was also invalid under article L 133-3 of the French Commercial Code and point 19 of summary recommendation n° 91-02 dated March 23, 1990, regarding contract terms that hinder the enforcement of legal rights by consumers.

97. Card No. FR001086, CLAB database, *supra* note 83; *see also* Card No. FR001088, CLAB database, *supra* note 83 (Internet travel service cannot shift liability for increases in fares to consumers).

- On the ground of unfairness of the type described in Annex 1(q), an Italian consumer successfully challenged a merchant's choice of forum clause specifying the forum as where the merchant's place of business was located.<sup>98</sup>

When U.S. Internet retail merchants decide to expand their services into European markets, U.S. managers may have a strong desire to use as many of the standard contract terms developed for U.S. markets as possible, and to limit the number of changes they make in their established business processes, especially if changes necessitate recoding and redesign of the merchant's Web site. This reluctance to localize contract terms and business processes may prove to be a costly error after European operations have been set up. The experience of AOL in France<sup>99</sup> shows the magnitude of changes that may be required to localize a U.S. business model and bring it into compliance with EU consumer protection law.

In 2002, the French Unfair Contract Terms Commission<sup>100</sup> held public hearings attended by both industry and consumer representatives. In 2003, it subsequently published a recommendation listing 28 types of clauses that were used by French Internet service providers in their standard form Internet access agreements with consumers which it deemed "unfair" under French law pursuant to French implementation of the Directive.<sup>101</sup> Although the French Unfair Contract Terms Commission's recommendations are not binding on French courts, in practice they are influential, and courts treat such recommendations with considerable deference when called upon to interpret French unfair contract terms law.<sup>102</sup> After these recommendations were issued, AOL revised and replaced the standard form consumer agreements it used in France. However, apparently relying on the fact that the Unfair Contract Terms Commission's recommendations were not binding, AOL elected not to act on all of them. Importantly, AOL also continued to apply the unrevised 2000 version of its standard form agreement to some of its existing customers. The Union Fédérale des Consommateurs-Que Choisir ("UFC")<sup>103</sup> brought suit against AOL, claiming that 36 terms found in the 2000 and the revised 2003 version of AOL's standard form agreement violated French law. As a national organization representing consumer interests, the UFC is authorized under French law to bring suit on behalf of French consumers collectively using

98. Card No. IT001105, *supra* note 35.

99. Although not a U.S. business, a similar case in France involving the internet service provider Tiscali illustrates how unfair contract principles were applied to online contracts. *See* R.G. N° 04/02911, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Paris, 1e ch., Apr. 5, 2005, tgif050405 (Fr.), available at <http://www.clauses-abusives.fr/juris/tgif050405.pdf> (24 out of 25 clauses challenged were deemed "unfair").

100. For more information about the La Commission des Clauses Abusives, see <http://www.clauses-abusives.fr/>.

101. Recommendation 03-01 (2003), available at <http://www.clauses-abusives.fr/recom/03r01.htm>.

102. Franklin Attorneys at Law, Court Rules Internet Access Agreement Terms Invalid, International Law Office.com, Mar. 10, 2005, available at <http://www.internationallawoffice.com> (copy on file with *The Business Lawyer*).

103. More information about the UFC is available at its Web site, [www.quechoisir.org](http://www.quechoisir.org).

the “representative action” process.<sup>104</sup> Although AOL was the first Internet service provider to be tested by a French consumer rights association in this way, UFC has subsequently successfully brought suit against several French ISPs whose contract terms similarly did not comply with the Commission’s recommendations.<sup>105</sup>

In 2004, the Tribunal de Grande Instance in the Paris suburb of Nanterre found that 31 of the 36 terms in the AOL agreements were either unfair or illegal and therefore null and void under French law.<sup>106</sup> The trial court found that the following terms were unenforceable against the consumer because they were unfair:

- The subscriber continuously must update his or her personal information, and the failure to do so terminates the subscriber agreement automatically and without notice;
- Tacit acceptance by the subscriber of the general conditions on use of the AOL Web site constitutes acceptance;
- The subscriber’s sole remedy in the event of breach by AOL is termination of the subscriber agreement;
- The assumption that e-mail notices have been accepted two days after delivery;
- AOL’s right to share the subscriber’s personal data with third parties without his or her prior consent;
- AOL’s unilateral right to modify the agreement, payment terms, and the subscriber’s user name at AOL’s discretion;
- AOL’s right to terminate the agreement without cause, or to suspend or terminate the agreement without prior notice for minor breaches by the subscriber;
- AOL’s right to bill for the remaining term after early termination by the subscriber; finding this term unfair because there was no provision permitting the subscriber to terminate early for cause without paying for the remaining term;
- AOL’s right to add 15 seconds to each invoiced connection as well as charging in full for each service minute used; and
- AOL’s right to disclaim liability for service interruptions, errors, and other failures.<sup>107</sup>

In addition, and more seriously for AOL, the trial court held the following terms to be illegal and therefore null and void:

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104. La loi du 18 Janvier 1992 sur l’action en représentation conjointe.

105. See *Les principales clauses abusives et illicites*, available at <http://www.quechoisir.org/Enquete.jsp?sessionId=BC9E752D11BBEFD25B34FC9DF214AECF&tomcat-1?id=Ressources:Articles:BA0028CF57BE4F24C12571D800652548&catcss=TEL000&categorie=NoeudPClassification:80ECC2565681E625C1256F0100348CB8>.

106. R.G. N° 02/03156, Tribunal de grande instance [T.G.I.] [ordinary court of original jurisdiction] Nanterre, le ch., June 2, 2004, tgin020604 (Fr.), available at <http://www.clauses-abusives.fr/juris/tgin020604.pdf>; Bradley Joslove & Andréi Krylov, *Standard American Business to Consumer Terms and Conditions in the EU*, 18 MICH. INT’L LAW. 1 (2005), available at <http://www.michbar.org/international/pdfs/Spring05.pdf>.

107. Joslove & Krylov, *supra* note 106, at 2–3.



- AOL's unilateral right to modify the agreement, even though that right was qualified by a duty to provide 30 days prior notice and the subscriber's right to terminate the agreement within that period;
- Tacit acceptance by the subscriber of modifications in payment terms constitutes acceptance;
- Subscribers must contest an invoice within 90 days; otherwise the amount due becomes uncontestable;
- A non-exclusive assignment from the subscriber to AOL for all content put online by the subscriber;
- AOL's right to collect exceptional fees from subscribers in the event of late payment or termination of the agreement;
- AOL's right to terminate the agreement for risk of non-payment;
- AOL's cap on its liability equal to the last 6 months of fees; and
- AOL's right to reasonable attorneys' fees in the event of the subscriber's breach.<sup>108</sup>

The court confirmed that contract terms that provide no recourse against the merchant cause a significant imbalance to the detriment of the online consumer. The court required AOL to remove the unfair and illegal terms from its agreements, to post the judgment of the court on AOL's home page, and to e-mail it to all its subscribers.<sup>109</sup> On September 15, 2005, the Court of Appeals in Versailles affirmed in full the decision of the Nanterre trial court.<sup>110</sup>

It is interesting to note that because of the harmonizing effect of the Directive, should the AOL matter have been tested in the UK, many of the same conclusions as to the unfairness of the contract terms under consideration would likely have been reached. The recent experience of Dell Corporation Limited supports this conclusion. In the summer of 2006, it became clear that the online retailer had been cooperating with the OFT and, as a result of concerns raised by the OFT, agreed (according to the OFT's own press release) to "improve the transparency of its agreements with consumers."<sup>111</sup> Notably that included separating the terms applicable to consumers from those Dell was using with its business customers (something some advisors had been recommending for some time). With obvious parallels to the *UFC-Que Choisir* case in France, Dell agreed to amend terms that purported to: "limit[] liability for negligence to the price of the product"; "exclude[] liability for consequential loss arising out of breach of contract"; "ex-

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108. *Id.* A German court recently held that in terms and conditions used by online merchants, terms that permit the substitution of goods, require original packing be returned with goods or the online terms and conditions to be amended at any time are illegal and without effect under Sec. 307 of German Civil Code. Landgericht Frankfurt am Main, August 23, 2006, case No. 2/2 O 404/05 (on file with *The Business Lawyer*).

109. *Id.*

110. *AOL France v. UFC Que Choisir*, R.G. N° 04/05564, Cour d'appel [CA][regional court of appeal] Versailles, 1<sup>e</sup> ch., Sept. 15, 2005, J.C.P. IV 150905, available at <http://www.clauses-abusives.fr/juris/cav150905.pdf>; see also Bradley Joslove, *French Appeals Court Upholds Decision Calling AOL's Contract Terms Unfair*, 10 ELECTRONIC COM. & L. REP. 1137 (Nov. 23, 2005).

111. See OFT Press Releases, July 6, 2006, available at <http://www.of.t.gov.uk/News/Press+releases/2006/111-06.htm>.

clude[] liability for oral representations not confirmed in writing”; and “require[] the consumer to notify Dell of any errors in its confirmation of the consumer’s order immediately.”<sup>112</sup> The changes made by Dell in response to OFT pressure indicate that UK authorities are actively policing the Internet to ensure consumer contracts are both “fair” and compliant with consumer protection laws.

Many U.S. courts have reviewed service agreements less favorable to consumers than the service agreement reviewed in the *UFC-Que Choisir* case and have had no trouble enforcing them. The analysis in U.S. cases is generally more focused on the enforceability of a choice of forum or arbitration term, so the issues raised in the *UFC-Que Choisir* case are rarely analyzed in depth. In *Hill v. Gateway 2000, Inc.*,<sup>113</sup> Judge Easterbrook held that the preprinted form contract enclosed with a computer that the Hills had ordered by telephone from Gateway was enforceable because the purchaser had a right to return the computer within 30 days if the terms were not acceptable.<sup>114</sup> The following year, a court in New York reviewed substantially the same contract and held that, although the terms of the preprinted form contract were generally enforceable, the arbitration clause it contained was unconscionable and therefore unenforceable.<sup>115</sup> As a general rule, most U.S. courts reviewing disputes between online service providers and consumers find both that a contract has been formed and that the choice of forum or arbitration term is enforceable, even if enforcement of the contract and its terms prevents a consumer from initiating a class action or resorting to the courts, so long as the contract is not unconscionable.<sup>116</sup> While some U.S. courts have been sympathetic to consumer claims that service providers’ terms should not be enforced because they are unfair,<sup>117</sup> such terms are unenforceable under the Directive.<sup>118</sup>

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112. *Id.*

113. 105 F.3d 1147 (7th Cir.), *cert. denied*, 522 U.S. 808 (1997).

114. 105 F.3d at 1150. *Accord* *Filius v. Gateway 2000, Inc.*, No. 97 C 2523, 1998 U.S. Dist. LEXIS 20358 (N.D. Ill. Jan. 15, 1998) (not unconscionable to require arbitration, but substituted American Arbitration Association as arbitrator in lieu of the International Chamber of Commerce as specified in the contract); *Edmond v. Gateway 2000, Inc.*, No. CV0002751345, 2001 WL 359176 (Conn. Super. Ct. Mar. 20, 2001); *Westendorf v. Gateway 2000, Inc.*, No. 16913, 2000 WL 307369 (Del. Ch. Mar. 16, 2000) (unpublished); *Falbe v. Dell, Inc.*, No. 04-C-1425, 2004 WL 1588243 (N.D. Ill. July 14, 2004).

115. *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1998).

116. For cases involving unsuccessful claims by consumers unhappy with wireless service providers, see *Forrest v. Verizon Commc'ns, Inc.*, 805 A.2d 1007 (D.C. 2002); *O'Quin v. Verizon Wireless*, 256 F. Supp. 2d 512 (M.D. La. 2003); *Net2Phone, Inc. v. Superior Court*, 135 Cal. Rptr. 2d 149 (Cal. Ct. App. 2003). For cases involving unsuccessful claims by consumers unhappy with Internet service providers, see *Groff v. America Online, Inc.*, No. PC 97-0331, 1998 WL 307001 (R.I. Super. May 27, 1998); *Caspi v. Microsoft Network, L.L.C.*, 732 A.2d 528 (N.J. Super. Ct. App. Div.), *cert. denied*, 743 A.2d 851 (1999); *Celmins v. America Online*, 748 So. 2d 1041 (Fla. Dist. Ct. App. 1999); *America Online, Inc. v. Booker*, 781 So.2d 423 (Fla. Dist. Ct. App. 2001); *Motise v. America Online, Inc.*, 346 F. Supp. 2d 563 (S.D.N.Y. 2004).

117. *Williams v. America Online*, No. 00-0962, 2001 WL 135825 (Mass. Super. Ct. Feb. 8, 2001); *Licitra v. Gateway, Inc.*, 734 N.Y.S.2d 389 (N.Y. City Civ. Ct. 2001); *Scarcella v. America Online*, 798 N.Y.S.2d 348 (N.Y. City Civ. Ct. 2004) (unpublished); *Lozano v. AT&T Wireless*, No. CV02-00090-WJR(AJWx), 2003 U.S. Dist. LEXIS 21794, at \*5 (C.D. Cal. Aug. 18, 2003) (an arbitration term contained in a “Welcome Guide” sent after a consumer had subscribed to a telephone service was not enforceable (citing *Ting v. AT&T*, 319 F.3d 1126, 1134 (9th Cir. 2003)).

118. UCT Directive, *supra* note 5, Annex 1(q); see Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 Hous. L. Rev. 1237, 1242-43 at n.18 (2001).

## 5. OTHER EU ONLINE CONSUMER PROTECTIONS

Recent European consumer protection legislation has concentrated on online selling. The legislation has created a complex matrix of rules of which an online merchant must be aware before it can create a compliant trading platform. In addition, there are many existing examples of other pieces of domestic consumer protection legislation which are applicable in the online context.<sup>119</sup> Given the uncertainty surrounding the application of older consumer laws to online markets, one objective behind recent European online consumer legislation has been to create a stable environment to inspire consumer confidence in ecommerce.<sup>120</sup> In 1997, the EU adopted the Distance Selling Directive (“DS Directive”).<sup>121</sup> The DS Directive promotes online commerce by providing consumers with the guarantee that they are protected by their own national consumer protection regimes when they enter into distance-selling contracts. “Distance selling” is defined as a contract regarding goods or services whereby the contract between the consumer and the supplier is formed at a distance through communications technology.<sup>122</sup> The rights granted consumers through the enactment of the DS Directive’s provisions into national law may not be waived by the consumer.<sup>123</sup> The DS Directive contains provisions similar to the U.S. FTC Mail Order Rule,<sup>124</sup> which requires that a transaction be completed within 30 days or notice of the delay be sent to the consumer and the consumer given the option to cancel the transaction.<sup>125</sup>

The DS Directive covers most forms of direct marketing, including catalog mail order, telephone sales, direct-response television sales, newspapers, magazines, and electronic communications such as e-mail. The DS Directive requires that a consumer be given certain minimum information both at the time of contract solicitation and at or before the time of delivery.<sup>126</sup> Written confirmation of information must be received by the consumer in some form of durable medium accessible to the consumer.<sup>127</sup> Consumers must, subject to certain exceptions, be given an unconditional “cooling-off” period of at least seven working days within which the consumer can cancel its order for most goods and receive a full refund.<sup>128</sup> The DS Directive takes a further step in that the seven-day cancellation period can be extended by up to three months if the online merchant fails to

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119. For example, in the UK alone the Trade Descriptions Act 1968, the Consumer Credit Act 1974, the Sales of Goods Act 1974, the Supply of Goods and Services Act 1982, and the Consumer Protection Act 1987, to name but a few, all have a direct impact on online sales.

120. See Preamble of the EC Directive, *supra* note 40.

121. Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Council Directive 97/7, 1997 O.J. (L 144) 19 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997L0007:EN:HTML>. The Member States had until May 20, 2000, to enact national laws embodying the terms of the DS Directive. DS Directive, *supra* note 39, at art. 15.

122. DS Directive, *supra* note 39, at art. 2.

123. *Id.*, at art. 12.

124. 16 C.F.R. § 435.1 (2006).

125. DS Directive, *supra* note 39, at art. 7.

126. *Id.*, at art. 4.

127. *Id.*, at art. 5.

128. *Id.*, at art. 6.

provide information (again in a durable medium) about the cancellation right.<sup>129</sup> This provision might be thought of as a “penalty default” rule, which puts pressure on one party to a contract to disclose information that the other party needs to avoid a particular negative consequence that follows from non-disclosure.<sup>130</sup> Where the consumer exercises his or her right of withdrawal from the contract, the supplier is obliged to reimburse the consumer for any sums paid.<sup>131</sup> Cold-calling of consumers by telephone, fax, or e-mail is not permitted unless the consumer has consented.<sup>132</sup>

In an effort to protect merchants from unreasonable burdens in consumer transactions, certain types of transactions are exempt from the coverage of some DS Directive protections.<sup>133</sup> For example, unless the parties have otherwise agreed, the consumer’s seven-day right of withdrawal does not apply to contracts for the provision of services if performance has begun before the seven days are up; for the supply of goods or services whose price depends on fluctuations in the financial market that cannot be controlled by the supplier; for the supply of goods made to the consumer’s specifications or personalized, or which are likely to deteriorate or expire rapidly; for audio or video recordings or computer software which are unsealed by the consumer; for the supply of newspapers, periodicals, or magazines; or for gaming or lottery services.

In May 2000, the European Parliament approved the Electronic Commerce Directive,<sup>134</sup> which governs any information society service provider<sup>135</sup> including Internet service providers (ISPs), and providers of electronic contracting, online advertising, and other commercial communications. While an information society service provider is given the right to operate throughout the EU subject to regulation only by the government of the country where it is established, in return it is now required to provide minimum information (e.g., its name, place of establishment, e-mail address, and VAT registration) to consumers.<sup>136</sup> Again, this is another push toward ensuring online transparency and enhancing consumer confidence in online transactions. Building upon the same ethos, merchants wishing to enter into contracts online are required to explain clearly and unequivocally

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129. See Regulation 11(3) of the Consumer Protection (Distance Selling) Regulations 2000 (the UK implementation of the DS Directive), available at <http://www.ofi.gov.uk/Business/Legal/DSR/default.htm>; DS Directive, *supra* note 39, at art. 6. German courts have recently held that German consumers have one month to revoke a contract unless notice is given at the time the contract is formed and not merely posted on the merchant’s Web site. Hanseatisches Oberlandesgericht, August 24, 2006, case No. 3 U 103/06 (on file with *The Business Lawyer*); Kammergericht Berlin, June 18, 2006, case No. 5 W 156/06 (on file with *The Business Lawyer*).

130. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L.J.* 87 (1989).

131. Regulation 14 of the Consumer Protection (Distance Selling) Regulations 2000, available at <http://www.ofi.gov.uk/Business/Legal/DSR/default.htm>.

132. DS Directive, *supra* note 39, at art. 10.

133. *Id.*, at art. 6(3).

134. EC Directive, *supra* note 40. In the UK, the Directive was implemented as the Electronic Commerce (EC Directive) Regulations 2002 [hereinafter “EC Regulation”], available at <http://www.opsi.gov.uk/si/si2002/20022013.htm>.

135. EC Directive, *supra* note 40, at art. 1(2) as defined.

136. EC Directive, *supra* note 40, at art. 6; EC Regulation, *supra* note 134, at art. 6.

prior to the formation of the contract the steps of contract formation,<sup>137</sup> whether the contract is accessible after formation, and procedures for handling errors in contract formation. In addition, the Electronic Commerce Directive clarifies the moment of the conclusion of a contract in certain cases: when a contract is formed by an end user giving assent to an offer through a technological means, such as clicking on an icon or button, then the contract is concluded when the end user receives an acknowledgment of receipt of that manifestation of assent from the other party.<sup>138</sup> Service providers are required to provide end users of online contracting services with an effective means of identifying and correcting errors and accidental transactions.<sup>139</sup>

## 6. CONCLUSION

U.S. Internet businesses that target consumers in Europe need to be aware that standard form contracts that work well in the U.S. may be unenforceable in the EU. Managers of U.S. Internet businesses need to recognize the enormity of the changes that may be required in their business processes and technology before their sites have been fully “localized” for European market conditions. AOL’s French subsidiary tried unsuccessfully to minimize the number of changes it made to localize its business model and found that its terms of service with French consumers were nearly all unenforceable because they were unfair. Subsequently Dell’s subsidiary in the UK also fell afoul of the laws against unfair consumer contract terms. These and other cases dealing with EU unfair contract terms law show the lack of enthusiasm among some of the U.S.’s major trading partners for the U.S. market-oriented approach to consumer protection law. The EU approach to B2C transactions reflects a continued commitment to strong regulatory oversight of Internet consumer markets.

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137. We are referring not to the formal legal rules for the contract formation, but the technical and procedural steps required by the consumer in order to conclude the contract.

138. EC Directive, *supra* note 40, at art. 11; EC Regulation, *supra* note 134, at art. 11.

139. See sources cited in note 138, *supra*.