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RIGHT OF WITHDRAWAL – INTEROPERABILITY OF DIRECTIVES

Marco Loos

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CASE C-423/97, TRAVEL VAC SL V MANUEL JOSÉ ANTELM SANCHIS²

§1. Facts

Travel Vac had sent Mr Antelm Sanchís several letters in which he was promised a luxury gift, which he could receive without obligation in Denia, a town situated about 100 km away from his hometown Valencia. These letters were followed by numerous telephone calls urging him to collect his gift. On 14 September 1996, he indeed went to collect his gift and was told to go to premises adapted for the purpose of presenting timeshare apartments to various consumers. He was kept there for several hours and was repeatedly offered alcoholic drinks. Ultimately, he decided to accept Travel Vac's offer to purchase a 1/51 undivided share of a furnished apartment in the Parque Denia residential development, entitling him to the exclusive use of that apartment during the 19th week of the calendar year under a time-share scheme. In addition, Travel Vac undertook to provide Mr Antelm Sanchís with certain services such as maintenance of the building, management and administration of the time-share scheme, use of the common services of the residential estate and membership of Resort Condominium International, an international club allowing the purchaser to exchange his holidays in accordance with the rules of the club. The price to be paid by Mr Antelm Sanchís amounted to ESP 1,090,000 (approximately EUR 6,550), of which ESP 285,000 (approximately EUR 1,700) was the price for the undivided share, and the rest of the price concerned the V.A.T., the joint ownership of the furniture of the apartment, the abovementioned services and the membership of Resort Condominium International. According to the contract, Mr Antelm Sanchís could withdraw from the contract ('right to cancel the contract') within 7 days of signing the contract, by giving notice to Travel Vac by way of an authentic document and payment of damages in the amount of 25 % of the total price.

It was agreed between the parties that Mr Antelm Sanchís was to appear at the bank to sign the document confirming the contract within three days of signing it, therefore by 17 September 1996 at the latest. However, on that day, Mr Antelm Sanchís did not appear at the bank. Instead, he went to the head offices of Travel Vac in his hometown of Valencia, Spain, and stated orally that the whole contract was of no effect and that the documents he had signed should be returned to him. On 22 November 1996, Travel Vac applied to the local court of first instance for an order for enforcement against Mr Antelm Sanchís.

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² [1999] ECR p. I-2195.

The national court raised the question whether the Doorstep selling directive (directive 85/577, *OJ* 1985, L 372/31), applied to the case and, if so, whether it could grant the counterclaim for cancellation of the contract made by Mr Antelm Sanchís.

§2. Judgement

17. By its first and second questions, which must be considered together, the national court is asking essentially whether directive 85/577 applies to a contract for the purchase of a right to use immovable property on a time-share basis and for the provision of services whose value is higher than that of the right to use the immovable property.

22. The Court holds it necessary to observe first of all that, whilst it is true that time-share contracts are covered by directive 94/47, this does not preclude a contract having a time-share element from being covered by directive 85/577 if the conditions for the application of that directive are otherwise fulfilled.

23. Neither directive contains provisions ruling out the application of the other. Moreover, it would defeat the object of directive 85/577 to interpret it as meaning that the protection it provides is excluded solely because a contract generally falls under directive 94/47. Such an interpretation would deprive consumers of the protection of directive 85/577 even when the contract was concluded away from business premises.

24. It must be pointed out next that, under Article 3(2)(a) of directive 85/577, that directive does not apply to contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property.

25. However, it must be observed, as the Commission points out, that, since a contract like that at issue in the main proceedings does not only concern the right to use a time-share apartment, but also concerns the provision of separate services of a value higher than that of the right to use the property, that contract is not covered by the exception provided for in Article 3(2)(a) of directive 85/577.

26. Accordingly, the answer to the first and second questions must be that directive 85/577 applies to a contract relating to the acquisition of a right to use immovable property on a time-share basis and to the provision of services whose value is higher than that of the right to use the immovable property.

27 By its third question, the national court asks essentially whether a contract can be considered to have been concluded during an excursion organised by the trader away from his business premises within the meaning of Article 1(1) of directive 85/577 if it was signed at a tourist complex of time-share apartments located in a town to which the consumer was invited and which is not the town where the trader has its registered office.

33 It must be borne in mind that, according to Article 1(1), first indent, of directive 85/577, a contract is covered by that directive if it is concluded during an excursion organised by the trader away from his business premises.

34 Furthermore, the fourth recital of directive 85/577 states that the special feature of contracts concluded away from the business premises of the trader is that it is the trader who initiates the contract negotiations.

35 As regards the question whether a contract was concluded during an excursion organised by the trader, it must be observed, first, that a contract concluded in a town other than the one in which the consumer lives and at a certain distance from it, such that he has had to undertake a journey to reach that town, must be considered to have been concluded during an excursion within the meaning of directive 85/577.

36 Second, where the initiative for such an excursion comes from the trader, in the sense that he invites the consumer to a specified place by letters and/or telephone calls indicating the date, time and place of the meeting, it must be considered that the excursion has been organised by the trader within the meaning of directive 85/577.

37 As regards the question whether the contract was concluded away from the trader's business premises, it must be observed that this concept refers to premises in which the trader usually carries on his business and which are clearly identified as premises for sales to the public.

38 The answer to the third question must therefore be that a contract concluded in a situation in which a trader has invited a consumer to go in person to a specified place at a certain distance from the place where the consumer lives, and which is different from the premises where the trader usually carries on his business and is not clearly identified as premises for sales to the public, in order to present to him the products and services he is offering, must be considered to have been concluded during an excursion organised by the trader away from his business premises within the meaning of directive 85/577.

39 By its fourth question, the national court is asking essentially whether it is sufficient, in order for a consumer to be able to exercise his right of renunciation under Article 5(1) of directive 85/577, for the contract to have been concluded in circumstances such as those described in Article 1 of that directive, or whether it must also be shown that the consumer was influenced or manipulated by the trader.

42 The fourth recital of directive 85/577 explains that, when a contract is concluded away from a trader's business premises, the consumer is unprepared for the contract negotiations, and that he is often unable to compare the quality and price of the offer with other offers. For that reason, according to the fifth recital of the directive, the consumer should be allowed a right of cancellation over a period of at least seven days in order to enable him to assess the obligations arising under the contract.

43 It follows that, in order for the consumer to have the right of renunciation provided for by directive 85/577, it is sufficient for him to be in one of the situations described in Article 1 of that directive. Specific conduct or an intention to manipulate on the part of the trader are not, however, required and do not therefore have to be proved.

44 Accordingly, the answer to the fourth question must be that the consumer can exercise his right of renunciation under Article 5(1) of directive 85/577 where the contract has been

concluded in circumstances such as those described in Article 1 of that directive, without there being any need to prove that the consumer was influenced or manipulated by the trader.

45 By its fifth question the national court is asking essentially whether directive 85/577 precludes a Member State from adopting rules providing that the notice of renunciation provided for by Article 5(1) of the directive is not subject to any condition as to form.

49 It should be borne in mind first of all that Article 5(1) of directive 85/577 provides that the consumer has the right to renounce the effects of his undertaking by sending notice within a period of not less than seven days from receipt by the consumer of the notice referred to in Article 4, in accordance with the procedure laid down by national law.

50 It follows that directive 85/577 does not preclude a Member State from adopting rules which provide that notice of renunciation is not subject to any condition as to form, so allowing the notice to consist, in particular, of unequivocal acts. Given the objective of the directive, namely to protect the consumer, a Member State may adopt such provisions to make it easier for the consumer to exercise his right of renunciation.

51 Whilst, as regards observance of the period prescribed, the last sentence of Article 5(1) provides that it is sufficient for notice to be sent before the end of that period, this does not mean that notice must be given in writing. This provision merely concerns the calculation of the minimum period of seven days where the consumer gives notice of renunciation in writing.

52 The answer to the fifth question must accordingly be that directive 85/577 does not preclude a Member State from adopting rules providing that the notice of renunciation provided for by Article 5(1) of the directive is not subject to any condition as to form.

53 By its sixth question, the national court is asking essentially whether directive 85/577 precludes the inclusion in a contract of a clause requiring payment by the consumer of a lump sum for damage caused to the trader for the sole reason that he has exercised his right of renunciation.

56 The Commission considers that a clause such as that described at paragraph 53 of this judgment is contrary to the binding provisions of Article 5(2) of directive 85/577. If notice of renunciation given by the consumer has the effect of releasing him from all obligations under the contract, the vendor cannot impose on him a contractual obligation to pay damages by way of compensation for the sole reason that he exercised the right of renunciation granted by directive 85/577.

57 On that point, it should be borne in mind that Article 5(2) of directive 85/577 provides that, in the event of renunciation the consumer is released from any obligations under the cancelled contract.

58 It follows that, after cancellation of the contract, the obligation to pay damages if the contract is not performed is extinguished. As the Advocate General points out in point 59 of his Opinion, to enforce payment of such damages would be tantamount to imposing a penalty on the consumer for exercising his right of renunciation, which would be contrary to the

protective purpose of directive 85/577 which is precisely to prevent the consumer from undertaking financial obligations without being prepared for them.

59 Whilst Article 7 of directive 85/577 refers to national laws to govern the legal effects of renunciation, particularly as regards the reimbursement of payments for goods or services provided and the return of goods received, that provision does not concern payment of compensation for exercise of the right of renunciation, but only the effects of renunciation on the parties, for which provision may be made in those laws, as regards the reimbursement or return of payments or goods already supplied.

60 Accordingly, the answer to the sixth question must be that directive 85/577 precludes the inclusion in a contract of a clause imposing payment by the consumer of a lump sum for damage caused to the trader for the sole reason that the consumer has exercised his right of renunciation.

II. COMMENTS

§1. Introduction

1. Throughout his academic career, Jules Stuyck has written on commercial law, commercial practices, consumer law and European Union Law, and very often his work has consisted of a combination of these subjects. Exemplary in this respect was his thesis in comparative law, in 1975, on aggressive sales methods.³ This subject had at that time had not yet been regulated at the European level, but was mentioned in the first Consumer Policy Program, which was adopted in that same year.⁴ It would take some 10 more years before this consumer policy program would yield its first legislative results: the adoption of the Misleading advertising directive in 1984⁵ and the Doorstep selling directive.⁶ With regard to commercial practices, other important pieces of regulation are the Timeshare directives of 1994 and 2008,⁷ the Distance selling directive of 1997,⁸ and the Unfair commercial practices directive of 2005.⁹ Recently, the Doorstep selling directive and the Distance selling directive have been replaced

³ J. Stuyck, *Agressieve Verkoopmethoden. Rechtsvergelijkende Studie in verband met de bescherming van de consument tegen onbehoorlijke beïnvloeding door de detailhandel*, diss., Leuven: Acco, 1975, XXVI + 923 p. (published in 3 parts).

⁴ Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, [1975] OJ C 92/2

⁵ Council directive 84/450/EEC of 10 September 1984 concerning misleading and comparative advertising, [1984] OJ L 250/17.

⁶ Council directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, [1985] OJ L 372/31.

⁷ Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, [1994] OJ L 280/83; directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts, [2009] OJ L 33/10.

⁸ 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, [1997] OJ L 144/19.

⁹ Directive 2005/29/EC of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market, [2005] OJ L 149/22.

by the Consumer rights directive of 2011,¹⁰ which has to be transposed by the Member States by 13 December 2013 and which will have to be applied as of 13 June 2014.^{11, 12}

2. The case discussed here relates to two different types of commercial practices that have traditionally been associated with aggressive sales methods: doorstep selling¹³ and timeshare. Both the 1985 Doorstep selling directive and the 1994 Timeshare directive as such do not exclude the possibility to make use of a particular sales method, but have installed mechanisms pertaining to the conclusion of the contract and, in particular, have introduced extensive information obligations for the trader to comply with, and a right of withdrawal for the consumer. These characteristics have been retained after the adoption of the Unfair commercial practices directive in 2005 and in the newer versions of these directives, i.e. the Consumer rights directive and the 2008 Timeshare directive.

3. The Travel Vac-case – for reasons unknown to me – has never been the subject of much discussion in legal literature. This is all the more strange as the Court of Justice has given a number of important decisions in this case pertaining to the right of withdrawal. Ground-breaking, however, is the decision which is given with regard to the matter of principle which is at stake here.

§2. Applicability of several directives to a single set of facts: just a matter of principle?

4. Given the fact that both the Doorstep selling directive and the 1994 Timeshare directive contain(ed) extensive regulations as to the conclusion of contracts, the question arises how these two directives relate to each other: do these sets of rules co-exist – in which case the protection the directives offer may be combined – or does the applicability of one of the directives imply the non-applicability of the other? Or, on a slightly more abstract level: the principle that the CJEU had to decide upon, therefore, is whether European directives aiming at the protection of consumers may both be applied to the same set of facts if neither directive contains an explicit provision on the interoperability of that directive with other European legal instruments. This is the main question raised by the national court in the Travel Vac-case.

5. The Court of Justice of the European Union's answer to this matter of principle is clear: if the conditions for the application of two directives have been met, and neither directive rules out the application of the other, both directives are applicable to the same situation.¹⁴ In essence, this means that the protection offered by one directive is added to that offered by another directive. Any other decision, the CJEU indicates, would have meant consumers being deprived of the protection offered by one directive without there being a basis for this in European law.¹⁵

¹⁰ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council directive 93/13/EEC and directive 1999/44/EC of the European Parliament and of the Council and repealing Council directive 85/577/EEC and directive 97/7/EC of the European Parliament and of the Council, [2011] OJ L 304/64.

¹¹ Cf. Article 28 Consumer rights directive.

¹² On the development of European consumer law, see M.B.M. Loos, A.L.M. Keirse, 'The Optional Instrument and the Consumer rights directive: alternative ways to a new *ius commune* in contract law – Introduction', in: A.L.M. Keirse, M.B.M. Loos (eds.), *Alternative ways to Ius commune. The Europeanisation of private law*, Cambridge/Antwerp/Portland: Intersentia, 2012, *Ius Commune Europaeum* series, no. 105, p. 1-20.

¹³ Discussed at length and in depth in Jules Stuyck's dissertation, p. 387-571.

¹⁴ Cf. case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraphs (22) and (23).

¹⁵ Cf. case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph (23).

6. As follows from the parts of the judgement of the CJEU quoted above, the answer to the main question is affirmative: to a contract relating to the acquisition of a right to use immovable property on a time-share basis not only the provisions of the Timeshare directive, but also the provisions of the Doorstep selling directive may be applied in case the requirements of that directive have (also) been met.

7. Although the principle thus established is clear, this does not mean that it is without complications. How do courts have to deal with situations where the rules of one directive lead to a result which is in conflict with the result achieved under another directive, and both directives claim applicability? The same question obviously arises where one directive indicates that the provisions of another directive are to be applied as well, but does not establish a hierarchy between these directives in case of conflict. Ultimately, this seems to be a matter of interpretation of the law. And whichever rule of interpretation is used by the CJEU to answer the question CJEU, it seems first and foremost that any such interpretation would be more or less unpredictable.

8. It should be noted, however, that nowadays European directives tend to indicate what their relation with existing EU law is. The 2011 Consumer rights directive, for instance, is explicitly inapplicable to contracts which fall under the scope of the 2008 Timeshare directive¹⁶ – which implies that the Travel Vac case could no longer be decided in the same manner as it was in 1999. This does not mean that the demarcation between European directives is much easier to understand. For instance, Article 3(4) of the 2005 Unfair commercial practices directive explicitly indicates that in so far as both this directive and other EU legislation apply and that other legislation regulates specific aspects of unfair commercial practices, that legislation takes priority over the provisions of the Unfair commercial practices directive. The question then, however, is when other EU legislation ‘regulates specific aspects of unfair commercial practices’. This is all the more difficult to determine since commercial practices are described as ‘any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers’¹⁷ and the directive is said to apply to unfair commercial practices ‘before, during and after a commercial transaction in relation to a product’.¹⁸ However, the directive also indicates that it is ‘without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract’. How this is to be understood, is far from clear, and the recent Jana Pereničová-case, which deals with the relation between the Unfair commercial practices directive and the Unfair contract terms directive, does not shed much light on this matter.¹⁹ Obviously, similar problems exist with regard to the relation between the Unfair commercial practices directive and the Consumer rights directive.

§3. Conditions for the applicability of the Doorstep selling directive

9. With its answer to the main question the CJEU settled the question whether as a matter of principle a timeshare contract could fall under the Doorstep selling directive. Even though this was possible in principle under the legislation which existed then, the conditions set out by

¹⁶ Cf. Article 3 paragraph (3) under (h) Consumer rights directive.

¹⁷ Cf. Article 2 under (d) Unfair commercial practices directive.

¹⁸ Cf. Article 3 paragraph (1) Unfair commercial practices directive.

¹⁹ See Jana Pereničová and Vladislav Perenič/SOS financ spol. s.r.o., case C-453/10, n.y.r.

the Doorstep selling directive itself of course had to be met. In addition to the type of contract, under the Doorstep selling directive the way the contract is concluded is relevant: the directive is applicable if the contract is concluded during a visit by the trader to the consumer at the consumer's or another consumer's home or at the consumer's place of work where the visit does not take place at the express request of the consumer, or during an excursion organized by the trader away from his business premises.²⁰

10. In the *Travel Vac* case, the question was whether the contract was concluded during such an excursion organized by the trader away from its business premises. The answer to this question was not evident, as it did not appear from the facts of the case that the trader had made means of transportation available to ensure that Mr Antelm Sanchís could visit the tourist complex in Denia. The CJEU, however, decided that the mere fact that the contract was concluded in another town than the one in which Mr Antelm Sanchís lived and that he had had to travel to reach that town was sufficient to consider that the contract was concluded during an excursion.²¹ As *Travel Vac* had invited Mr Antelm Sanchís to come to Denia and had informed him of the location and the date and time of the meeting, the initiative for the meeting was taken by *Travel Vac*, and as a consequence the excursion was deemed to have been organised by the trader.²²

11. Not much work was put into the question whether or not the contract was concluded away from the trader's business premises. According to the CJEU, the concept of 'business premises' refers to a place in which the trader usually carries on his business and which is clearly identified as premises for sales to the public.²³ As the national court had indicated that the contract was not concluded in the town where *Travel Vac* had its registered office, the tourist complex where the contract was concluded apparently could not be considered as such.

12. In my view, the fact that *Travel Vac* did not have its registered office in Denia but in Valencia can hardly be seen as decisive. A company's registered office is merely its official address, and many companies have several places where they regularly conduct business. If and to the extent that *Travel Vac* had clearly made visible at the tourist complex that it intended to conclude contracts there and then – e.g. by banners and billboards – the Court could have decided that the tourist complex was in fact a place of business. That the Court did not say anything on the matter, therefore, suggests that the CJEU intended an extensive interpretation of the scope of the Doorstep selling directive. The same impression is left by the way that the CJEU had disregarded the applicability of Article 3 paragraph (2) under (a) of the Doorstep selling directive: under this provision, contracts for the construction, sale and rental of immovable property or contracts concerning other rights relating to immovable property are excluded from the scope of the directive. This exception was said not to apply if in addition to these rights the contract also pertains to the provision of separate services and these services are of a value higher than that of the right to use the property.²⁴

²⁰ Cf. Article 1 Doorstep selling directive.

²¹ Cf. case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph (35).

²² Cf. case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph (36).

²³ Cf. case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph (37).

²⁴ See case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph (25).

§4. The exercise of the right of withdrawal

13. The Doorstep selling directive intended to compensate consumers for the fact they are often taken by surprise by the trader's initiative to offer the possibility to negotiate a contract and where consumers, as a result, are often unable to compare the quality and price of the offer with other offers.²⁵ Similarly, the original Timeshare directive intended to avoid misleading or incomplete information pertaining to the purchase of immovable properties rights on a timeshare basis and to give the consumer a chance to realise the extent of his rights and obligations under the contract better.²⁶ Both directives therefore intend to prevent consumers from being unduly influenced or manipulated by the trader during the conclusion of the contract.²⁷ This could suggest that the protection offered by these directives is available only when the trader's actions are somewhat surprising or misleading for the consumer. However, the CJEU makes clear that the use by the trader of unfair commercial practices is not a prerequisite for the consumer to invoke the right of withdrawal.²⁸ This implies that although both directives were intended to protect consumers from unfair commercial practices, their application does not depend on the existence of such practices: the mere fact that the contract is concluded under the circumstances set out under the Doorstep selling directive, or pertains to the purchase of immovable properties rights on a timeshare basis entitles the consumer to make use of the right of withdrawal.²⁹ This seems to be in line with the fact that under the 1994 Timeshare directive, the consumer need not state any reasons for his withdrawal from the contract,³⁰ but the Doorstep selling directive did not state this explicitly. The 2008 Timeshare directive³¹ and the 2011 Consumer rights directive³² now both explicitly indicate that the consumer need not state any reasons for his withdrawal, and thus confirms the decision taken by the CJEU in 1999 for doorstep selling contracts as well.

14. Another matter pertains to the way the right of withdrawal is to be exercised: is the withdrawal subject to a particular form?³³ The Doorstep selling directive does not explicitly say so, but it offers more arguments to answer the question affirmatively than in the negative. First, Article 5 paragraph (1) of the directive mentions a 'notice' that is to be 'sent' within 7 days from the receipt of the trader's notice of the consumer's right of withdrawal. The second sentence of that paragraph adds that in so far as the notice is 'dispatched' within that timeframe, it is considered to be effective. Moreover, the trader is required to give the consumer notice of the consumer's right of withdrawal in writing, as Article 4 of the directive makes clear. However, as the CJEU makes clear, the Doorstep selling directive only contains minimum harmonisation, which already indicates that Member States may also allow other forms for the declaration of withdrawal, including unequivocal factual acts.³⁴ This is now codified in Article 11 paragraph (1) of the Consumer rights directive. However, where the

²⁵ Cf. recitals (3) and (4) of the preamble to the Doorstep selling directive.

²⁶ Cf. recitals (7) and (11) of the 1994 Timeshare directive.

²⁷ See extensively M.B.M. Loos, 'Rights of withdrawal', in: G. Howells, R. Schulze (eds.), *Modernising and harmonising consumer contract law*, Munich: Sellier. European law publishers, 2009, p. 247.

²⁸ Case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraphs 39-44.

²⁹ See with regard to doorstep selling Case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph 43.

³⁰ Cf. Article 5 paragraph (1), first indent, of the 1994 Timeshare directive.

³¹ Cf. Article 6 paragraph (1) of the 2008 Timeshare directive.

³² Cf. Article 9 paragraph (1) Consumer rights directive.

³³ Case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraphs 45-52.

³⁴ Case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph 50.

consumer wishes to withdraw from a timeshare contract, this provision is not applicable,³⁵ and under the 2008 Timeshare directive the withdrawal from such a contract is to be given on paper or on another durable medium.³⁶

15. The last question put to the CJEU pertained to the question whether or not the Doorstep selling directive accepts or precludes the possibility that the consumer contractually agrees to pay a lump sum for damage caused to the trader as a consequence of the withdrawal in case the consumer exercises his right of withdrawal.³⁷ The answer to this question is not as evident as it may seem now, as the Doorstep selling directive did provide that the withdrawal has the effect of releasing the consumer from any obligations under the contract,³⁸ but explicitly left the legal effects of the withdrawal to the Member States.³⁹ Moreover, under the 1994 Timeshare directive, the parties could agree that the consumer would be required to pay expenses that are incurred by the trader as a result of the conclusion of and withdrawal from the contract and which correspond to legal formalities which must be completed before the end of the cooling off-period.⁴⁰ These costs could, for instance, include the costs of a notary public or a public registry where such formalities would be required under national law for the validity of the contract. On the other hand, the then recent Distance selling directive provided that when the consumer had exercised his right of withdrawal, he would be entitled to a full reimbursement of any sums paid to him ‘free of charge’, and the parties could only agree that the consumer be required to pay for the direct cost of returning the goods received to the trader.⁴¹ In 2010, the CJEU confirmed that this also implied that the trader could not claim payment for the original costs of transportation, and where the consumer had paid for these costs in advance even those direct costs would have to be returned by the trader.⁴² Nevertheless, under both the 1994 Timeshare directive and the Distance selling directive at least some of the direct costs resulting from the exercise of the right of withdrawal could be imposed on the consumer.

16. In the Travel Vac-case, the CJEU therefore had to make a decision that could have gone either way, in so far at least as the payment imposed on the consumer could be seen as a compensation for the direct cost the trader would incur *as a result* of the withdrawal. The CJEU decided that the fact that the notice of withdrawal has the effect of releasing the consumer from all obligations under the contract implies that a contractual obligation to pay damages is also extinguished.⁴³ Moreover, if the consumer were required to pay damages, the trader would in effect impose a penalty on the consumer for exercising his right of withdrawal, and that would be contrary to the purpose of the Doorstep selling directive to prevent the consumer from undertaking financial obligations without being prepared for

³⁵ As mentioned earlier, the Consumer rights directive does not apply to timeshare contracts, see Article 3 paragraph (3) under (h) of that directive.

³⁶ Cf. Article 7 of the 2008 Timeshare directive.

³⁷ Case C-423/97, Travel Vac, [1999] ECR p. I-2195, paragraphs 53-60.

³⁸ Cf. Article 5 paragraph (2) Doorstep selling directive.

³⁹ Cf. Article 7 Doorstep selling directive.

⁴⁰ See Article 5 paragraph (3) of the 1994 Timeshare directive.

⁴¹ See Article 6 paragraph (2) Distance selling directive.

⁴² See case C-511/08, Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV, [2010] ECR p. I-3047, paragraphs 55-58.

⁴³ Case C-423/97, Travel Vac, [1999] ECR p. I-2195, paragraphs 57-58.

them.⁴⁴ The legal effects that are to be determined by the Member States can therefore only pertain to the reimbursement or return of payments or goods already supplied by the parties.⁴⁵

17. This final decision of the CJEU may ultimately have been the most important one for practice, as it ensured that consumers would not be discouraged from exercising the right of withdrawal because of the fact that even after the exercise of the right of withdrawal the consumer would be required to pay the trader in part.⁴⁶ On the other hand, the fact that consumers could withdraw from the contract at all times – under the Doorstep selling directive possibly even years later in case the precontractual information obligations had not been met⁴⁷ – does open the door to the possibility of abuse of the right of withdrawal: a consumer who was not made aware of that right by the trader but otherwise knew the right existed, could simply wait until he got tired of the purchased goods and then withdraw from the contract. In such a case, one could argue that the national court should apply the doctrine of abuse of right or a similar doctrine⁴⁸ in order to prevent the consumer from successfully invoking the right of withdrawal at will.⁴⁹ Community law currently would not stand in the way of the application by a national court of such a doctrine in the case of deceit or abuse by a consumer of a right originating from a European directive, the Court of Justice already had decided a year before in the case of *Kefalas v Greece*.⁵⁰ However, the Court had added that the use of such doctrine ‘must not prejudice the full effect and uniform application of Community law in the Member States (...). In particular, it is not open to national courts, when assessing the exercise of a right arising from a provision of Community law, to alter the scope of that provision or to compromise the objectives pursued by it.’⁵¹ This seems to leave little room for the application of the doctrine of abuse of right, since it can be argued that in the case of right of withdrawal, which can be invoked by the consumer at will, the European legislator has taken the possibility of abuse of right for granted.⁵² In the *Messner*-case,⁵³ the CJEU took an alternative route by distinguishing between the testing of the goods and the use thereof and by allowing a Member State to order the consumer to pay fair compensation in the case where the consumer had made use of the goods ‘in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment’,⁵⁴ provided that this would not adversely affect the functionality and efficacy of the right of withdrawal, e.g. because the amount of compensation would in effect prevent the consumer from exercising

⁴⁴ Case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph 58.

⁴⁵ Case C-423/97, *Travel Vac*, [1999] ECR p. I-2195, paragraph 59.

⁴⁶ See also case C-511/08, *Handelsgesellschaft Heinrich Heine GmbH v Verbraucherzentrale Nordrhein-Westfalen eV*, [2010] ECR p. I-3047, paragraphs 56-58.

⁴⁷ In case C-481/00, *Heininger v Bayerische Hypo- und Vereinsbank*, [2001] ECR p. I-9945, nos. 44-48, the ECJ confirmed that Member States cannot impose a cut-off period on(?) the exercise of the right of withdrawal in a case where the consumer was not informed of the existence of that right since the wording of the directive did not leave room for such interpretation.

⁴⁸ Depending on the national law of the court; one may think of doctrines such as estoppel, *Rechtsverwirkung* and good faith and fair dealing.

⁴⁹ Cf. *Bundesgerichtshof (BGH, the highest German court in civil cases) 19 February 1986, VIII ZR 113 / 85, Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 97/127* under II. 4, where the BGH ruled that a court may only in the case of very limited exceptions (‘nur in eng begrenzten Ausnahmefällen’) accept that the consumer abuses his right of withdrawal.

⁵⁰ Cf. Case C-367/96, *Kefalas v Greece*, [1998] ECR p. I-2843, paragraph 21.

⁵¹ Cf. Case C-367/96, *Kefalas v Greece*, [1998] ECR p. I-2843, paragraph 22.

⁵² Cf. J. Büßer, *Das Widerrufsrechts des Verbrauchers. Das verbraucherschützende Vertragslösungsrecht im europäischen Vertragsrechts*, Frankfurt am Main: Peter Lang, 2001, p. 137-138, who, however, makes an exception for the situation, described here, where the consumer actually knew of the existence of his right of withdrawal (p. 178-179).

⁵³ Case C-489/07, *Messner v Firma Stefan Krüger*, [2009], p. I-7315, discussed elsewhere in this book by *Peter Rott*.

⁵⁴ Case C-489/07, *Messner v Firma Stefan Krüger*, [2009], p. I-7315, paragraph 26.

his right of withdrawal.⁵⁵ However, the European legislator seems to have slammed that door by determining in the Consumer rights directive that such compensation cannot be required from the consumer where the consumer had not been informed by the trader of his right of withdrawal.⁵⁶ On the other hand, where the consumer was informed of his right of withdrawal and then before exercising that right continued to make use of the goods after having examined and tested them, the consumer is liable for any subsequent diminished value of the goods.⁵⁷ This should ensure that consumers should only handle and inspect the goods in the same manner as they would be allowed to do in a shop, and at the same time prevent that the obligations of the consumer in the event of withdrawal discouraging the consumer from exercising his right of withdrawal.⁵⁸

§5. Conclusion

18. The Travel Vac case in many respects may be seen as a landmark case, standing at the crossroads of unfair commercial practices and consumer contract law. As such, it underlines the interrelation between the two fields of consumer law in which Jules Stuyck has excelled throughout his academic career – even up to this year, when he discussed the interplay between the Unfair commercial practices directive, the Consumer rights directive and the Unfair contract terms directive at a seminar at my research institute. It is only appropriate that with the discussion of this case, Jules’ important work in both fields of consumer law is commemorated and praised. I can only hope that many more publications will follow in the coming years.

⁵⁵ Compare case C-489/07, *Messner v Firma Stefan Krüger*, [2009], p. I-7315, paragraph 27.

⁵⁶ Cf. Article 14 paragraph (2), second sentence, Consumer rights directive.

⁵⁷ Cf. Article 14 paragraph (2), first sentence, Consumer rights directive.

⁵⁸ Cf. recital (47) of the preamble to the Consumer rights directive.